* IN THE HIGH COURT OF DELHI AT NEW DELHI

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\+ CEAR No. 3 of 2001

% Date of decision: 8 December, 2005

COMMISSIONER OF CENTRAL EXCISE,TRICHY ... Petitioner
Through: Ms. Geeta Luthra, Adv.

Vs.

M/S DALMIA CEMENT (BHARAT) LTD .. Respondent
Through: Mr. Shanti Bhushan, Sr Adv with
Mr. Ramesh Singh and Ms. Shruti Chaudhary,
Advs.

CORAM

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MADAN B LOKUR

1. Whether the reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

MARKANDEYA KATJU, C.J.

1. Heard learned counsel for the parties.

2. On an application under Section 35G(3) of the Central Excise Act,1944, the Customs Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as the 'CEGAT') referred the following question to us for our opinion:-

> "Whether Section 11B of the Central Excise Act, as amended, applies to cases where though an order has been passed directing refund, implementation of the order is pending?"

3. The proceedings arose out of applications for refund filed by the assessee before the Assistant Collector, Central Excise, Trichy for the years 1970 to 1978. These refund applications were rejected by the orders of the Assistant Collector on 16.10.1979, 7.3.1980 and 1.8.1980. Appeals against these orders were also dismissed by the Appellate Collector vide orders dated 1.12.1980 and 6.12.1980. Further appeals were filed by the assessee before the CEGAT and these were allowed vide orders dated 1.6.1989 and 6.6.1989. By these two orders the orders of the Assistant Collector and the Appellate Collector were set aside and the refund applications of the assessee were allowed. It may be mentioned that the amounts of excise duty which had been claimed by the department had been paid by the assessee under protest in the years 1970 to 1978 and subsequently the assessee made applications for refund under Section 11B of the Central Excise Act,1944 (hereinafter referred to as 'the Act'). It may also be mentioned that the orders dated 1.6.1989 and 6.6.1989 passed by the CEGAT were accepted by the Revenue.

4. Section 11B was amended with effect from 20th September,1991 by Section 3 of the Central Excise and Customs Laws (Amendment) Act,1991. Section 11B(1) as it stood before the Amendment of 1991 was in the following terms:-

> **"Section 11B: Claim for refund of duty** (1) Any person claiming of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the

relevant date. 90

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any persons the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim."

5. After the 1991 amendment, the material part of Section 11B reads as follows:-

"**Section 11B: Claim for refund of duty.** (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person.

Provided that where an application for refund has been made

before the commencement of the Central Excise and Customs Laws (Amendment) Act,1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by the Act.

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund.

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify;

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the

Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2)".

6. Although the applications for refund of excise which had been made in the years 1972 to 1978 already stood allowed finally by the orders of the CEGAT dated 1.6.1989 and 6.6.1989 well before the 1991 Amendment, the Department took the view that even though the appeals of the assessee in the matter of refund applications had already been allowed by the CEGAT in 1989, but as the amount of refund had not been actually paid to the assessee till 1991, the provisions of Section 11B as amended in 1991 were applicable and, therefore, instead of the amount being refunded to the assessee, the Assistant Collector directed the assessee to credit the said amounts to the Consumer Welfare Fund as required by sub-section (2) of Section 11B of the Central Excise Act, 1944 as amended by the Amendment Act of 1991.

7. The Assistant Collector by his two orders passed on 28.3.1996 directed that the said amount of Rs. 4,97,101.01 and Rs. 2,63,69,322.00 were not to be refunded to the assessee but to be credited to the Consumer Welfare Fund.

8. The aforesaid orders of the Assistant Collector were confirmed

in appeals preferred by the assessee by the Commissioner (Appeals) vide order dated 20th December,1996 when this order was carried in appeal by the assessee to the CEGAT. The CEGAT by its final order dated 27th January,1998 (as rectified vide R.O.M. Order dated 9th July,1998) held that provisions of Section 11B as amended with effect from 20th September 1991 by the Amendment Act were not applicable to the present case in as much as the refund applications filed by the assessee in the years 1972 to 1978 already stood finally disposed of by the orders of the CEGAT dated 1.6.1989 and 6.6.1989 long before Section 11B was amended. The appeals of the assessee were accordingly allowed by the CEGAT.

9. In the judgment of the CEGAT dated 27.1.1998, as rectified vide R.O.M. Order No. 9.7.1998, it was held that the provisions of Section 11B of the Central Excise Act as amended with effect from 20th September 1991 by the 1991 Amendment were not applicable in the present case since the refund applications had already been allowed in 1989. It is this decision which has been questioned by the department in this Reference.

10. On the facts of this case there are no merits in this Reference as the question involved is clearly settled by the 9 Judge Bench decision of the Supreme Court in Mafatlal Industries Ltd and Others v. Union of India and Others (1997) 5 SCC 536. What has

been laid down therein is that if an application for refund has been disposed off, and the order had become final before the 1991 amendment to Section 11B came into force, the principle of unjust enrichment will not apply.

11. It may be mentioned that the main judgment in the case was delivered by Hon'ble Mr. Justice B.P. Jeevan Reddy, who held on behalf of himself and also on behalf of Hon'ble Mr.Justice J.S. Verma, Hon'ble Mr. Justice S.C. Agrawal, Hon'ble Mr. Justice A.S. Anand and Hon'ble Mr. Justice B.N. Kirpal. Since the judgment of Hon'ble Mr. Justice B.P. Jeevan Reddy amounts to a judgment of five Hon'ble Judges in a 9 Judge Bench, hence it is the majority judgment and anything inconsistent with that judgment in the judgment of other Hon'ble Judges has to be disregarded.

12. Thus in para 57 of his judgment Hon'ble Mr. Justice B.P. Jeevan Reddy observed:-

> "The first decision of this Court to consider the amended Section 11-B is in *Union of India v. Jain Spinners Ltd.* The validity of the 1991 (Amendment) Act was, however, neither raised nor considered by the court. The impugned orders of the High Court, made before the coming into force of the 1991 (Amendment) Act, directing refund of the excess duty collected to the manufacturers, this Court held, would defeat the provisions of amended Section 11-B which had come into force during the pendency of the refund proceedings. The Court held that so long as the refund proceedings are pending, the amended provisions get attracted and disentitle the manufacturer-payer from claiming any refund contrary to the said provisions. In other words, the contention of the manufacturers that the amended Section 11-B applies only to claims of

refund, arising after the coming into force of the said Amendment Act was rejected."

13. The same opinion has been expressed by Hon'ble Mr. Justice B.P. Jeevan Reddy in para 108(xi) of the judgment wherein it is observed:-

> " Section 11B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/ Tribunal/Authority or otherwise. It must be held that *Union of India v. Jain Spinners* and *Union of India v. ITC* have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated – in the sense that the appeal period has also expired – before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and/or governed by Section 11-B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

14. The view expressed by Hon'ble Mr. Justice B.P. Jeevan Reddy is also expressed by Hon'ble Mr. Justice K.S. Paripoornan in para 342 of the judgment wherein it is observed:-

> "Sections 11-B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities which have become final. It follows from a plain reading of Section 11-B, clauses (1), (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law to obtain a refund after the Amendment Act comes into force. I am of the opinion

that if the said provisions are held applicable, even to *matters concluded by the judgments or final orders of courts*, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances".

15. The same view has also been expressed by Hon'ble Mr. Justice S.C. Sen in para 255 of the judgment which states:-

"I shall now examine the other provisions of the newly-added sections. Sub-section (1) of Section 11-B requires an application for refund to be made. Sub-section (2) requires the Assistant Commissioner to pass an order of refund provided the conditions set out therein are fulfilled. Sub-section (3) merely lays down that no refund shall be made except as provided in sub-section (2). There is a non obstante clause that this will operate notwithstanding anything to the contrary contained in any judgment, decree, order etc. It is obvious that new provisions will apply in cases where applications for refund were made before the new provisions came into force and also subsequently. Sub-section (3) has no retrospective effect. When a case has been finally heard and disposed of and no application for refund need be made, sub-section (3) cannot apply. If there is a judgment, decree or order which has to be carried out, the legislature cannot take away the force and effect of that judgment, decree or order, except by amending the law retrospectively on the basis of which the judgment was pronounced.

16. Thus, 8 out of 9 Hon'ble Judges comprising the Bench have taken the same view that if the refund application has been finally disposed off by an order passed before the 1991

Amendment came into force, and that order had become final, then the amended Section 11-B will not apply.

17. Only Hon'ble Mr. Justice A.M. Ahmadi took a contrary view vide paras 7 to 9 of his judgment, but it is not necessary to refer to that judgment since it cannot prevail over the view taken by 8 out of 9 Hon'ble Judges of the Bench in Mafatlal's case (supra).

18. It may be noted that Section 11-B, after the 1991 amendment, stated that the party applying for refund has to establish that the incidence of such duty had not been passed on by him to any other person. It follows, therefore, that Parliament did not apply the principle of unjust enrichment to cases covered by the unamended Section 11-B, and it was for this reason that the amendment was made in Section 11-B in 1991.

19. In our opinion, Heydon's mischief rule is applicable to the present case. Under that we have to see the mischief in the old law and find out the mischief which the legislature wanted to remove. Obviously, the mischief was that under the unamended Section 11-B the principle of unjust enrichment was not applicable and hence an assessee was entitled to refund even if it had passed on the burden to the consumers.

20. In D.R. Fraser & Co. Ltd v. Minister of National Revenue, AIR 1949 PC 120 (p.123)Lord Macmillan observed:-

> "When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately".

21. Thus, where the word 'reduce' has been substituted by the word 'modify' it was held that the word 'modify' has a wider connotation so as to include not only reduction but also other kinds of alteration including enhancement, vide Western India Theatres Ltd v. Municipal Corporation, Poona, AIR 1959 SC 586 (589); State of U.P v. Malik Zarid Khalid, AIR 1988 SC 136 (138); and State of Madhya Pradesh v. G.S. Dall and Flour Mills, AIR 1991 SC 772 (783,784).

22. Similarly when the New Zealand Dairy Board Act,1953, section 11 of which gave the Dairy Board power to appoint committees and to delegate to a committee with the consent of the minister any of its powers and functions was repealed and replaced by the New Zealand Dairy Production and Marketing Board Act, 1961, section 13 of which gave the Board power to appoint committees to advise it, it was held that the change in language was not accidental and gave rise to the inference that Parliament deliberately refrained from giving the Board power to delegate any of its powers and functions to a committee with the consent of

the minister, vide Jeffs v. New Zealand Dairy Production etc, (1966) 3 All ER 863 (PC), (870). An argument that change in law by an amending Act was not intended will be readily negatived if adherence to the law as it was before the amendment would make the words added by the amending Act otiose, vide State of U.P. v. Radhey Shyam, AIR 1989 SC 682 (689,690). It was thus held that after amendment of section 17(4) of the Land Acquisition Act,1894 by the Amendment Act of 1984, a notification under section 6 of the Act cannot be issued simultaneously with the notification under section 4, even in cases of emergency to which section 17 is applied, for that will make the words 'after the publication of the notification under section 4(1)' as added in section 17(4) redundant, vide State of U.P. v. Radhey Shyam (supra). Numerous illustrations can be found where the legislature is not happy with a particular construction placed upon an enactment and has changed the same by an amending statute, and that is specially true of tax and welfare legislations. After a statute is amended, the statute thereafter is to be read and construed with reference to the new provisions and not with reference to provisions that originally existed, vide Venkata Subamma v. Ramayya, AIR 1932 PC 92; Shamrao V. Parulekar v. District

Magistrate, Thana, AIR 1952 SC 324 (326); Ramnarain v. Simla Banking & Industrial Co. Ltd, AIR 1956 SC 614 (621); Laxmi Devi v. Mukund Kanwar, AIR 1965 SC 834 (837); Onkarlal Nandlal v. State of Rajasthan, (1985) 4 SCC 404 (415); M/s Orient Paper Industries Ltd v. State of Orissa, AIR 1991 SC 672 (682); and Yadiapatti Venkateswarlu v. The State of Andhra Pradesh, AIR 1991 SC 704 (709). Further the wisdom of the warning given by Lord Watson cannot be doubted that it is an "extremely hazardous proceeding to refer to provisions which have been absolutely repealed in order to ascertain what the legislature meant to enact in their room and stead, vide Bradlaugh v. Clarke (1883) 8 AC 354 (380).

23. Learned counsel for the department submitted that if we take the view that under the unamended Section 11-B the principle of unjust enrichment will not apply, then such a view will be inequitable and unfair to the public as the party will be unjustly enriched.

24. In our opinion, there is no equity in a tax and considerations of equity are wholly out of place in a taxing statute. This is because the principle of strict interpretation applies to taxing statutes.

25. The principle of strict interpretation of taxing statutes

was best enunciated by Rowlatt J in his classic statement:

> "In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used, (vide Cape Brady Syndicate v. IRC (1921) 1 KB 64 [cited with approval in AIR 1968 SC 623]).

26. In AV Fernandez v. State of Kerala, AIR 1957 SC 657, the Supreme Court of India stated the principle as follows: "If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the taxing statute no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter.

27. Hence in taxing statutes the language cannot be strained, vide State of Punjab v. Jullunder Vegetable Syndicate, AIR 1966 SC 1295. If the words of a taxing statute fail, so must the tax. The courts cannot, except rarely and in clear cases, help the draftsman by a favourable construction,vide ITO v. Nadar, AIR 1968 SC 623.

28. In Innamuri Gopalan v. State of AP, 1964 SCR (2) 888, the exemption was denied to the assessee on the ground

that the intention of the notification was to avoid double taxation, and as this was not a case of double taxation no exemption could be granted. The Supreme Court held that on the plain language of the notification the assessee was entitled to exemption, and since the intention was not reflected in plain words, it could not be taken into consideration.

29. It is said that tax and equity are strangers, vide Partington v. Attorney General (1869) LR 4 HL 100. This view was best expressed by Lord Carins;

> "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind. On the other hand if the court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be", vide Partington v. Attorney General (supra).

30. Thus, in interpreting a taxing statute one cannot go by the notion as to what is just and expedient, vide CIT v. Shahzada Nand, AIR 1966 SC 1342. In IRC v. Hinchy, (1960) AC 748, the House of Lords held that a provision in the Income Tax Act 1952 for a statutory penalty (for making an incorrect return of income) of £20 and trebling 'the tax which he ought to be charged under this Act' referred not to the tax on the amount which the taxpayer had failed to declare, but to the whole tax

which he ought to be charged for the relevant year, notwithstanding the extravagant consequences which flowed from giving the words their natural meaning.

31. The Supreme Court of India has held that equity is out of place in tax laws, vide CIT v. Firm Muar, AIR 1965 SC 1216. In CIT v. Madho Prasad Jatia, (1976) 4 SCC 92, it held that there could be no consideration of equity if the language of the provision was plain and clear, but where it was not, and two interpretations were possible, the one in consonance with equity and fairness should be preferred.

32. In view of the above discussion, we answer the question referred in the negative, i.e. in favour of the assessee and against the department. It is, however, clarified that it is only orders of refund which have become final to which the amended Section 11-B will not apply, and not orders of refund against which appeals/revisions are pending, before the higher authorities.

M. Katju

CHIEF JUSTICE

Madan Lokur

MADAN B. LOKUR, J

DECEMBER 8, 2005
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