

(2019) 04 RAJ CK 0124
In the Rajasthan High Court
Case No : Civil Writ Petition No. 880 Of 2018

Saraswati Marble

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 26-04-2019

Acts Referred:

Central Excise Act, 1944 — Section 11A, 11A(1), 11AB, 11AC, 11B, 35, 35B, 35E,
35G, 35K, 35K(1), 35M, 35M(3)
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 04 RAJ CK 0124

Hon'ble Judges : Sangeet Lodha, J;Dinesh Mehta, J

Bench : Division Bench

Advocate : Ramit Mehta, Saurabha Maheshwari, Tarun Dudia, Falgun Buch

Final Decision : Dismissed

Judgement

1. The petitioner has preferred the present writ petition invoking this Court's jurisdiction under Articles 226 and 227 of the Constitution of India with the following prayers :-

- "(i). Allow the present writ petition filed by the petitioner company;
- (ii). Quash and set aside the impugned order dated 30.11.2017 (Annexure-12) passed by respondent no.3;
- (iii). Quash and set aside the impugned notice dated 25.03.2008 (Annexure-6) passed by respondent no.2;
- (iv). Quash and set aside the impugned notice dated 20.12.2017 (Annexure-13) issued by the respondent no.4;
- (v). Quash and set aside the impugned corrigendum dated 03.05.2017 (Annexure-10) passed by respondent no.2;
- (vi). Hold, that the impugned order dated 30.11.2017 (Annexure-12) is beyond limitation;

(vii). Hold, that the petitionr has been rightly granted the refund of duty vide sanction/adjudication order dated 30.08.2007 (Annexure-5);

(viii). Hold, that once the order under Section 11B has not been challenged, proceedings for recovery of such refund cannot be initiated under Section 11A(1) considering the same refund to be erroneous;

(ix). Restrain the respondents and/or any agent, officer, any person representing the respondent department from taking any coercive action against the petitioner company until the final disposal of the present writ petition."

2. With a view to pronounce upon the prayers made by the petitioner and in a bid to adjudicate the controversy involved in the present writ petition, it is desirable to narrate the facts in a nut-shell, which we do, as infra :-

2.1 The petitioner Company is engaged in the process of cutting the marble blocks into marble slabs and tiles. On 14.11.1996, the Officers of the Central Excise Department conducted a survey on the business premises of the petitioner Company and found that it was not paying the Central Excise on the processing of marbels. The Adjudicating Authority initiated proceedings under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as "the Act of 1944") for levy/recovery of Excise Duty, which culminated into an order dated 20.11.1997.

By way of the said order, a demand of Central Excise to the tune of Rs.20,80,834/- was confirmed and penalty of Rs.20,50,000/-was imposed.

2.2 The petitioner preferred an appeal against the said order in original passed by the Commissioner, before the Custom, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the CESTAT or the Tribunal"). The Tribunal however disposed of the appeal by remading the matter back to the adjudicating authority.

2.3 In furtherance of the remand so made by the Tribunal, the adjudicating authority passed another order dated 18.04.2000 and re-confirmed duty and penalties.

2.4 The petitioner took up the matter before the CESTAT again by way of an appeal, which came to be decided by order dated 23.2.2001. This time though the demand of duty of Rs.20,80,834/- was affirmed, but the penalty imposed under Section 11AC of the Act of 1944 was however reduced from Rs.20,50,000/- to Rs.5,00,000/-.

2.5 It is not in dispute that the assessee deposited the demand duty of Rs.20,80,834/-; penalty of Rs.5,00,000/- and Rs.1,50,000/- against interest, through Challan TR6.

2.6 It is admitted case of the petitioner that it did not assail the order of the Tribunal dated 23.02.2001 by way of any appeal or otherwise. The petitioner having deposited the demand, sprang into action only in the year 2004 after the judgment of Hon'ble the Supreme Court in case of M/s Aman Marbles

pronounced on September 18, 2003 and a writ petition came to be filed before this Court, .

2.7 The petitioner in its writ petition being DB Civil Writ Petition No.2246/2004, contended that in light of the judgment of Hon'ble the Supreme Court in Aman Marble's case wherein it had been held that cutting of marble blocks into the marble slabs does not amount to manufacture, excise duty was not payable and thus, the amount deposited by it or recovered from it was unauthorized.

2.8 A Division Bench of this Court allowed the petitioner's writ petition, vide its judgment dated 24.08.2006 and quashed the demand of excise duty and consequential penalty. A direction to refund the amount already deposited/recovered from the assessee, subject to provisions of Section 11B of the Act of 1944 was also issued.

2.9 In furtherance of above referred judgment dated 24.08.2006 passed by Division Bench of this Court, the petitioner moved an application on 03.01.2007 seeking refund of excise duty and penalty paid by it.

2.10 The petitioner's said application for refund was processed and allowed by the Assistant Commissioner, Central Excise-respondent No.3. During the course of the proceedings, the factum of pendency of department's SLP No.2372/2007, pending before Hon'ble the Supreme Court was noticed and it was proposed to withhold the refund. Whereat the assessee contended that merely because an SLP had been filed before Hon'ble the Supreme Court against the order of the High Court, it cannot be said that the order of the High Court was no longer in force. It was contended by the petitioner that the order of the High Court is operative and the same would remain in force till it was reversed or set aside.

2.11 After examining the refund application, the respondent No.3 found that the refund claim was not hit by principle of unjust enrichment as the burden of the disputed amount had been borne by the petitioner. It was also recorded that the entire amount had been deposited by the assessee after removal/clearance of the goods. It was also noticed that the proceedings were initiated in furtherance of the visit of Anti Evasion Team on 14.11.1996, whereas the subject goods had already been cleared.

2.12 Having recorded the categorical finding of not passing on the incidence of the tax to the customers, the adjudicating authority allowed the refund claim of the petitioner, vide its order dated 30.11.2007 and issued a cheque dated 30.08.2007, amounting to Rs.26,80,834/-.

2.13 Having passed the above referred order dated 30.08.2007 and refunding the amount to the petitioner on 25.03.2008, the Additional Commissioner of the Central Excise issued a show cause notice to the petitioner Company, requiring it to show cause as to why amount of Rs.26,80,834/- erroneously refunded to it, be not recovered under Section 11A of the Act of 1944 along with applicable interest under Section 11AB of the Act of 1944.

2.14 It is pertinent that in the notice dated 25.03.2008, the Additional Commissioner had categorically recorded the factum of filing of SLP No.2373/2007 against the judgment dated 24.08.2006, passed in petitioner's writ petition No.2246/2004. It was inter alia observed that in the event of Department succeeding in Supreme Court, the refund granted to the petitioner would become erroneous. The relevant extract of para 3 of the said show cause notice dated 25.03.2008, is reproduced hereunder :-

"3. And whereas the department has filed SLP No.2373/07 in the Hon'ble Supreme Court against the Order dated 24.08.2006 of the Hon'ble High Court passed in DB CWP No.2246/2004. Hence the Order has not attained finality. In the event of Department succeeding in Appeal, the Refund granted shall become erroneous. Therefore, this demand notice is being issued to protect the recovery of amount erroneously refunded so as to ensure that recovery is not barred by limitation as per the provision of Section 11A of the Central Excise Act, 1944."

2.15 The above referred notice dated 25.03.2008 under Section 11A of the Act of 1944 was issued to the petitioner well within the period of limitation (one year), prescribed under Section 11A of the Act of 1944. It may have some relevance that said notice dated 25.03.2008 was however not proceeded with any further by the respondents, perhaps in wake of pendency of SLP / appeal before Hon'ble the Supreme Court.

2.16 The SLP filed by the department being SLP No.2372/2007, which was later registered as appeal No.5857/2007 came to be allowed by Hon'ble the Supreme Court, vide its order dated October 16, 2015.

2.17 Hon'ble the Supreme Court while allowing the appeal filed by the respondent Department accepted their contentions that no writ petition for refund of claim of excise duty, penalty and interest was maintainable, when the proceedings had attained finality at the Tribunal level and amount had been recovered. Hon'ble the Supreme Court while accepting the contention of the department quashed not only the impugned judgment of the High Court but also, the directions contained in relation to refund of amount of duty, penalty and interest.

2.18 The Additional Commissioner - respondent No.2 thereafter on 03.05.2017, issued a corrigendum to the show-cause notice dated 25.03.2008 (issued under Section 11A of the Act) and asked the petitioner to show cause within 30 days of the receipt of the notice, as to why sum of Rs.26,80,834/-, erroneously refunded to it, be not recovered along with the interest under Section 11A and 11AB of the Act of 1944.

2.19 The petitioner filed a reply dated 09.10.2017 to the said show cause notice and contended that the noticee was not aware of any SLP filed by the department against the order dated 26.08.2004 passed by the High Court and decision thereon. It was further stated that on search made by it, the petitioner found a copy of the judgment of Hon'ble the Supreme Court.

2.20 The petitioner's basic contention pursuant to the show-cause notice dated 25.03.2008 read with corrigendum had been that the Department was not entitled to recover any duty from the respondent, after the judgment in case of M/s Aman Marbles.

2.21 Short reply dated 9.10.2017, filed by the petitioner in response to the show-cause notice demonstrates the stand of the assessee, according to which no recovery could be made from it, as the Supreme Court had held that "from the date of judgment of this Court, the Excise Department is not entitled to recover any such excise duty from the respondents." In other words, the petitioner opposed the recovery of the amount already refunded to it, taking shelter of the aforesaid observation made by Hon'ble the Supreme Court.

2.22 The petitioner's aforesaid submissions did not find favour of the respondents and the Assistant Commissioner observing that the petitioner has mis-interpreted the judgment of Hon'ble the Supreme Court, passed an order dated 30.11.2017 and held the sum of Rs.26,80,834/- to be recoverable from the petitioner, with interest as the same had been erroneously refunded.

3. Feeling aggrieved of the order in original dated 30.11.2017, passed by Assistant Commissioner - respondent No.3, the petitioner has again approached this Court by way of the present writ petition.

4. Mr. Ramit Mehta, learned counsel for the petitioner firstly apprised us with the facts antecedent to passing of the order dated 30.11.2017, impugned in the instant writ petition.

5. The petitioner has assailed the impugned order dated 30.11.2017 alleging it to be void and without jurisdiction. The essence of petitioner's contentions has been that the show cause notice dated 25.03.2008, corrigendum notice dated 03.05.2017 and the consequential recovery order dated 30.11.2017, passed by the respondents are without jurisdiction. It has been contended by the petitioner's counsel that the show-cause notice dated 25.03.2008 issued under Section 11A of the Act was illegal and contrary to the facts and law, inasmuch as it was not a case of evasion of excise duty for which the proceedings for recovery of the refund could be initiated. He emphasized that provision of Section 11A of the Act of 1944 is a self contained Code, which explains the procedure required to be adopted by the department in case the refund has been made erroneously. The proceedings under Section 11-A can be drawn only if the refund had been made on the basis of fraud, collusion or suppression of facts or in contravention of any of the provisions of the Act of 1944 or rules made thereunder. He submitted that the refund application of the petitioner had been allowed by the adjudicating authority vide its order dated 30.08.2007, after due application of mind and ascertaining the requisite facts including the factum of not passing on the burden of excise duty to the customers. He argued that in the factual backdrop of the case, it cannot be said that the refund had been made erroneously.

6. It was also contended by the petitioner that Hon'ble the Supreme Court while passing the judgment dated 16.11.2015 had noticed the facts of the connected matter namely M/s. Vividh Marbles and since the petitioner (Saraswati Marble & Granite Industries Pvt. Limited) was not represented before Hon'ble the Supreme Court, it could not be brought to the notice of Hon'ble the Supreme Court that the respondents have already allowed the refund application of the petitioner and refunded a sum of Rs.26,80,834/- to it. Had this fact been brought to the notice of Hon'ble the Supreme Court, the things would perhaps have been different, submitted learned counsel for the petitioner.

7. He also contended that the impugned order dated 30.11.2017 has been issued in furtherance of the notice dated 03.05.2017, which had been issued after more than 18 months of passing of the judgment dated October 16, 2015 by the Supreme Court. The contention of the petitioner has been that the said show cause notice was issued after the limitation of one year prescribed in Section 11A of the Act and the same was clearly time barred and without jurisdiction. He added that extended period of five years could not be invoked in the facts of the present case, as there was no allegation of fraud, collusion or willful mis-statement.

8. Learned counsel for the petitioner in addition to the above, submitted that the provisions of Section 11A of the Act of 1944 were not applicable and if the respondents were of the view that the order granting refund to it was erroneous, the department ought to have exercised power to review under Section 35E of the Act and should have directed the adjudicating authority to file an appeal against the order dated 30.08.2007.

9. Resting his arguments, counsel for the petitioner submitted that if the impugned order dated 30.11.2017 is allowed to stand, it would cause great prejudice to the petitioner and the recovery of the amount already refunded to it, would be contrary to law, as the same was done after due scrutiny and recording a finding that incidence of excise duty had not been passed on to the buyer.

10. In a bid to support his argument that Section 11A of the Act of 1944 cannot be used for recovery of the amount, even if it has been erroneously refunded, Mr. Ramit Mehta relied upon judgment of Madras High Court, reported in 2016 337 ELT 189 in the matter of Eveready Industries India Limited Vs. CESTAT.

11. Reliance was placed upon the judgment of Hon'ble the Supreme Court in case of Commissioner of Central Excise, Pune Vs. SKF India Ltd., reported in (2009) 13 SCC 461 with a view to suggest what is "erroneous" and so also upon the judgement of Hon'ble the Supreme Court in case of Kuntesh Gupta Vs. Management of HKM, Sitapur & Ors., reported in 1987 (32) ELT 8 (SC) to contend that quasi judicial authority cannot review its own order.

12. Opposing the petitioner's writ petition, Mr. Falgun Buch, learned counsel for the respondents at the outset raised a preliminary objection that the petitioner has directly rushed to this Court against the adjudicating order dated

30.11.2017, passed by the Assistant Commissioner, by-passing the statutory remedy of appeal under Section 35 before the Commissioner (Appeals) and then to the Central Excise & Service Tax Appellate Tribunal under Section 35B of the Act. According to him, writ petition filed against the order dated 30.11.2017 was liable to be dismissed in wake of alternative statutory remedy.

13. Without prejudice to his preliminary objection, learned counsel for the respondents submitted that it is wrong to contend that the Department came into action on 3.5.2017, by way of the corrigendum notice. He pointed out that no sooner had the refund been sanctioned vide order dated 30.08.2007, than the respondent No.2 initiated the proceedings for recovery of the erroneously refunded amount. The proceedings so initiated on 25.03.2008 were well within limitation, it was a different matter that they were kept in abeyance, awaiting final out come of the SLP filed against the Division Bench judgment dated 24.08.2006, passed in none other than petitioner's own case. He clarified that by way of the corrigendum dated 03.05.2017, only the adjudicating authority was changed in light of the circular dated 29.09.2016 issued by the Central Board of Excise & Custom and keeping in view the monitory limits, in place of Additional Commissioner, Central Excise, the Assistant Commissioner, Central Excise, Rajsamand was authorized to proceed with the matter. It was resurrection of the proceedings initiated on 25.03.2008 and the petitioner contention that the notice dated 03.05.2017 was barred by limitation had no legs to stand, vehemently argued Mr. Buch.

14. We have heard rival counsel and perused the material available on record.

15. Before advertng to the arguments touching upon the merit of the petitioner's case, we prefer to firstly deal with the preliminary objection raised by the respondents, about maintainability of the writ petition. It does not require great deal of deliberation that against an order of adjudication, including the order of recovery of the refund, a statutory appeal does lie before the appellate authority and in normal course, the petitioner or an assessee is supposed to avail the statutory remedy available under the Act of 1944.

16. However, in the facts peculiar to the present case, more particularly looking to the petitioner's endeavour of filing writ petition(s), instead of availing statutory remedies, we deem it appropriate to decide the petition on merits, rather than leaving the petitioner to create a confusion in the minds of the authorities on one pretext or the other. We are constraint to observe that firstly having lost in appeal before the CESTAT on 25.01.2004, the petitioner did not choose to file an appeal available under Section 35G of the Act and filed a writ petition after three years. The petitioner filed the writ petition only on pronouncement of judgment of Hon'ble the Supreme Court in M/s Aman Marble's case, wherein it had been held that the activity of cutting of marble blocks into slabs does not amount to manufacture. Not only this, even if it is presumed that the notice of SLP was not served on the petitioner, it did not bother to contest its case before Hon'ble the Supreme Court, despite being aware of pendency of SLP No.2373/2007, which

had come to its notice admittedly on receipt of show-cause notice dated 25.03.2008, issued by the Additional Commissioner, Central Excise, vide which refund of Rs.26,80,834/- made to the petitioner was sought to be recovered. The petitioner firstly chose not to defend its case before Hon'ble the Supreme Court, and then has sought to raise a grievance that the relevant facts could not be brought to the notice of Hon'ble the Supreme Court, when its SLP No.2373/2007 (appeal No.5857/2007) was decided. The petitioner has taken a recluse that as the assessee was not represented before Hon'ble the Supreme Court, the fact that the amount of Rs.26,80,834/-had already been refunded to it, was not taken into consideration by Hon'ble the Supreme Court, else the said SLP/appeal would have been dismissed as having become infructuous.

17. Without expressing any opinion on petitioner's such stand, we are of the view that if that be so, the petitioner ought to have been advised to move Hon'ble the Supreme Court by way of appropriate proceedings. As far as this Court is concerned, it is bound by the final adjudication made by Hon'ble the Supreme Court. Concededly, the Division Bench judgment dated 24.08.2006 passed in DB Civil Writ Petition No.2246/2004 in petitioner's own case has been reversed, holding in no ambiguous terms that the petitioner's writ petition was not maintainable.

18. Hence, in the extant facts, instead of relegating the petitioner to avail appellate remedy, we proceed to decide the issue, so as to give quietus to the otherwise flimsy and hyper-technical grounds raised and likely to be raised by the petitioner, in an anxiety of retaining the amount of Rs.26,80,834/-, paid to it.

19. According to us, since the very premise of the refund order, namely the Division Bench judgment dated 24.08.2006 itself has gone, the amount paid to the petitioner in compliance of such order becomes automatically erroneous and unauthorised.

20. We are of the considered view that it is not the notice dated 3.5.2017, but the show cause notice dated 25.03.2008, vide which the proceedings for recovery of the refund already made to the petitioner were initiated.

21. A specific assertion has been made by the respondents in para No.11 of their reply that the proceedings initiated on 25.03.2008 were kept in abeyance. We deem it apt to reproduce relevant part of Para 11 of the reply, which reads thus :-

"11. That on 25.03.2008, the Additional Commissioner, Central Excise Commissionerate, Jaipur-II issued a show cause notice to the petitioner company intimating them that the respondent department has filed an SLP before the Hon'ble Supreme Court and in light of the same the proceedings issued under the said Show Cause Notice was kept in abeyance subject to final outcome of the SLP. The said show cause notice was issued in order to create a protective demand. Subsequently, thereafter, a corrigendum dated 03.05.2017 was issued due to competency of adjudicating authority revised by Govt. of India. In the subsequent amendment, for sanction/ rejection of refund claim the Deputy/

Assistant Commissioner of Division is authorized to deal with refund claim of any amount and therefore, the corrigendum was issued."

22. It is also a matter of record that the proceedings, already initiated by the Additional Commissioner on 25.03.2008, were kept in abeyance, and later on, as a result of change in monetary limit defining the jurisdiction, pursuant to the CBEC Circular dated 29.09.2016, the same came within the jurisdiction of the Assistant/ Deputy Commissioner. The corrigendum notice dated 03.05.2017, was issued by the Additional Commissioner only to bring such change of jurisdiction on record.

23. The impugned order dated 30.11.2017 ultimately came to be passed by the Assistant Commissioner, Central Excise - respondent No.3. It is thus clear that the proceedings under Section 11A of the Act had been initiated by the respondents vide notice dated 25.03.2008, with a view to pass a protective order, in order to meet the contingency of acceptance of SLP No.2373/2007, filed by the department against the Division Bench judgment and order dated 24.08.2006 passed in petitioner's writ petition.

24. The notice dated 25.03.2008 had been issued apparently to ward off the possible plea of proceedings being time barred, in the event of said SLP filed by the department would succeed in future. A categorical note to this effect (as reproduced in para No.3) had been made in the show cause notice dated 25.03.2008, which had been issued well within the period of one year from the concerned date, viz. the date when the Division Bench of this Court allowed petitioner's writ petition.

25. The genesis of the order dated 30.11.2017 is the show cause notice dated 25.03.2008, which clearly falls within the ambit of Section 11A of the Act of 1944. In our considered view the refund of Rs.26,80,834/-, made pursuant to the judgment dated 24.08.2006 passed by a Division Bench of this Court was rendered erroneous, the moment Hon'ble the Supreme Court rendered the judgment dated 16.10.2015.

26. The petitioner's contention that the proceedings initiated vide notice dated 25.03.2008 and the impugned order dated 30.11.2017 are void and without jurisdiction, is thus clearly untenable in the eye of law.

27. Apart from the above, since the very premise of the refund, i.e. the order dated 24.08.2006, passed in petitioner's earlier writ petition No.2246/2004 has crumbled, consequent to the judgment of Hon'ble the Supreme Court, the petitioner cannot be allowed to retain the fruits of such order, which has been set at naught by Hon'ble the Supreme Court.

28. The judgment of Madras High Court relied upon by Mr. Ramit Mehta, is clearly distinguishable on both facts and law. A look at Para No.37 of the said judgment reveals that the High Court of Madras was dealing with a situation, when even though the refund order was made by a higher authority, the

authority subordinate to it had invoked the power of recovery under Section 11A of the Act of 1944. That apart, para No.46 of the judgment makes it more explicit that the said case involved altogether different facts.

We do not find it out of place to reproduce the same.

"46. In this case, an order of refund was passed on an application under Section 11B. The appeal against the finalisation of the assessment was closed on the basis of the refund order. There can be no doubt about the fact that the statutory right of appeal is a valuable right conferred upon the assessee. That right was actually altered on the basis of an order of refund. Suppose there had been no order of refund, the appeal could have been pursued against the finalisation of the assessment."

29. In concluding para No.51 of the judgment, the Division Bench of Madras High Court has clearly observed that one authority cannot be allowed to say in a collateral proceeding that what was done by the another authority was erroneous. It is thus clear that judgment of Madras High Court was rendered in entirely different factual matrix, hence the same does not serve the cause of the petitioner herein.

30. In the case at hands, it was the Assistant Commissioner who had granted the refund to the petitioner by order dated 30.08.2007, and thereafter passed the impugned order dated 30.11.2017, under Section 11A of the Act. It is a different matter that the notice dated 25.03.2008 was issued by the Additional Commissioner, indisputably an officer higher in rank and having territorial jurisdiction over the petitioner. Hence, we do not find any illegality in the instant case.

31. Adverting to the judgment of Hon'ble the Supreme Court in case of SKF India Ltd. (supra), suffice it to say that the said judgment throws light on the expression "erroneous" used in Section 11A of the Act. Facts and issues involved before Hon'ble the Supreme Court in the above referred case of SKF India Ltd. were entirely different. In the present case, there cannot be any doubt about the legal position that the refund made to the petitioner was/had become erroneous, inasmuch as the Division Bench judgment of this Court, in furtherance whereof the petitioner was granted refund, itself stood reversed. As such, this judgment is of little avail to the petitioner.

32. The second judgment in the matter of Kuntesh Gupta (Supra) cited by the petitioner is an authority on the power of quasi judicial authority to review its own order. In our considered view, this judgment of Supreme Court is also not applicable in the facts of the present case.

33. The principle that a quasi judicial authority cannot review its own order untill and unless parent statute authorises it to do so is well settled. In the present case, the respondent No.3 has not reviewed its order, but has exercised the powers available to it under Section 11A of the Act of 1944. In the face of the

express provision contained under Section 11A of the Act of 1944, the petitioner's contention that the quasi judicial authority cannot review its own order, is off the mark. The judgment of Kuntesh Gupta (supra) is thus hardly relevant in the present case.

34. It is to be noticed that on receipt of the show cause notice dated 25.03.2008, the petitioner filed its reply dated 09.10.2017 and contested its liability towards the refund amount, in light of the observation made by Hon'ble the Supreme Court in the judgment dated 16.10.2015. It will not be out of place to reproduce the petitioner's stand taken in its abovereferred reply which reads thus :-

"In any case now noticee found a copy of the judgment during search on excus & find that hon'ble Supreme Court has already decided such SLP & has held that "However, once this court has settled the position of law holding that the aforesaid process would not be manufacture, from the date of the judgment of this court, the excise department is not entitled to recover any such excise duty from the respondents".

In view of above, no recovery can be made from us because as per judgment of hon'ble Supreme Court, the Excise/ Central Tax Department is not entitled to recovery any such excise duty from notice.

Further no personal hearing in the matter is required by us.

Noticee therefore request you to please drop the SCN & Oblige."

35. We affirm the finding of the adjudicating authority that the petitioner has tried to mis-interpret the observation made by Hon'ble the Supreme Court . The true purport of the expression quoted above is that after the date of judgment in case of Aman Marble's i.e. September 18, 2003, no excise duty can be recovered; or for the period after 18.09.2003, no excise duty is leviable nor the same can be recovered. However, these observation are not intended for the period prior to the date of judgment, more particularly in petitioner's case when the order of CESTAT passed on 23.02.2001, has attained finality.

36. It would not be out of context to reproduce the relevant part of the judgment of Hon'ble the Supreme Court dated 16.10.2015 , which reads thus:-

"A neat submission which his made by Mr. A.K. Sanghi, learned senior counsel appearing for the Union of India, is that no such writ petition to claim refund of the excise duty, penalty and interest was maintainable when the proceedings in respect of respondents had attained finality and amount recovered. Merely because this Court in some other judgment, at a subsequent date, took a different view and settled the position in law, is not a valid ground available to the respondents to approach the HighCourt under Article 226 of the Constitution of India dn claim such a relief.

The aforesaid submission is valid and justified in law. Insofar as the respondents are concerned, the duty was paid by them after proper adjudication and a

particular view was taken which was upheld by the Tribunal as well. As mentioned above, no further appeals were brought by the respondents and, therefore, such proceedings had attained finality. The order of refund of this amount, merely because this Court took different view thereafter in some other case, would not be permissible. Thus, insofar as direction contained in the impugned judgment to refund the amount of duty, interest and penalty is concerned, the same is set aside. However, once this Court has settled the position of law holding that the aforesaid process would not amount to manufacture, from the date of the judgment of this Court, the Excise Department is not entitled to recover any such excise duty from the respondents.

With the aforesaid directions and in terms of the aforesaid orders, these appeals are allowed."

37. We also find that the petitioner has brought before us an entirely new case. The objections regarding the proceedings being without jurisdiction, on the ground of being time barred or out of the ambit of Section 11 A were not raised by the petitioner before the adjudicating authority.

38. Apart from what has been discussed hereinabove, we are of the belief that no law declared by Hon'ble the Supreme Court can be rendered otiose or nugatory by adopting circuitous route or taking hyper-technical grounds. It is not in dispute that the judgment of this Court, being the fulcrum of the refund made to the petitioner has been upturned by the Supreme Court vide its judgment dated 16.10.2015. the law laid down by the Supreme Court should lead to its natural consequence.

39. If there is no express power and the power can be traced in some other provision, we are of the view that the respondents can justifiably take recourse to such power to effect the recovery. In this regard, we notice that Section 35K and 35M (3) of the Act of 1944 convey power to the respondent - assessing officer to give effect to the judgment of High Court or the Supreme Court. Sub-section (3) of Section 35M of the Act of 1944 provides that where the judgment of the High Court is varied or reversed in an appeal, the effect shall be given to the order of the Supreme Court in the manner provided in Section 35K, as is applicable in case of judgment of High Court. Section 35K of the Act of 1944 provides that where the High Court delivers a judgment in an appeal filed before it under Section 35G, the concerned Central Excise Officer shall give effect to the order passed by the High Court in an appeal on receipt of certified copy of the judgment.

40. The above referred provision can be gainfully reproduced for ready reference.

" 35- K. Decision of High Court or Supreme Court on the case stated.- (1) the Supreme Court hearing any such case shall decide the questions of law raised therein and shall deliver its judgment thereon contraining the grounds on which such decision is founded and a copy of the judgment shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which

shall pass such orders as are necessary to dispose of the case in conformity with such judgment.

(1-A) Where the High Court delivers a judgment in an appeal filed before it under section 35-G, effect shall be given to the order passed on the appeal by the concerned Central Excise Officer on the basis of a certified copy of the judgment.

(2) The costs of any reference to an appeal to Supreme Court which shall not include the fee for making the reference shall be in the discretion of the Court.

"35-M. Hearing before Supreme Court.-

(1)

(2)

(3) Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 35-K in the case of a judgment of the High Court."

41. There is no gainsaying that the petitioner-assessee had directly preferred a writ petition instead of filing an appeal against the judgment of the Tribunal rendered in the year 2001. That writ petition, though filed after three years, in a sense was an appeal against the order of the Tribunal, as the Tribunal's order passed in 2001 had been quashed by this Court. As such the order dated 24.08.2006, of the Division Bench of this Court can in no manner be treated to be different than an order passed under Section 35G of the Act of 1944.

42. The petitioner cannot claim immunity from the applicability of the provisions contained in Sub-section (3) of Section 35M read with Section 35K (1) of the Act of 1944, merely because he had chosen to file a writ petition in place of a regular statutory appeal under Section 35G of the Act. Had the judgment dated 24.08.2006 been passed in an appeal under Section 35G, the amount refunded to the petitioner was clearly recoverable upon reversal of the judgment of the Division Bench, by the Supreme Court. According to us, the respondent No.3 is having the power to recover the amount, which had been paid to the petitioner in pursuance of the Division Bench judgment, once the same had been upturned by the Supreme Court.

43. As an upshot of the discussion foregoing, we have no hesitation in holding that the Assistant Commissioner did have the power to recover the refund, which had been erroneously made to the petitioner. The impugned order dated 30.11.2017 passed by the adjudicating authority is in conformity with the provisions of law and harmony with the mandate and spirit of the judgment dated 16.10.2015 passed by Hon'ble the Supreme Court.

44. The impugned order dated 30.11.2017 is upheld in its entirety, whereas the writ petition is dismissed.