

(2021) 10 GAU CK 0006

In the Gauhati High Court

Case No : Writ Appeal No.162, 163, 170, 180, 186, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 219, 220, 221, 222, 223, 224, 225, 226, 227, 230, 231, 232, 233, 234, 235, 242, 243, 244, 245, 246 Of 2021

Union Of India And 4 Ors VsM/S Keshari Industries

Date of Decision : 08-10-2021

Acts Referred:

Constitution Of India, 1950 — Article 16(4), 16(4A), 16(4B), 32, 142, 370
Finance Act, 2004 — Section 91, 92, 93
Central Excise Act, 1944 — — Section 8(2A), 11A, 11A(1), 37B
Assam General Sales Tax Act, 1993 — Section 31

Citation : (2021) 10 GAU CK 0006

Hon'ble Judges : Sudhanshu Dhulia, CJ;Manash Ranjan Pathak, J

Bench : Division Bench

Advocate : S.C. Keyal, Dr. A. Saraf, A. Chowdhary, N. Hawelia

Final Decision : Dismissed

Judgement

1. All these writ appeals have been filed by the Union of India challenging the common judgment & order of the learned Single Judge dated 12.03.2021 passed in a bunch of writ petitions [WP(C) No.2929/2020 being the leading case], wherein the learned Single Judge has allowed the petitions and had quashed the show cause notices given to each of the petitioners by the Central Excise Department. These show cause notices were given to each of the petitioners calling upon them to return the amount refunded to them earlier deposited by each of the petitioners as Education Cess and Secondary and Higher Education Cess.

2. In order to get a better perspective of the matter, we need to state the background in which all these petitions were filed and also the dispute which led to the filing of these petitions.

3. In order to boost the industrial progress of the North East Region and for attracting investments in the industrial sector in the region, the Government of India had announced an "Industrial Policy Resolution" vide its Notification dated

24.12.1997 (hereinafter referred to as "IPR"). The Resolution contains a package of incentives and concessions to be given to such industries which will be established in the North East Region of the country, which includes Assam, Arunachal Pradesh, Nagaland, Mizoram, Manipur, Tripura, Meghalaya and Sikkim.

4. One of the benefits of this policy was to grant tax holiday for a certain period to those who set up an industry in the North East. Under this Scheme or Policy as far as the Central Excise was concerned, the Union of India had issued two Notifications, i.e. Notification No.32/99-CE and No.33/99-CE, both of which are dated 08.07.1999. These Notifications granted exemption in respect of all excisable goods cleared from a unit located in the growth or Integrated Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estates or Industrial area or Commercial Estate, as the case may be, in the North East. The exemption was applicable to all new industrial units which had commenced their commercial production on or after 24.12.1997, or to an industrial unit which had "substantially extended" its production after the said date, i.e. 24.12.1997. In continuation of this policy the Government had announced in the year 2007 that there will be a 100% excise duty exemption on finished products made in the North Eastern Region. In terms of that promise, the Government of India vide Notification No.20/2007 dated 01.04.2007 had declared the North East Industrial and Investment Promotion Policy (NEIIPP), 2007. This conferred benefits in terms of the promise made earlier.

5. The Notification dated 01.04.2007 was issued by the Government of India through its Ministry of Commerce & Industry, which granted a tax holiday to industries in the North-East in the shape of income tax as well as excise duty, for a period of ten years. Certain industries which were in the "Negative list" were not covered under this Notification. For any purposes, since we are only concerned with the exemption of excise duty, the relevant portion of the Notification dated 01.04.2007, reads as under:-

"OFFICE MEMORANDUM

Sub: North East Industrial and Investment Promotion Policy (NEIIPP), 2007

The Government has approved a package of fiscal incentives and other concessions for the North East Region namely the "North East Industrial and Investment Promotion Policy (NEIIPP), 2007", effective from 1.4.2007, which, inter-alia, envisages the following :

(i) *****

(ii) *****

(iii) *****

(iv) *****

(v) Excise Duty Exemption:

100% Excise Duty exemption will be continued, on finished products made in the North Eastern Region, as was available under NEIP, 1997. However, in cases, where the CENVAT paid on the raw materials and intermediate products going into production of finished products (other than the products which are otherwise exempt or subject to nil rate of duty) is higher than the excise duties payable in the finished products, ways and means to refund such overflow of CENVAT credit will be separately notified by the Ministry of Finance."

6. The excise duty was not liable to be paid by manufacturers who had set up new industrial units which had commenced their commercial production on or before 01.04.2007. This benefit was also available to the industrial units existing before 01.04.2007, which had undertaken substantial expansion by way of increase in the installed capacity by not less than 25% on or after 01.04. 2007. The exemptions contained in the said notifications in terms of para 4 of the Notification are made applicable to such industrial units for a period not exceeding 10 years from the date of publication of the Notification in the official Gazette or from the date of commencement of commercial production, whichever ever was later.

7. Encouraged by the said promises and incentives offered by the Govt. of India under its new policy towards North-East which were continuing since 1990 and the subsequent Notification granting exemption of excise duty, many industries were set up in the North-East for producing excisable goods falling under various Central Excise Tariff Heads and Sub-heads and the petitioners before the learned Single Judge are such industrial units which are duly registered with the Central Excise Authority in accordance with the provisions of Central Excise Act, 1944 and they had been paying excise duty.

8. It may also be mentioned at this juncture that by the Finance Act, 2004, the Parliament levied Education Cess on certain goods specified in the First Schedule of the Central Excise Tariff Act, 1985, and the Education Cess was to be calculated @ 2% of the aggregate of all duties of excise. The provision regarding Education Cess made in Section 91 to 93 of the Finance Act, 2004 are reproduced below:

"91. Education Cess. - (1) Without prejudice to the provisions of sub- section (11) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalisd quality basic education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise, such sums of money of the Education Cess levied under sub-section (11) of section 2 and this Chapter for the purposes specified in sub-section (1), as it may consider necessary.

92. Definition. - The words and expressions used in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944), the Customs Act, 1962 (52 of 1962) or

Chapter V of the Finance Act, 1994 (32 of 1994), shall have the meanings respectively assigned to them in those Acts or Chapter, as the case may be.

93. Education Cess on excisable goods. - (1) The Education Cess levied under section 91, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent, calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be."

9. The admitted position here is that prior to 2007 each of the petitioners was paying the excise duty as well as the above "Cess", since it was being taken as part of the excise duty.

10. Pursuant to the said Notice, which exempted the manufacturers (petitioners) from paying excise duties, the excise duties already paid by those manufacturers (petitioners) were returned to them. What was not returned to them was the cess paid by them @2% of the excise duty, which was Education Cess and Higher Education Cess, which was paid by them in terms of the Finance Act, 2004, as already referred above. The case of the petitioners (manufacturers) was that Education Cess and Higher Education Cess was part of excise duty and since they have been exempted from excise duty they are also liable to be exempted from paying Education Cess and Higher Education Cess and as excise duty has been returned to them, the amount paid by them as Education Cess and Higher Education Cess is also liable to be returned to them.

11. The Revenue, however, did not agree to this logic. Later, however, the matter reached the Hon'ble Apex Court (M/s SRD Nutrients Private Limited -Vs- Commissioner of Central Excise, Guwahati (2018) 1 SCC 105), which was a case relating to the present cases which reached the Hon'ble Apex Court after the matter had travelled CESTAT as well as the High Court. The opinion of the Hon'ble Supreme Court was as under:

"22. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education cess is on excise duty. It means that those assesseees who are required to pay excise duty have to shell out education cess as well. This education cess is introduced by Sections 91 to 93 of the Finance (No. 2) Act, 2004. As per Section 91 thereof, education cess is the surcharge which the assessee is to pay. Section 93 makes it clear that this education cess is payable on "excisable goods" i.e. in respect of goods specified in the First Schedule to the Central Excise Tariff Act, 1985. Further, this education cess is to be levied @ 2% and calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force. Sub-section (3) of Section 93 provides that the provisions of the Central Excise Act, 1944 and the Rules made thereunder, including those related to refunds and duties, etc. shall as far as may be applied in relation to levy and collection of education cess on excisable goods. A conjoint reading of these provisions would amply demonstrate that education cess as a surcharge, is levied @ 2% on the duties of excise which are payable under the Act. It can, therefore, be clearly inferred that when there is no excise duty payable, as it is exempted, there would not be any education cess as well, inasmuch as education cess @ 2% is to be calculated on the aggregate of duties of excise.

There cannot be any surcharge when basic duty itself is NIL."

12. Some of the manufacturers were thereafter refunded the Education Cess and Higher Education Cess, but as it did not happen in all cases, many were constrained to file writ petitions before this Court wherein order was passed in favour of the manufacturers in terms of the decision of the Hon'ble Apex Court in M/s SRD Nutrients Private Limited. The admitted position is that, consequently, the amount paid by the manufacturers/ petitioners as Education Cess and Higher Education Cess was returned to them.

13. Subsequently, a Three-Judge Bench of the Hon'ble Apex Court, in the case of M/s Unicorn Industries -Vs-Union of India (2020) 3 SCC 492 had an occasion to go into the matter of as to what actually constitutes "excise duty". It was observed by the Apex Court in this case that earlier a three-Judge Bench, in the case of Union of India & Ors. - Vs- M/s Modi Rubber Limited (1986) 4 SCC 66 had held that excise duty is only a basic duty and it does not include any special duty which is over and above excise duty. This judgment was not considered by the Court in Limited and the view taken in M/s SRD Nutrients Private Limited was thus contrary to the view taken by the Three-Judge Bench in M/s Modi Rubber Limited and, therefore, it was held that the view taken in M/s SRD Nutrients Private Limited is "per incuriam". The observations of the Hon'ble Apex Court in M/s Unicorn Industries reads as under:

"51. Thus, it is clear that before the Division Bench deciding SRD Nutrients (P) Ltd. [SRD Nutrients (P) Ltd. v. CCE, (2018) 1 SCC 105] and Bajaj Auto Ltd.

[Bajaj Auto Ltd. v. Union of India, (2019) 19 SCC 801 : 2019 SCC OnLine SC 421] , the previous binding decisions of the three-Judge Bench in Modi Rubber Ltd. [Union of India v. Modi Rubber Ltd., (1986) 4 SCC 66 : 1986 SCC (Tax) 781] and Rita Textiles (P) Ltd. [Rita Textiles (P) Ltd. v. Union of India, 1986 Supp SCC 557 : 1987 SCC (Tax) 87] were not placed for consideration. Thus, the decisions in SRD Nutrients (P) Ltd. [SRD Nutrients (P) Ltd. v. CCE, (2018) 1 SCC 105] and Bajaj Auto Ltd. [Bajaj Auto Ltd. v. Union of India, (2019) 19 SCC 801 : 2019 SCC OnLine SC 421] are clearly per incuriam. The decisions in Modi Rubber Ltd. [Union of India v. Modi Rubber Ltd., (1986) 4 SCC 66 : 1986 SCC (Tax) 781] and Rita Textiles (P) Ltd. [Rita Textiles (P) Ltd. v. Union of India, 1986 Supp SCC 557 : 1987 SCC (Tax) 87] are binding on us being of coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view."

(Emphasis provided)

14. After the aforesaid decision of the Hon'ble Apex Court in M/s Unicorn Industries, the Revenue initiated the present exercise of giving notice to the petitioners/ manufacturers under Section 11A(1) of the Central Excise Act, 1944, to re-deposit the Education Cess and Higher Education Cess which were earlier "erroneously" refunded.

Section 11A(1) of the Central Excise Act reads as under:

"Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.- (1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, -

(a) the Central Excise Officer shall, within (two years) from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of -

(i) his own ascertainment of such duty; or

(ii) duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

15. The revenue was demanding the refund in terms of the provisions of Section 11A(i) of the Central Excise Act, 1944 and it further held that the petitioners were also liable to pay interest on the amount to be recovered in terms of Section 11A of the Act. Each of the manufacturers who received this notice filed writ petition before the Single Judge of this Court challenging the jurisdiction of

the authorities as well as legality of this notice. The common question before the learned Single Judge was as follows:-

"(I) That the refund of Education Cess and Secondary and Higher Education Cess which was granted to the petitioners was on the basis of law laid down by the Apex Court in the case of SRD Nutrients (supra) which was prevailing at that point in time, and therefore, it cannot be said to be erroneous refund simply on the ground that the Apex Court in the subsequent decision rendered in M/S Unicorn Industries (supra) held that judgment passed by the Apex Court earlier in SRD Nutrients Pvt. Ltd. (supra) to be per incuriam.

(ii) As the refunds granted to the petitioners was in terms of the law laid down by the Apex Court in the case of SRD Nutrients (supra) prevailing at the relevant point in time, cannot be held to be erroneous and, therefore, the impugned demand-cum-show cause notices issued by the Department under Section 11A of the Central Excise Act is without jurisdiction.

(iii) That the binding effect of any judgment rendered will not be reversed or effected even if the said judgment is overruled and/or held to be per incuriam by a subsequent judgment as the refund granted to the petitioners were made by the Central Excise Department in terms of the judgment rendered by the Apex Court in SRD Nutrients which was the law prevailing at the relevant point in time. The said judgment being held to be per incuriam by later judgment will not alter the binding effect of SRD Nutrients under which the refunds were already granted to the petitioners. Accordingly the refunds granted cannot be said to be erroneous as have been sought to be projected by the Department by issuing the impugned Demand-cum-show cause notices."

16. The argument raised before the learned Single Judge by the petitioners was that the conditions which was necessary for exercise of power under Section 11A(i) of the Act were not present in the case as there was no "fraud", "collusion" or "wilful misrepresentation" given to the revenue by the petitioners. The ground on which the refund was made was a judgment of the Hon'ble Apex Court given in the case of M/s SRD Nutrients Private Limited, which was good law at the time when such a refund was made and merely because it has been held to be per incuriam, the amount already refunded is not liable to be returned and it cannot be said that the refund was made to the petitioners "erroneously". It was also stated that now that M/s SRD Nutrients Private Limited has been declared to be per incuriam, the result would be that M/s SRD Nutrients Private Limited would lose its "precedential value". All the same, the judgment will still have binding effect between the parties to the said judgment. It was also stated that even the review petition filed by the Revenue Department was dismissed.

Indeed the case of the revenue before the learned Single Judge was that the refund has been made to the petitioners erroneously and is, therefore, liable to be recovered.

17. The learned Single Judge in his well considered judgment while dealing with

all aspects of the matter has come to the conclusion that the demand of the refund is not justified. The learned Single Judge was of the view that merely because M/s SRD Nutrients Private Limited had been held to be per incuriam by the latest judgment of the Hon'ble Apex Court in the case of M/s Unicorn Industries, the refund already been made to the petitioners in terms of M/s SRD Nutrients Private Limited cannot be refunded. As M/s SRD Nutrients Private Limited had been declared to be per incuriam, it loses its precedential value but the Act already been done when the said judgment was a good law cannot be held to be done due to misrepresentation or has been done erroneously or by any fraud. It was also held that the refund was made by judgment of the Hon'ble Apex Court in M/s SRD Nutrients Private Limited as well as by different orders passed by this Court in favour of the petitioners. These orders have not been revoked. Therefore, the revenue cannot now take recourse for recovery of these amounts. Even the judgment given by the Hon'ble Apex Court in the case of M/s SRD Nutrients Private Limited, against which a review was filed and the review petition itself was dismissed, there was no curative petition and it was only a subsequent judgment that this judgment was declared as per incuriam.

18. The writ petitions were allowed and the show cause notice given to the petitioners were quashed by the learned Single Judge. Aggrieved by the order of the learned Single Judge, the Revenue, i.e. Excise Department, has filed these appeals.

19. Before opening his argument, Mr. S.C. Keyal, learned counsel for the appellants gave a statement before the Court that the Revenue had earlier filed a review petition in M/s SRD Nutrients Private Limited, which was dismissed on 10.07.2018. Thereafter, another petition was filed before the Hon'ble Apex Court and the Apex Court has vide order dated 27.09.2021 referred the matter to a larger Bench and, therefore, in view of this fact, learned counsel for the appellants has prayed that these matters be adjourned till the case is decided by the larger Bench of the Hon'ble Apex Court.

20. Dr. A. Saraf, learned senior counsel, appearing for the respondents, on the other hand, has objected to the above request of Mr. Keyal and he would argue that M/s SRD Nutrients Private Limited has been declared as per incuriam in a later decision of the Hon'ble Apex Court and that is the admitted position. All this Court has to now decide is the rights and liabilities of the petitioners when M/s SRD Nutrients Private Limited has been declared as per incuriam. Merely because M/s SRD Nutrients Private Limited has now been referred to a larger Bench should not stop this Court from hearing these matters and, in any case, all the parties will ultimately be bound by the decision taken by the larger Bench of the Hon'ble Apex Court. In view of this submission, we think it appropriate that the matters be disposed of on the basis of the arguments of the parties.

21. The main argument of Mr. S.C. Keyal, learned counsel for the Revenue would be that refund was made to the petitioner on the strength of the judgment of the Hon'ble Apex Court in M/s SRD Nutrients Private Limited, wherein it was held

that education cess and higher education cess is a part of excise duty and since excise duty has been exempted and has been refunded to the petitioner, there is no reason as to why the amount collected as education cess and higher education cess, which was a part of the excise duty, should also not be refunded. The admitted position is that subsequent to the said decision and the orders passed by the Gauhati High Court in several petitions, the amount was refunded to the petitioners. The same amount is being demanded again by the Revenue on the ground that the amount paid to the petitioners was done "erroneously", as the decision of the Hon'ble Apex Court in M/s SRD Nutrients Private Limited was subsequently held to be "per incuriam" by a three Judge Bench of the Apex Court in the case M/s Unicorn of Industries.

22. According to the learned counsel for the appellants, the Revenue has its powers to recover duties which have been erroneously refunded. These powers are there under Sub-Section (i) of Section 11A of the Central Excise Act, where in case an amount had been refunded, inter alia 'erroneously', it can be recollected. It is further argued that the said amount can be recovered within a period of two years from the date such an amount was paid and the admitted position is that this is being done within the said limitation of two years. A three-Judge Bench of the Hon'ble Supreme Court in M/s Unicorn Industries has come to the conclusion that the judgment of the Supreme Court in M/s SRD Nutrients Private Limited is per incuriam for the reason that two earlier decisions of the Hon'ble Supreme Court in M/s Modi Rubber Limited and Rita Textiles Private Limited Pvt. Limited & Ors. -Vs- Union of India & Ors. (1986) (Supp) SCC 557 were not considered where it was held that an excise duty is only the basic duty of excise. Anything over and above the basic duty of excise, such as special duty, cannot be called an excise duty and what can be refunded is only the excise duty and not any other duty. Consequently, the refund made to the petitioners was made "erroneously" and since the Revenue has the power to take back the amount refunded "erroneously", as these powers are conferred under Section 11A of the Central Excise Act, the same have been exercised and the amount is being now recovered.

23. Rebutting this argument of the learned counsel for the appellant, learned senior counsel for some of the assesses/petitioners, Dr. A. Saraf would argue that it is an admitted position that the amount which was refunded to the petitioners was refunded in view of the findings of the Hon'ble Apex Court in M/s SRD Nutrients Private Limited. After two years of the said judgment, another judgment, i.e. M/s Unicorn Industries, a three Judges Bench of the Hon'ble Apex Court has held M/s SRD Nutrients Private Limited per incuriam. Merely because M/s SRD Nutrients Private Limited has now been declared as per incuriam by the larger Bench of the Hon'ble Supreme Court, it would not undo everything which had been done between the Revenue Department and the petitioners subsequent to the decision in M/s SRD Nutrients Private Limited, when the said judgment was holding the field. The learned counsel would argue that now M/s SRD Nutrients Private Limited has been declared as per incuriam, therefore, now it

loses its precedential value and it cannot be cited as a precedent, but between the parties concerned, it would still operate as res-judicata.

24. The first judgment being relied upon by Dr. Saraf, learned counsel for the respondents is Bharat Sanchar Nigam Limited & Anr. -Vs- Union of India & Ors. (2006) 3 SCC 1. In the said case, a three Judges Bench of the Hon'ble Apex Court were to decide as to what is the nature of transaction by which mobile phone connections are enjoyed, whether it is a sale, or it is service or it is both. While giving its finding on the said aspects, the Hon'ble Apex Court had an occasion to consider as to what would be the net result when an earlier judgment of the Supreme Court is declared as per incuriam by a latter Bench of the Supreme Court. In Paragraph 22 of the judgment, the Hon'ble Apex Court had observed as under:-

"22. A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in Hurra v. Hurra [(2002) 4 SCC 388] . As we have said, overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate....."

25. Another judgment cited by the learned senior counsel for the respondents is the judgment of the Hon'ble Apex Court in Dr. Shah Faisal & Ors. -Vs- Union of India & Anr. (2020) 4 SCC 1. In the said case, the Hon'ble Supreme Court inter alia was considering a challenge as regarding two constitutional orders issued by the President of India in exercise of his powers under Article 370 of the Constitution of India. While giving the said order, the consideration which had come before the Hon'ble Supreme Court was whether the matter has to be referred to a larger Bench or not. While deciding on the said aspect, the Hon'ble Apex Court again had an occasion to consider the net result when an earlier judgment is declared as per incuriam. Giving a reference to the case of A.R. Antulay -Vs- R.S. Nayak (1988) 2 SCC 602, the Hon'ble Apex Court had held that "when a previous decision is so overruled it does not happen - nor has the overruling Bench any jurisdiction so to do - that the finality of the operative order, inter partes, in the previous decision is overturned". Again it was emphasized that all that would happen is when the earlier judgment is

declared as per incuriam, it still loses its precedential value and it is not a good law any more.

26. The third judgment being cited by the learned counsel for the petitioner is Commissioner of Income Tax, Bhopal -Vs- G.M. Mittal Stainless Steel (P) Limited (2003) 11 SCC 441. In the said case, the Commissioner of Income Tax had passed a particular order relying upon a decision of the High Court which was

operating at the relevant point of time. It was held that an assessment was done by the officer based on the judgment of the High Court. In another case where a different view has been taken by the Hon'ble Apex Court, it cannot be said that at the time when the order was passed by the Income Tax Officer, it was an erroneous order.

27. Learned senior counsel for the petitioner has relied upon a judgment of the Division Bench of this Court in Victor Cane Industry -Vs- Commissioner of Income Tax & Ors. 2002 (2) GLR 69. This judgment also relates to exemption granted to the industries in order to boost industrialisation in the State of Assam. Under the Assam Sales Tax Act, exemption was given in favour of these industries and subsequently, under the provisions of the Central Sales Tax Act as well this exemption was granted which was held to be correct in view of the decision of the Hon'ble Apex Court in M/s Pine Chemicals Limited & Ors. -Vs- Assessing Authority & Ors. (1992) 2 SCC 683. Subsequently, the said judgment was reversed by the Apex Court in the year 1995 in the case of Mahavir Coke Industries -Vs- Income Tax Commissioner, Assam (1995) 97 STC 186 and the Commissioner Sales Tax exercised his powers under Section 31 of the Assam Sales Tax Act for recovery. This was held to be incorrect by a Division Bench of this Court by holding as follows:-

"9. It will be seen that this Court had taken the view after relying on earlier judgments of different High Courts as also observations of Supreme Court in India Aluminum Cable Ltd. case. No doubt the view of the Apex Court expressed In Pine Chemicals case 1992 (2) SCC 683 was reversed by the Apex Court itself in 1995 (1) SCC 58, but according to us that should not make any difference on the assessments already completed. On similar matter a Division Bench of Punjab & Haryana High Court in 107 STC 332 observed as under :

'4. From the perusal of Section 40 as reproduced above, it would be apparent that the Commissioner can call for the record of any case pending before or disposed of by any Assessing Authority or appellate authority to satisfy himself as to the legality or propriety of any proceedings or any order and pass such order in relation thereto as he may think fit. The Scope of revisional powers is, thus, only to examine legality or propriety of any proceedings or any order. That being the scope of the revision, the only question that, thus, needs determination is as to whether the appellate authority while accepting the appeals preferred by M/s. Free Wheels (India) Limited as on the day when the appeals were decided had committed any illegality or the orders suffered from any impropriety. All that is stated on behalf of the counsel representing the State of Haryana is that the appellate authority had based its decision on the decision of the Tribunal in M/s. Liberty Footwear Co., Kamal, which decision could not be held to be laying down the correct law in view of the later decision rendered by the Tribunal in M/s. Steel Kraft, Panipat. We do not find any merit in the contention of the learned counsel as on the day when the appellate authority decided the appeals preferred by Free Wheels (India) Ltd., the decision rendered

by the Tribunal in M/s. Liberty Footwear Co., had the field. If on a subsequent decision the Tribunal has taken a contrary view it would not make the proceedings that have been finalised far earlier and are based upon an earlier decision of the Tribunal either Illegal or improper. If the contention of the learned state counsel is upheld. It would result into endless litigation as all matter finalised earlier on the basis of law then in existence and holding the field would need reconsideration if law changes in succeeding years. All matters that have been finalised shall be then reported thus, unsettling the settled matters, in any case, as mentioned above, the order passed by the appellate authority which was based upon the law then holding the field could not possibly be styled as illegal or improper. That apart, the Commissioner by powers vested in him by virtue of Section 40 on his own motion can call for the record of any case pending or disposed of by any Assessing Authority or appellate authority other than the Tribunal. The decision of the appellate authority that was set aside by the revisional authority as mentioned above was based upon the decision of the Tribunal, even though, therefore, the revisional authority was not reopening. The case decided by the Tribunal, it virtually amounts to upsetting an order that is based upon the decision of the Tribunal.'

10. The matter can be looked from another angle also. This Court in Mahavir Coke Industries v. Income Tax Commissioner; Assam (1995) 97 STC 186 (Division Bench which judgment was pronounced on October 5, 1993 relying on earlier judgment of this Court (1992 (1) GLR 46) as well as Pine Chemical Limited Case 1992 (2) SCC 683 (supra) took the view that industries like the appellant were exempt from the payment of Central Sales Tax under Section 8(2A) of the Central Sales Tax Act. Against the aforesaid judgment the S. L.P. filed by the revenue was dismissed on 3.3.1997 (S.L.P. No. C 5644 of 1997). Thereafter the revenue filed a review petition No. 1370/97 before the Apex Court on the ground that the judgment reported in 1992 (2) SCC 683 (supra) already stood reviewed and reversed in the case reported in 1995 (1) SCC 58 and therefore the order passed in the S.L.P. dated 3.3.1997 may be reviewed.

11. However, the Apex Court dismissed the review petition on 13.7.1997. From this the learned counsel emphasised that the law as it exists on the date of passing of the order has to be seen and the judgment reported in 1995 (1) SCC 58 would be applicable only to the assessments which are made after the date of the judgment. According to the learned counsel, the law laid down in fiscal matters has to be applied prospectively.

12. From the above, it can reasonably said that despite the fact that it was brought to the notice of the Apex Court that the earlier view expressed in 1992 (2) SCC 683 stood reversed in 1995 (1) SCC 58; yet the Apex Court did not review the order passed in the SLP inasmuch as the Division Bench judgment of this High Court in Mahavir Coke Industries case was on the basis of the then existing law i.e., 1992 (2) SCC 683 and could not be said to be wrong just because later on that view was upset in 1995 (1) SCC 58. We agree with the

learned counsel that law laid down in Tax matters should normally be applied prospectively. No tax was collected by the appellant from the purchasers as per the law then existing."

28. Dr. Saraf, learned senior counsel would argue that the power under Section 11A of the Central Excise Act for recovery of the amount erroneously paid can only be done if the amount has been paid erroneously. But it cannot be said by any stretch of imagination that when the amount of education cess or higher education cess was refunded to the writ petitioners, it was done erroneously, rather it was done in accordance with law and in compliance of the judgment of the Apex Court which is a law under Article 142 of the Constitution of India and has to be followed by every Court in the country.

29. What amounts to be paid erroneously has been explained by another Division Bench of this Court in the case of *Rajendra Singh -Vs- Superintendent of Taxes & Ors.* 1990 (1) GLR 449. Though it relates to the Tripura Sales Tax Act, 1976, but the principle would be the same. In para 10 of the said judgment, it has been held that an erroneous order would be one which has been passed without any authority of law or which has been passed by an authority without making an enquiry. To our mind an erroneous refund would also be a refund which has been made by an order which is without jurisdiction. All the same, such is not the case here in the present matters. 30. Another case relied upon by Ms. N. Hawelia, learned counsel for the respondents is *Dhananjay Verma -Vs- State of Uttarakhand* (MANU/UC/0287/2019) (Manupatra), wherein a Full Bench of the Uttarakhand High Court has held as under:

"22. The ratio decidendi of a case is the principle of law that decides the dispute in the facts of the case. (*Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*). As only the ratio decidendi can act as the binding or authoritative precedent, (*Girnar Traders*), a Larger Bench would only overrule the law declared in the earlier judgment, as a result of which the earlier judgment will cease to be a precedent binding on future cases. While the law declared by the Division Bench in its order in Special Appeal No.162 of 2013 dated 14.08.2013, that Articles 16(4), (4A) and (4B) are exhaustive of all forms of reservation, stands overruled by this order, the question which necessitates examination is regarding the effect of the said order of the Division Bench, in Special Appeal No.162 of 2013 dated 14.08.2013, declaring the Government Order dated 06.10.2006, whereby reservation was provided in favour of sportsmen, non est and that no right flowed therefrom.

23. In examining this issue, the distinction between the law laid down in the earlier judgment being declared erroneous, and the decision itself being overruled, must be borne in mind. An order passed by a Court of competent jurisdiction, after adjudication on merits of the rights of the parties, binds the parties or the persons claiming right, title or interest from them. Its validity can be assailed only in an appeal or review. Its validity cannot be questioned in subsequent proceedings. (*Sushil Kumar Metha Vs. Gobind Ram Bohra*). The judgment of a competent Court, even if it is erroneous, is binding inter- parties

and cannot be re-agitated in collateral proceedings. The binding character of judgments, of Courts of competent jurisdiction, is in essence a part of the rule of law on which administration of justice is founded. (The Direct Recruit Class- II Engineering Officers' Association and others vs. State of Maharashtra and others; U.P. State Road Transport Corporation vs. State of U.P. and Anr.). Once a matter, which was the subject-matter of a lis, stood determined by a competent Court, no party can thereafter be permitted to reopen it in a subsequent litigation. (Swamy Atmananda and Ors. vs. Sri Ramakrishna Tapovanam and Ors.; Ishwar Dutt vs. Land Acquisition Collector and Anr.).

24. A decision, which has attained finality, is binding between the parties, and they are not to be permitted to reopen the issue decided thereby. (Supreme Court Employees Welfare Association Vs. Union of India). Such orders bind the parties in a subsequent litigation or before the same Court at a subsequent stage of proceedings. (Barkat Ali v. Badrinarain). An order of a Court/Tribunal of competent jurisdiction, directly upon a point, creates a bar, as regards a plea, between the same parties in some other matter in another Court/Tribunal where the said plea seeks to raise afresh the very point that was determined in the earlier order. (Swamy Atmananda²⁹; Iswar Dath Land Acquisition Collector). Issues which have been concluded inter-parties cannot be raised again in proceedings inter-parties. (State of Haryana Vs. State of Punjab).

25. A decision inter-parties cannot be overturned in collateral proceedings. A decision can be set aside in the same lis on a prayer for review or an application for recall. Overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. It is open to a court of superior jurisdiction or strength, before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. (Bharat Sanchar Nigam Ltd. and Ors. vs. Union of India and Ors). As the judgment of the Division Bench, in Special Appeal No. 162 of 2013 dated 14.08.2013, has attained finality, no appeal or review having been preferred there against either by the petitioner therein or the Government of Uttarakhand, the said order of the Division Bench, quashing the Government Order dated 06.10.2006 and in holding it non est, cannot be set at naught in collateral proceedings even by a Larger Bench."

31. Ms. N Hawelia, learned counsel for the respondents would also argue that there are department circulars reference to which has been made in Paragraph No.69 of the judgment of the learned Single Judge which are binding on the department in view of Section 37B of the Central Excise Act. Reference here is of the Circular dated 09.01.2020. As per the said Circular, the Board has instructed its officer to contest matters pending before this Court by filing statutory appeal or review petition, as the case might be, or in the alternative, submit a proposal for filing a SLP before the Hon'ble Apex Court. In other words, before initiating

recovery proceedings, as it has been done in the present case, these remedies ought to have been exhausted as this Circular is binding upon the authority. It is true that we have not received any satisfactory answer from the Union of India as to why this Circular has not been followed.

37B. Instructions to Central Excise Officers.-The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on [such goods or for the implementation of any other provision of this Act], issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board:

Provided that no such orders, instructions or directions shall be issued-

- (a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or
- (b) so as to interfere with the discretion of the Commissioner of Central Excise (Appeals) in the exercise of his appellate functions.

32. Mr. R. Chowdhary, learned counsel who appears for the respondents in W.A. No. 170/2021, W.A. No. 201/2021 and W.A. No. 213/2021, though has adopted the arguments of Dr. Saraf, would also argue that the decision in M/s SRD Nutrients Private Limited is binding between the parties and until the said judgment is set aside, even the show cause notice which has been given to the respondents by the Revenue is without jurisdiction.

33. To summarize the basic argument of the respondents would be that irrespective of the fact that M/s SRD Nutrients Private Limited has been declared as per incuriam, the matter has attained finality between the parties, inasmuch as, the order passed by the Revenue for refund of the amount has not been challenged, nor has the order of the learned Single Judge, by which the learned Single Judge has directed that in view of the M/s SRD Nutrients Private Limited the amount should be refunded, been taken in writ appeal before this High Court. The matter having attained finality, it cannot be now opened at this stage even though M/s SRD Nutrients Private Limited has been declared as per incuriam, in the case of M/s Unicorn Industries.

34. We agree with the submissions of the learned counsels for the assessee/petitioners that, under the facts and circumstances of the case, the amount refunded to them cannot be recovered, as it was not refunded to them erroneously, but it was returned to them for the reason that it was the requirement of law; law as it stood at the relevant time. The matter having attained finality cannot be re-opened for the reason that the earlier law has been declared to be "per incuriam".

35. Consequently, we find no occasion to interfere with the findings of the learned Single Judge. We see no merits in the present writ appeals of the Revenue. Accordingly, all the appeals are hereby dismissed.