

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10691 OF 2011

COMMISSIONER OF CUSTOMS

.....Appellant(s)

Vs.

HINDUSTAN ZINC LIMITED
THROUGH ITS MANAGING DIRECTOR

.....Respondent(s)

WITH

CIVIL APPEAL NO. 6854 OF 2018

WITH

CIVIL APPEAL NOS. 10619-10620 OF 2011

WITH

CIVIL APPEAL NO. 10612 OF 2011

WITH

CIVIL APPEAL NO. 6605-6609 OF 2015

WITH

CIVIL APPEAL NO. 6809 OF 2013

WITH

CIVIL APPEAL NO. 9286 OF 2012

WITH

CIVIL APPEAL NO. 10690 OF 2011

WITH

CIVIL APPEAL NO. 10628 OF 2011

WITH

CIVIL APPEAL NO. _____ OF 2023
(@ SLP(C) No. 11169 of 2022)

O R D E R

Special leave granted in SLP(C) No. 11169/2022.

In all these cases the common question which arises is whether claim for refund of amounts deposited towards provisional duty, as a condition for clearance of imported goods can be the subject matter of refund after conclusion of assessment proceedings and having regard to its outcome, under Section 18 of the Customs Act. It is not disputed that this issue has been considered both in the context of provisional assessment under Rule 9-B of the Central Excise Rules by judgments of this Court as well as in the context of Section 18 of the Customs Act, in "*Commissioner of Customs, New Delhi vs. M/s Oriental Exports, New Delhi*" [2003 156 ELT 161]. The Court held that even though Rule 9-B of the Customs Rules (applicable in that case) was not retrospective, nevertheless pending applications were entitled to the relief prescribed by it. This Court had occasion again to consider the issue in the light of the conflict of decision by a three Judge Bench, in a three Judge Bench decision in "*Commissioner of Central Excise, Mumbai-II vs. Allied Photographics India Ltd.*" [(2004) 4 SCC 34]. The Court held that the doctrine of unjust enrichment was not applicable to provisional assessment even after finalization of the proceedings.

The impugned judgments in all these appeals have followed view expressed in "Oriental" and "Allied".

It is brought to the notice of this Court that a judgment subsequent to the ruling in "Allied" i.e. "Sahakari Khand Udyog Mandal Ltd. vs. Commissioner of Central Excise & Customs" [(2005) 3 SCC 738] appears to have expressed a different view in that the Court held that to maintain a claim for refund, the assessee has to establish that he or it had paid the amount for which relief is sought and had not passed on the burden to the consumers. This judgment though rendered by a three Judge Bench, overlooked the ruling in *Allied (supra)*. Furthermore, even though the judgment has generally referred to the nine Judge Bench ruling in "*Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors.*" [(1997) 5 SCC 537], nevertheless the specific observations in para 104 appears to have escaped the attention of the Court. Para 104 in *Mafatlal Industries Ltd.*, is extracted below:

104. Rule 9-B provides for provision assessment in situations specified in clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisional assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the

adjustment under sub rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B as the case may be. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B(5) reagitating the issues already decided under Rule 9-B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11-B. It follows logically that position would be the same in the converse situation. Nature and character of refund claims under the Central Excises and Salt Act and the Customs Act."

The judgment in "*Sahakari Khand Udyog Mandal Ltd.*", in this Court's considered view, has to be confined to the facts of that case for the reasons mentioned above. In this view of the matter, there is no infirmity with the findings and conclusions recorded in the impugned judgments, which are in accord with the ratio in *Allied* (supra). The revenue's appeals are, accordingly, dismissed.

.....J.
(S. RAVINDRA BHAT)

.....J.
(DIPANKAR DATTA)

New Delhi;
March 23, 2023.

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No. 10691/2011

COMMR.OF CUSTOMS

Appellant(s)

VERSUS

HINDUSTAN ZINC LIMITED
THROUGH ITS MANAGING DIRECTOR

Respondent(s)

WITH

C.A. No. 6854/2018 (III)

C.A. No. 10619-10620/2011 (III)

C.A. No. 10612/2011 (III)

SLP(C) No. 150/2016 (XIV)

C.A. No. 13501/2015 (XIV-A)

C.A. No. 6605-6609/2015 (IV-A)

C.A. No. 6809/2013 (III)

C.A. No. 9286/2012 (XIV-A)

C.A. No. 10690/2011 (III)

C.A. No. 10628/2011 (III)

SLP(C) No. 11169/2022 (IV-A)

(FOR ADMISSION and I.R. and IA No.88232/2022-EXEMPTION FROM FILING
C/C OF THE IMPUGNED JUDGMENT)

Date : 23-03-2023 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE DIPANKAR DATTA

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Mr. R. Parthasarathy, AOR

UPON hearing the counsel the Court made the following
O R D E R

The revenue's appeals are dismissed in terms of signed
order.

All pending applications are disposed of.

SLP(C) No. 150/2016 and C.A. No. 13501/2015

List these matters before a Bench of which one of us
(Hon'ble Mr. Justice S. Ravindra Bhat, J.) is not a member.

(NEETA SAPRA)
COURT MASTER (SH)

(MATHEW ABRAHAM)
COURT MASTER (NSH)