

itw Singnode India Ltd., Hyd. Vs. Assistant Commissioner of Customs and Central Excise, Hyd.

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Court : Andhra Pradesh

Decided On : Jun-22-2000

Reported in : 2000(4)ALD167; 2000(3)ALT676; 2000(71)ECC49; 2000(122)ELT651(AP)

Judge : P. Venkatarama Reddi ;and S.R. Nayak

Acts : [Central Excise Act, 1944](#) - Sections 11-B; Central Excise Rules, 1944; [Central Excise Tariff Act, 1985](#) - Sections 35; [Constitution of India](#) - Articles 226 and 227; Customs Laws (Amendment) Act, 1991

Appeal No. : WP No. 26710 of 1999

Appellant : itw Singnode India Ltd., Hyd.

Respondent : Assistant Commissioner of Customs and Central Excise, Hyd.

Advocate for Def. : Mr. B. Adinarayana Rao, SC for Central Government

Advocate for Pet/Ap. : Mr. V. Jogayya Sarma, Adv.

Judgement :

ORDER

S.R. Nayak, J.

1. The petitioner Company has filed this writ petition for refund of Rs. 1 crore paid as a pro-deposit on 28-11-1997 as a condition precedent for hearing the appeal before the Customs, Excise and Gold (Control) Tribunal (for short 'CROAT'), South Regional Bench, Chennai consequent on the allowing of the above appeal by the CEGAT by its final order dated 20-8-1998 and for certain other reliefs, The prayer in the writ petition reads as follows:

'For the reasons stated in the accompanying affidavit the petitioner herein prays that this Hon'ble Court may be pleased to issue a writ or order or direction especially one in the nature of Mandamus: (i) compelling the respondents to refund an amount of Rs.1 crore (Rupees one crore only) pre-deposited while exercising the right of appeal to the Commissioner of Customs and Central Excise (Appeals), Hyderabad as per the directions of this Hon'ble High Court in WP No.31505 of 1997 dated 27-11-1997; (ii) declaring that as a consequence of the final Order No. 1644-1659/98 1644-1659/98 , dated 20-8-1998 of the Customs, Excise, Gold (Control) Tribunal (CEGAT), South Regional Bench, Chennai setting aside the order in Appeal No. 114/96(H), CE/A No. 1891 /95(H) CE, dated 9-3-1996 As well as the order-in-original (C.No.v/73/17/15/95-VC/Adjn. Order No.62 of 1995 dated 20-9-1995) of the Assistant Commissioner of Central Excise, Hyderabad-I Division, an amount of Rs.1 crore deposited as a precondition for the hearing of the appeal before the Commissioner of Customs and Central Excise (Appeals), Hyderabad is liable to be refunded immediately; (iii) setting aside the Order-in-original

Rc.No.226/99/Adjn/Order No.22 of 1999, dated 18-11-1999 passed by the Assistant Commissioner of Central Excise, Hyderabad-I Division and consequently direct the respondents immediately to refund the amount of Rs. 1 crore (Rupees one crore only) paid as a pre-dcposit on 28-11-1997 with interest as per Section 11-BB of the [Central Excise Act, 1944](#) from the date immediately after the expiry of three months from the date of refund of the said amount; and (iv) to grant such other relief or reliefs as this Hon'ble Court deems fit and proper in the circumstances of the case'.

2. The petitioner Company is a public limited company. It has factories at a number of locations including one at Rudraram village in Medak District, Andhra Pradesh manufacturing some goods liable to Central Excise duty under the [Central Excise Act, 1944](#) (for short 'the Act') and the Central Excise Rules, 1944 (for short 'the Rules') made thereunder. The petitioner Company is engaged in the activity of processing and sale, inter alia, of steel strappings also known as Box Strappings at their Rudraram works.

3. There is a dispute between the petitioner Company and the Central Excise Department as to whether the process through which the Box Strappings are made amounts to manufacture or not within the meaning of the Act so as to attract Central Excise Duty, and if so, how the Box Strappings should be classified under the [Central Excise Tariff Act, 1985](#) and what is the applicable rate of duty thereon. After the Central Excise Tariff Act came into force, the petitioner Company filed a Classification List in March, 1986 for Box Strappings quoting the earlier acceptance and this classification was accepted by the Excise Department. However, during April, 1987 the Collector of Central Excise, Hyderabad issued show-cause notice demanding duty of Rs.1,13,82,247 on Box Strappings for the period from 1-3-1986 to 19-2-1987 under Heading 7308.90 of the Tariff. However, on consideration of the objections filed by the petitioner Company the Collector of Central Excise, Hyderabad dropped the proceedings. On an appeal by the Department, the CEGAT passed an order allowing the appeal and held that the goods are classifiable under the Heading 7308.90 of the Tariff. Thereafter, the petitioner Company filed a statutory appeal to the Supreme Court and, it is stated, the same is pending decision in Civil Appeal No.7868 of 1995.

4. The Range Superintendent of Central Excise issued eight show-cause notices for the period from 1-10-1989 to 28-2-1993 demanding an amount of Rs.12,45,19,736/- towards Central Excise Duty. On 20-9-1995 the Assistant Commissioner of Customs and Central Excise, Hyderabad-I Division, the first respondent herein passed an order classifying the Box Strappings under Heading 7308.90 of the Tariff and confirmed the duty demand of Rs.12,45.19.736/-. On an appeal filed by the petitioner Company against the above said order, the Commissioner of Central Excise (Appeals), Hyderabad accepted the claim of the

petitioner Company vide order in Appeal No.114/96(H) CE/A No.891/95(H) CE dated 9-3-1996 that the Box Strappings are classifiable under Heading 7212.30 of the Tariff'. However, the Commissioner (Appeals) did not allow MODVAT Credit and certain other claims of the petitioner Company. Therefore, the petitioner Company filed a statutory appeal. The Excise Department also filed an appeal disputing the correctness of the classification made by the Commissioner of Central Excise under Heading 7212.30 of the Tariff. The CEGAT South Regional Branch, Chennai disposed of the appeals by final Order No.1644/1659/1998 dated 20-8-1998 by setting aside the Order-under-Appeal No.I 14/96 (H)CE/A.No.891/95(H)CE dated 9-3-1996 as well as the Order-in-Original No.C.No./73/I 7/15/95/VC/Adjn. Order No.62 of 1995 dated 20-9-1995 and remanded the matter to the first respondent for de novo consideration of the classification issue and other attendant issues. The CEGAT also suggested that since the issue relating to manufacture is already pending consideration before the Supreme Court, 'it would perhaps be in the fitness of things to await a final decision from the Hon'ble Supreme Court on this before the issue is finally decided by the Assistant Commissioner on classification also'.

5. In the meanwhile, pursuant to the order of the Commissioner (Appeals) dated 9-3-1996. the first respondent issued a letter dated 7-11-1996 requesting the petitioner Company to pay Central Excise Duty amounting to Rs.5,25,02,913/- under Heading 7212.30 of the Tariff. The petitioner Company filed its objections to the demand notice. The first respondent, after considering the objections of the petitioner Company, passed an order in C.No.V/73/171/5/95-CE dated 31-3-1997/17-4-1997 directing the petitioner Company to pay a total amount of Rs.5,25,02,913/- under Heading 7212.30 of the Tariff. Against the said order the petitioner Company filed a statutory appeal before the Commissioner of Customs and Central Excise (Appeals), Hyderabad. An application for stay was also filed requesting for dispensing with the pre-deposit of the total deposit of Rs.5,25,02,913/-. In the meanwhile, the petitioner Company apprehending coercive action from the Central Excise Department for recovery of duties despite the said appeal and stay application having been filed before the Appellate Authority filed WP No.18197 of 1997 in this Court and this Court, by its order dated 6-8-1997 directed the Central Excise Department not to take any coercive steps

against the petitioner Company for collecting the duty pending disposal of the stay application either by the Commissioner of Customs and Central Excise (Appeals), Hyderabad or any Commissioner in charge of that post. Thereafter, the Commissioner of Central Excise (Appeals), Bangalore passed an Order No.22/97 (II)CE in A.No.269/97(H)CE dated 26/20-9-1997 directing the petitioner Company to deposit Rs.3 crores within 60 days from the date of receipt of the order. The petitioner Company again riled WP No.31505 of 1997 in this Court against the above direction of the Commissioner of Central Excise (Appeals), Bangalore and this Court disposed of the said writ petition on 27-11-1997 staying collection of the disputed amount pending disposal of the appeal by the CEGAT or Commissioner (Appeals), whichever is earlier, subject to the condition of the petitioner Company depositing a sum of Rs.1 crore within a period of two weeks. Accordingly, the petitioner Company deposited a sum of Rs.1 crore as a pre-deposit. This Court while disposing of the above writ petition also observed that as the demand was raised as a sequel to the order dated 9-3-1996 of the Commissioner (Appeals), which was the subject-matter of the appeal before CEGAT, the first respondent may pass appropriate orders in the light of the final orders that may be passed by CEGAT and raise the demand accordingly. As pointed out supra, the CEGAT passed final order remanding the matter to the first respondent suggesting, inter alia, that it is better to await the outcome of the Civil Appeal No.7868 of 1995 pending in the Supreme Court. In the meanwhile, and as a consequence of the order of the CEGAT, the second respondent also passed an order in Appeal No.146/ 99(HI)CE dated 20-10-1999 setting aside the order in C.No.V/73/1715/95-CE dated 31-3-1997/17-4-1997 of the first respondent. The resultant position is that there is neither the adjudication order of the first respondent nor any order for demand of duty and both the orders are non est.

6. When the matter stood thus, the petitioner Company submitted a claim in Form R dated 20-8-1999 under Section 11-B of the Act for refund of the amount of Rs.1 crore and that claim was received in the office of the first respondent on 20-8-1999. Further, immediately after the order under appeal dated 20-10-1999 of the Commissioner of Central Excise (Appeals), Hyderabad setting aside the order in C.No.V/ 73/1715/95-CE dated 31-3-1997/17-4-1997 of the first respondent was received by the petitioner Company on 1-11-1999, the petitioner Company

addressed a letter dated 1-11-1999 to the first respondent requesting him to refund a sum of Rs.1 crore. The first respondent issued a show-cause notice in R.C.No.226/99 dated 1-11-1999 proposing to reject the claim of the petitioner Company for refund of the pre-deposit on the ground that it is premature and directing the petitioner Company to show-cause as to why the refund claimed should not be refused. The petitioner Company filed its reply on 2-11-1999, and the Company was given personal hearing on 3-11-1999. The first respondent ultimately passed the order on 18-11-1999 turning down the claim of the petitioner Company and the same was served on the petitioner Company on 23-11-1999. Hence, this writ petition assailing the above order of the first respondent dated 18-11-1999 and seeking the reliefs to which reference is already made in the beginning of this order.

7. Sri V. Jogayya Sarmu, learned Counsel appearing for the petitioner Company while assailing the order of the first respondent dated 18-11-1999 would contend that refund of pre-deposit made under Section 35-F of the Act for availing right of appeal is bound to be refunded when appeal is allowed. The learned Counsel would also contend that Section 11-B is not applicable to such refund. In support of his submission the learned Counsel would place strong reliance on the decision of the Delhi High Court in *Voltas Limited v. Union of India*, 1999 (112) ELT 34 (Del.). On the other hand, the learned Standing Counsel for the Excise Department would maintain that since the adjudication on merit is yet to take place before the first respondent-original authority, and since there is no evidence adduced by the petitioner Company to show that the incidence of duty had not been passed on by it to the consumers, the impugned order of the first respondent, in the facts and circumstances of the case, is just and legal, and in the public interest, therefore, there is no warrant for this Court to interfere with the impugned order in exercise of its discretion under Article 226 of the Constitution. The learned Standing Counsel would also maintain that the impugned order of the first respondent is an appealable order under Section 35 of the Act and the petitioner has not stated any valid reason or ground to bypass the statutory appeal remedy and to rush to this Court straightaway under Article 226 of the Constitution and therefore, the writ petition is liable to be dismissed in limine on the ground of non-exhaustion of alternative remedy without going into the merits of the dispute.

8. It is true that against the impugned order of the first respondent dated 18-11-1999 an appeal lies to the Commissioner (Appeals) under Section 35 of the Act. It is also true that the remedy under Article 226 of the Constitution being, in general, discretionary, the High Court may refuse to grant it where there exists an alternative remedy, equally efficient and adequate unless there are good grounds therefor. Whether the alternative remedy is equally efficacious or adequate is always a question of fact to be decided in each case having regard to the facts and circumstances of such case. Where the petitioner may get adequate relief by an ordinary action at law, i.e., a civil or a criminal proceeding or a proceeding under a statute before a statutory authority, relief under Article 226 may be refused. When a statute creates a right or liability and it itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226. The High Court may, in exercise of its discretion, decline to interfere until all statutory remedies are exhausted, including administrative representation, particularly when the decision of the question of jurisdiction depends upon the appreciation of the evidence or the resolution of disputed facts. But the existence of an alternative remedy is not an absolute bar to the relief under Article 226. It is a circumstance, which the High Court has to take into consideration, in exercising its discretionary powers under Article 226. It does not take away the jurisdiction of the Court to grant relief under Article 226 in exceptional circumstances. The rule of exhaustion of alternative remedy before a writ will be granted is a rule of policy, convenience and discretion rather than a rule of law, as held by the Supreme Court in *Abraham v. Income Tax Officer*, : [1961]41ITR425(SC) and in *Venkateswaran v. Ramchand*, : 1983ECR2151D(SC) , and several other pronouncements to follow those decisions. Thus, the Court may, in exceptional cases, issue discretionary writ, notwithstanding the fact that the alternative or statutory remedies have not been exhausted. The rule of exhaustion of alternative remedy does not bar the jurisdiction of the High Court under Article 226, as held by the Supreme Court in *Union of India v. Verma*, (1958) SCR 499. What these exceptional circumstances are cannot be exhaustively enumerated because the matter is pre-eminently one for the discretion of the Court issuing the writ, which is to be exercised according to the facts and circumstances of each case.

9. In this case, we find an error apparent on the face of the impugned order of the first respondent. None of the grounds stated by the first respondent in his order to refuse refund of Rs.1 crore is tenable or legal. The reasons for refusal are found in Paragraphs 7 and 8 of the impugned order. They read as follows:

'(7). Now, therefore, the case before me is whether Rs.1 crore should be returned to ITW or not. Although, the case in question and the revworkings made by the Assistant Commissioner had been remanded. Yet the said remand is conditional and has direct bearing on the outcome of the Hon'ble Supreme Court of India in the civil appeal referred to above. It is not only important but also imperative to note that the duty originally demanded the case was Rs.1 1,35,63,282/-BED + Rs.1,09,56,453/- SED, which is manifold more than Rs.1 crore involved. Suppose, if the Hon'ble Supreme Court upholds department's appeal, the goods in question will become liable to duty. Then the lone question remains to be settled succinctly is about classification. In any case, the chances of subject demand becoming a nought is scarce. That apart, the fact remains large chunk of revenue remained unpaid by ITW for more than four years. Hence, in the facts and circumstances, I feel it is just and equitable to hold back Rs.1 crore against a possible demand of more than one crore.

(8) I also observe that the amount under dispute was not made as a pre-deposit under the provisions of Section 35F of [Central Excise Act, 1944](#). On the other hand, the said amount was paid as per the direction of the Hon'ble High Court of Andhra Pradesh in lieu of payment of Rs.5.25 cores confirmed against them. In other words, the disputed amount was not paid while exercising the Right of Appeal before the Hon'ble CEGAT. The stay granted by the Hon'ble High Court remains operative subject to the payment of Rs.1 crore till such time, the Hon'ble CEGAT disposes Tribunal is final. Therefore, the Hon'ble High Court's stay order still holds the field. As the amount in question is not in terms of Section 35F *ibid*, I find that the present case is not covered by the facts of judicial pronouncements relief upon by them'.

10. Firstly, the remand of the proceedings by the CEGAT is conditional, as stated by the first respondent in his order, is not correct statement. Secondly, the

observation of the first respondent that if the Supreme Court upholds the department's appeal the goods in question would become liable to duty is a totally hypothetical and uncertain ground to refuse the refund. Thirdly, the observation of the first respondent 'in any case, the chances of subject demand becoming a nought is scarce' shows that there is a pre-determination of the issue on the part of the first respondent even before adjudication of the issue after the remand of the proceedings by the CEGAT. Fourthly, the statement of the first respondent that the pre-deposit was not made under Section 35F of the Act is apparently absurd and misconceived. Should it be noted that when the Commissioner of Central Excise (Appeals), Bangalore by his order dated 20-9-1997 directed the petitioner Company to deposit a sum of Rs.3 crores as a pre-deposit, the petitioner Company filed WP No.31505 of 1997 in this Court and that writ petition was disposed of by this Court on 27-11-1997 staying collection of the disputed demand, pending disposal of the appeal by the CEGAT or by the Commissioner (Appeals), whichever is earlier, subject to the condition of the petitioner Company depositing a sum of Rs. 1 crore within a period of two weeks. In other words, this Court reduced the quantum of pre-deposit to one crore from Rs.3 crores. Therefore, it is quite clear that sum of Rs. 1 crore deposited by the petitioner Company in pursuance of the order of this Court should undoubtedly be treated as a pre-deposit only. Lastly, the observation of the first respondent that the stay order granted by this Court on 27-11-1997 in WP No.31505 of 1997 remains operative subject to payment of RS.1 crore till such time the CEGAT disposes of the dispute finally on merit, obviously referring to a future uncertain event, is totally misconceived and erroneous. Thus, we find the impugned order suffers from many apparent factual and legal flaws. In that view of the matter, and since the first respondent has not decided on the jurisdictional fact, i.e., whether the petitioner Company has passed on the incidence of duty to the consumers or not, and since we are of the considered opinion that the first respondent cannot refuse to refund Rs. 1 crore except on the ground that the petitioner Company has passed on the incidence of duty to the consumers, we are not inclined to dismiss the writ petition solely on the ground of non-exhaustion of appeal remedy under Section 35 of the Act.

11. Section 11B of the Act deals with claims for refund of duty. Subsection (1) of Section 11B reads as follows:

'Sec: 11B. Claim for refund of duty :-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 applicant for refund has been made before the commencement of the Central Excises 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 that Act;

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

Significant amendments to Section 11B have been made by the Central Excises and Customs Laws (Amendment) Act. 1991 (Act 40 of 1991). The object of the Amendment Act is to regulate the refund of duty so as to prevent the unjust enrichment of middlemen like the manufacturers, producers, importers etc., and in the event of duty being found refundable, to credit the same to the Consumer Welfare Fund and to utilise the same for the Welfare of the Consumers, in accordance with the rules to be framed by the Central Government and to enable the person who has borne the burden in incidence of duty ultimately to claim the refund of duty paid by him. The application for refund has to be made in the prescribed Form, i.e.. Form R under Central Excise series 2 AA and should be accompanied by such documentary or other evidence as specified in the amended section. The new first proviso to subsection (1) of Section 11B gives retrospective effect to the amendment by stipulating that an application for refund which had

been made before the commencement of the Amendment Act shall be deemed to have been made under the amended sub-section.

12. We do not find any merit in the contention of Sri V. Jogayya Sarma, learned Counsel for the petitioner that Section 11B is not applicable to the facts of this case. The above contention of the learned Counsel is grounded on the hypothesis that Rs.1 crore paid by the petitioner Company as a pre-deposit cannot be treated as a duty, as on the date, for both the Order-in-Original of the first respondent dated 31-3-1997/ 17-4-1997 and the Order-in-Appeal dated 20-10-1999 of the Commissioner of Central Excise and Customs (Appeals), Hyderabad be set aside and the proceedings stand remitted to the first respondent for de novo determination of the duty, and the first respondent is yet to determine the duty payable by the petitioner Company after de novo adjudication. This contention is sought to be supported by the judgment of the Delhi High Court in *Vallas* case (supra). In *Asival Agro Limited v. Assistant Commissioner of Central Excise*, 1994 (70) ELT 48 (SC), where the assessee furnished bank guarantee as directed by the Court and the same was encashed by the Revenue. On the issue of applicability of Section 11B to refund of such amounts the Supreme Court held that a bank guarantee issued for security in favour of the Revenue is not the payment of duty, and that eventually if the appeal is decided in favour of the appellant, refund would be admissible and such refund would not be governed by the provisions of Section 11B of the Act. But, the above decision of the Supreme Court must be appreciated and applied in the light of the subsequent decision of the Supreme Court in *Mafatlal Industries Limited v. Union of India*. 1997 (89) KLT 247 (SC), wherein it has been declared that all refunds except those which are unconstitutional levies are governed by Section 11B.

13. The decision of the Delhi High Court in *Voltas* case (supra) is of no help to the petitioner to contend that Section 11B is not applicable to the facts of this case. No doubt, in that case, the petitioner Company had deposited a sum of Rs.50 lakhs under Section 35F of the Act to avail appeal remedy before the CEGAT as directed by the CEGAT as a pre-deposit. The CEGAT allowed the appeal and remanded the proceedings to the adjudicating authority for passing a fresh order of adjudication. When the order of remand was passed by the CEGAT, the learned

Counsel for the petitioner made a prayer for the amount of pre-deposit being refunded. The prayer was refused by the CEGAT. Feeling aggrieved by the order of the CEGAT, refusing to refund the amount of pre-deposit, the petitioner Company filed civil writ petition in the Delhi High Court invoking its jurisdiction under Articles 226 and 227 of the Constitution. It was contended before the Delhi High Court that once an order of adjudication resulting into a demand forming subject-matter of appeal was set-aside, there was no occasion for withholding the amount deposited pursuant to the order of adjudication, which had ceased to exist. The Delhi High Court accepted that contention and was pleased to observe in Paragraphs 7 and 8 as under:

'7. It cannot be denied that the demand against the petitioner was raised consequent to the order of adjudication. Section 35F of the Act under which the petitioner was required to deposit the amount of Rs.50 lakhs speaks of 'deposit pending appeal'. It is clear that the amount so deposited remains a deposit pending appeal and is thereafter available for appropriation or disbursal consistently with the final order maintaining or setting aside the order of adjudication.

8. In this case, the matter has been remanded inasmuch as the Tribunal was of the opinion that the adjudication was not satisfactory and it required a fresh application of mind. In our opinion, once the order of adjudication was set aside, the Tribunal could not have ordered the amount of pre-deposit to be retained awaiting the order of adjudication. There is no provision in the law requiring certain amount to be retained as a pre-deposit pending finalisation of the adjudication proceedings. As the amount is being withheld without any authority of law, it is liable to be refunded'.

14. So opining, the Delhi High Court allowed the civil writ petition and directed that the amount in deposit shall be refunded to the petitioner-assessee.

15. We have perused the above judgment of the Delhi High Court. Though the above judgment was delivered on 9-11-1998, nowhere in the judgment, the Delhi High Court has referred to/ considered the provisions of Section 11B of the Act. Further, the Delhi High Court has not noticed the judgment of the Supreme Court

in Mafatlal's case (supra) The Delhi High Court also did not examine the question whether the duty in question was passed on to the consumers by the petitioner Company. Further, the Delhi High Court has nowhere slated that Section 11B is not applicable to the facts of that case. When that is the position, only in the head note of the reported judgment there is a reference to Section 11B. Obviously, the editors of the report have referred to Section 11B probably because that is the only section in the Act under which any refund of duty could be claimed.

16. In the instant case, should it be noted that when the petitioner Company deposited Rs.1 crore as a condition precedent for availing appeal remedy in pursuance of the direction issued by this Court, it was deposited as a part of the duty. Simply because, subsequently, the Order-in-Original and the Order-in-Appeal are set aside, the nature of the deposit would not alter or change with retrospective effect. Be that as it may, we do not find it necessary to dilate this aspect further because, admittedly, the impugned order was made by the first respondent in pursuance of an application made by the petitioner company in Form R under Section 11B of the Act itself. In other words, the petitioner Company subjected itself to the jurisdiction of the first respondent invoking his power to refund under Section 11B of the Act by filing application in Form R. The petitioner Company cannot be permitted to approbate or reprobate. It is not the contention of the learned Counsel for the petitioner that there is any other provision either under the Act or the Rules framed thereunder which deals with the refund of pre-deposits made by the appellants in the event of they succeeding in the appeals. The Supreme Court in Mafatlal's case (supra) declared that all refunds except those which are unconstitutional levies are governed by Section 11B.

17. Now, let us proceed to consider merits of the matter. Since the Order-in-Original of the first respondent dated 13-3-1997/17-4-1997 and the Order-in-Appeal dated 20-10-1999 are set aside, and the proceedings are remanded to the first respondent for de novo determination of the levy, and since the first respondent has not yet re-determined the levy payable by the petitioner Company after de novo adjudication, the first respondent cannot withhold refund of Rs.1 crore deposited by the petitioner Company as a pre-deposit for availing the appeal remedy without satisfying himself that the incidence of the duty in question has

been passed on by the petitioner Company to the consumers. There is no provision in the Act or Rules permitting refund to be withheld in such circumstances. Unfortunately, in the present case, the first respondent has not at all applied his mind to the crucial aspect, namely, whether disputed duty has been passed on to the buyers. Undoubtedly, the burden of proof that the duty had not been passed on to the consumers rests with the petitioner Company. From the records placed before us it is not clear whether the petitioner Company has produced any evidence before the first respondent to satisfy him that the duty in question had not been passed on to the consumers. In that view of the matter, it is appropriate for us to set aside the impugned order and remand the proceedings to the first respondent to dispose of the claim application of the petitioners Company filed in Form R, afresh, in accordance with law and in the light of this decision.

18. Although the petitioner Company has sought for a direction to the respondents to pay interest in terms of Section 11BB of the Act, since the petitioner Company's entitlement to seek refund of Rs.1 crore is yet to be established before the first respondent by proving that the incidence of duty has not been passed on to the consumers, granting interest at this stage does not arise. Therefore, the claim of the petitioner Company for interest in terms of Section 11BB of the Act is left open to be agitated at an appropriate stage.

19. In the result and for the foregoing reasons, we allow the writ petition with no order as to costs, and quash the impugned order of the first respondent R.C.No.226/99/ Adjn.Order No.22 of 1999 dated 18-11-1999 and remand the proceedings to the first respondent with a direction to consider and dispose of the petitioner's application in Form R for refund of Rs.1 crore filed under Section 11B of the Act afresh after giving a reasonable opportunity to the petitioner Company to adduce evidence to prove that the incidence of disputed duty was not passed on to the consumers, in the light of this decision. However, we make it very clear that if the first respondent is satisfied that the incidence of duty is not passed on to the consumers by the petitioner Company, the first respondent is bound to refund pre-deposit money of Rs. 1 crore to the petitioner Company without further loss of time.

