IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

CJ Court

Case: **CEA No. 10 of 2020**
CEA Nos. 9,11-26, 30-133, 135-152 of 2020
CEA Nos. 1-46, 48-545, 547-553, 588-599, 601,603,616-621 of 2021.

Date of Reserve: 10.12.2021:
Pronounced on: 23 .05.2022

Commissioner of CGST and Commissioner of Central Excise, (J&K) Jammu …Petitioner(s)/Appellant(s)

Through: Mr. Jagpaul Singh, Advocate.

v/s

M/s Narbada Industries, Lane No.2, Phase –II, SIDCO, Industrial Complex, Bari Brahamana, Jammu (J&K) …. Respondent(s)

Through: Sh. K.S.Johal, Sr. Advocate with
Sh. Karman Singh Johal, Advocate
(CEA Nos. 123, 124/2020, 131, 132, 133/2020, 136-143/2020)
Sh. Pranav Kohli, Sr. Advocate with
Sh. Arun Dev Singh, Advocate
Smt. Seema Sheikher, Sr. Advocate with Sh. C.S.Gupta, Advocate and Sh. Sameer Bakshi, Advocate (CEA Nos. 84-98/2021, 429/2021, 437/202, 451, 452, 453/202, 455, 456/2021, 458/2021)
Sh. Sudhir Malhotra, Advocate
(CEA Nos. 10/2020, 51-54/2020, 62-66/2020, 84/2020, 142/2020, 425, 426, 428, 440/2021 and 616-621/2021)
Sh. Gautam Chugh, Advocate with
Sh. J.A.Hamal, Advocate
Ms. Supriya Arora, Advocate
Ms. Kanika Malhotra, Advocate
Sh. Amrinder Singh, Advocate
Ms. Garima Gupta, Advocate (CEA No. 41/2020)
Sh. Jatin Mahajan, Advocate
Sh. Mohd Ashfaq Mir, Advocate

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

J U D G M E N T

PANKAJ MITHAL, CJ:

1. About 700 appeals have been filed by the Commissioner, CGST and Central Excise Jammu and Kashmir, Jammu u/s 35 G of **the Central Excise Act, 1944,** (for short **'the Act**') against the orders of different dates passed by the Customs Excise and Service Tax Appellate Tribunal (for short **'CESTAT'**), Chandigarh, setting aside the orders passed by the Commissioner (Appeals) and the Adjudicating Authority and directing for the refund of the Education Cess and Secondary & Higher Education Cess to the assessee in view of the decision of the Apex Court in **M/s SRD Nutrients Pvt. Ltd. Vs. Commissioner of Central Excise, Guwahati,** ***2017 (335) ELT 481 (SC)*** **.**

2. All appeals except two, i.e., Central Excise Appeal Nos. 09 and 11 of 2020 are reported to be barred by time ranging from 200 to 1100 days.

3. An objection has been raised that not a single appeal is within time and that even the aforesaid two appeals are barred by limitation, if the limitation is properly calculated from the date of the service of the order upon the appellant.

4. The dates on which orders were passed by the CESTAT, the dates of service of those orders upon the appellant and the date of filing of the appeals in each case clearly reveals that almost all the appeals have been preferred beyond time.

5. It may be noted that the period for filing appeal under Section 35G of the Act is 180 days from the date of service of the order.

6. In some cases date of service of the orders is wrongly mentioned and is shown to be the date of service of the subsequent order passed by the CESTAT on the rectification application. Therefore, the limitation in many cases has wrongly been reported by the registry.

7. In all appeals, facts are similar and a common substantial question of law is sought to be raised namely:

> *'Whether the assessee is liable to return the Education Cess and Secondary & Higher Education Cess on the changed view of law as subsequently laid down by the Full Bench of the Supreme Court in Unicorn Industries vs Union of India & others (2020) 3 SCC 492, over ruling SRD Nutrients P Ltd vs. CCE, (2018) 1 SCC 105, on the basis of which the aforesaid Cess was refunded to the assessee?.'*

8. We cannot straight away jump to answer the above question unless the appellants remove the defect in filing of the appeals by furnishing adequate explanation for getting the delay in filing the appeals condoned.

9. In addition to the above hurdle as per the preliminary objections raised from the side of respondents two other problems arise in dealing with the appeals on merit.

10. The first is whether the appellant can file and maintain the appeals as the tax incidence in each case is less than ₹ One Crore, whereas, under the Circular of the Ministry of Finance (Department of Revenue, Central Board of Indirect Taxes and Customs) New Delhi, dated 22.08.2019, the Government of India has fixed the monetary limit of ₹ One Crore below which appeal cannot be filed in the High Court.

11. The second preliminary objection is whether the appeal under Section 35G of the Act is maintainable before the High Court or it has to be filed directly in Supreme Court under Section 35L of the Act, as it pertains to question having relation to the rate of excise.

12. In dealing with all the above issues whether preliminary, technical or on merits it would be prudent to refer to the brief background where under the question of charging, levy, collection and refund of the Education Cess and Secondary & Higher Education Cess arises.

13. The Government of India with the avowed object of encouraging commercial activity for setting up manufacturing units in industrially backward areas, came out with a policy of granting tax exemptions to the newly setup manufacturing units for a period of 10 years from the date of the commencement of business. One such Notification No. 56/2002-CE dated 14.11.2002 was issued in context with the State of J&K, where under new industrial units were entitled to hundred percent excise duty exemption for a period of 10 years from the date of commencement of production. It provided that the assessee would be entitled to refund of duty paid other than duty paid by way of utilization of CENVAT credit. The methodology adopted and prescribed in the notification in granting the exemption from duty of excise was that the manufacturer was initially supposed to pay the excise duty leviable on the excisable goods and thereafter claim refund thereof provided he first utilizes CENVAT credit available to him on the last date of the month under consideration for payment of duty and pays only the balance amount in cash.

14. In other words, the duty on excisable goods in the first instance was payable by utilizing the whole of CENVAT credit and balance if any by cash

payment. The duty paid in cash alone was hundred percent refundable i.e to say that it is the balance amount of duty paid in cash which alone is refundable to the assessee in the event of exemption.

15. It is pertinent to mention here that the aforesaid exemption notification was issued under Section 5(A) of the Act, which authorizes the Central Government to exempt generally, either absolutely or subject to certain conditions as may be specified, excisable goods of specified nature from the whole or any part of the excise duty leviable therein, if the Government is satisfied, it is necessary to do so in public interest.

16. At the same time, Government levied Education Cess and Secondary & Higher Education Cess by virtue of the Finance Act No. 2 of 2004 and 22 of 2007 respectively and in connection with the goods manufactured or produced. The Finance Acts themselves provides that said cess would be a duty of excise at the rate of 2 % and 1 % respectively calculated on the aggregate of all duties of excise which are leviable and collected by the Central Government under the provisions of the Act or under any law for the time being in force.

17. It is in the above context a dispute arose whether the duties of excise leviable and collected under the Act alone is to be refunded or Education Cess and Secondary & Higher Education Cess which are leviable and collected under the Finance Acts are also to be refunded in view of the exemption. The issue was resolved by the Supreme Court vide its judgment and order dated 10.11.2017 passed in **SRD Nutrients Pvt. Ltd**. It was held that the Education Cess and the Secondary & Higher Education Cess levied on the excise duty partakes the character of excise duty itself. The Government itself vide two circulars has taken a stand that where whole of excise duty is exempted, the

Education Cess and the Secondary & Higher Education Cess would not be payable. Therefore, when there is no excise duty payable, as it is exempted, there would not be any Education Cess or Secondary & Higher Education Cess as they are to be calculated @ 2% and 1% respectively on the aggregate of excise duties. Accordingly, on the basis of the above judgment CESTAT by the impugned orders in appeals held that the assesses are entitled to refund of Education cess and Secondary & Higher Education Cess.

18. The appellant made no effort to challenge any of the above orders passed by the CESTAT which have been impugned in the various appeals in time and rather took a conscious decision not to file appeals and proceeded to refund the Education cess and Secondary & Higher Education Cess thus accepting the decision of the CESTAT. It was only after a judgment was rendered on 06.12.2019 by the Supreme Court in **Unicorn Industries** taking a contrary view on the subject that the appellant decided to file appeals that too in the first instance before the Supreme Court under Section 35L of the Act but subsequently before the High Court.

19. It is in the above backdrop that we have been confronted with these appeals.

20. The first preliminary objection of the respondents is that the appellants cannot prefer these appeals as the Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes and Custom vide Circular dated 22.08.2019 has specifically provided that the Department should not file any appeal before the High Court in a matter where under the amount involved is less than ₹ One Crore.

21. In order to address the above preliminary objection we have prepared a chart which is Schedule II to this opinion showing the tax incidence involved in each of the appeals.

22. The valuation of each of the appeal as mentioned clearly reveals that none of the appeals involve tax incidence ₹ One Crore or above. All appeals relate to amounts which are less than Rs One Core.

23. Sh Jagpaul Singh, learned counsel for the appellant in order to submit that the appeals are maintainable as the total incidence of tax involved in all appeals is certainly above ₹ One Crore and as such the above circular will not come into play. In support, he has placed reliance upon paragraph 24 of a Division Bench Judgment of this Court in Sun Pharma Laboratories[1]. In the said decision the Division Bench without referring to the contents of the above Circular of the Board brushed aside the objection that the appeals are not maintainable as the amount of duty involved in each appeal is much less than that prescribed for filing appeals by simply stating that there are several appeals on the same issue and the amount involved is substantial. A reading of the aforesaid judgment would reveal that the Division Bench has not dealt with the above preliminary objection on merits in the light of directions contained in the circulars which are binding upon the departmental authorities.

24. In an appeal filed by the Commissioner of Central Excise before the High Court of Sikkim u/s 35G of the Act in relation to refund of Education Cess and the Secondary & Higher Education Cess the value involved was ₹ 63 lakhs only and an objection was raised that the appeal is not maintainable in view of the National Litigation Policy dated 22.08.2019 which provides for not

[1] **2019 12 TMI J&K High Court**

filing of appeals to High Court where the valuation is below ₹One Crore. The Division Bench observed that the preliminary objection has much substance though the appeal was disposed of otherwise.

25. The above Circular dated 22.08.2019 is stated to have been issued in exercise of the powers conferred by Section 35R of the Act. It applies to matters relating to Central Excise and Service Tax. It clearly prescribes the monetary limits below which appeals are not to be filed before the CESTAT, High Courts and Supreme Court. In respect of High Court the monetary limit prescribed is ₹ One crore. The use of phrase '*Monetary Limits below which appeal shall not be filed'* refers to the amount of a single appeal and not to the collective amount of several appeals. If several appeals are taken collectively for applying the above circular it may lead to chances of misuse of power to file appeals. The department may not file appeal in isolation on the subject with lower valuation and wait for other similar matters to come and as and when sufficient number of appeals arises having a collective valuation of over ₹ One Crore, may proceed to file all of them in order to defeat the purpose of the circular. The cause of action in each appeal is separate. Therefore the monetary limit below which appeal shall not be filed referred to in the circular, is in context to a single appeal rather than the group of appeals. The amount involved in a group of appeals cannot be taken together for the purposes of the above Circular.

26. It is trite to mention here that the Circulars of the Government of India are binding upon its departments therefore when the above circular clearly provides that no appeal shall be filed before the High Court if the monetary

limit is below ₹ One crore, the appellants cannot go against it and file an appeal.

27. The Supreme Court in several decisions has ruled that the circulars issued by the Department are binding upon the Departments starting from **K.P. Varghese vs. ITO** ***AIR 1981 SC 1922.*** In **Nagraj Shivarao Karjagi vs. Syndicate Bank A,** ***1991 SC 1507,*** the scope of the circulars issued by the Ministry have been explained and it has been observed that they are binding upon the officers of the Department. It is thus clear that the circulars are binding both upon the Department and the officers of the Department.

28. The circulars of the Central Board of Excise and Customs are binding upon the Tax Department as they furnish legitimate aid to the construction of the relevant provision and are necessary to give effect to internal complexity of the fiscal statute. The Constitution Bench of the Supreme Court in **Collector of Central Excise Vadodra vs. Dhiren Chemical Industries,** ***AIR 2002 SC 453***, held that if there are circulars issued by the Central Board of Excise and Customs which places a different interpretation upon a phrase in the Statute, the interpretation suggested by the circular would be binding upon the revenue regardless of the interpretation placed by the Supreme Court.

29. The appellants have not brought on record any material to show that any special permission was granted by the Government of India or the Ministry of Finance to file appeal ignoring the above Circular.

30. It is also important to note that these appeals do not involve any substantial question of law. The question of law proposed to be raised stands settled by catena of decisions as would be clear by the subsequent discussion and, as such, cannot be regarded as substantial question of law.

31. In view of the above we are of the opinion that appellants were not justified in filing these appeals contrary to the mandate of the above circular which is binding upon them. Accordingly, these appeals are not maintainable.

32. Now we travel to the second aspect whether the appeals are maintainable before the High Court or are required to be filed directly before the Supreme Court u/s 35 L of the Act.

33. The appeal to the High Court lies from every order passed in appeal by the Appellate Tribunal if the High Court is satisfied that the case involves a substantial question of law provided it does not relate, among other things, to the determination of question having a relation to the rate of duty of excise or to the value of the goods for the purposes of the assessment.

34. In other words, if the appeal involves any question in relation to rate of excise duty or the value of the goods in context with the assessment, the appeal would not lie before the High Court but would lie to the Supreme Court u/s 35L of the Act which enables filing of the appeal in the Supreme Court if the order passed by the authority below relates to the determination of any question in relation to the rate of duty of excise or to the value of goods for the purposes of the assessment.

35. On the plain reading and the understanding of both the above provisions we need not dwell much on authorities which have been cited by both the sides on the above issue in as much as the issue on merit is regarding liability of the assessee to return the Education Cess and Secondary & Higher Education Cess which stands already determined. The said issue has no concern with the assessment or determination of any question in relation to rate of excise duty or value of goods. No authority has been cited to persuade us to hold that the

liability to return the Education Cess and Secondary & Higher Education Cess would in any way be connected with the determination of any question relating to rate of excise duty or the value of goods for the purposes of assessment. The assessment part is already over and is not involved in any of the appeals.

36. In view of the aforesaid, we are clearly of the opinion that since the appeals are directed against the order passed by CESTAT directing refund of cess and does not involve determination of any question in relation to rate of excise duty or value of goods for the assessment purposes, the appeals would lie to the High Court and have rightly been preferred. The appeals as such are maintainable. The preliminary objections to the above extent stand over ruled.

37. The third point for consideration in these batch of appeals is with regard to condonation of delay in filing the appeals. Thus, we have to examine the explanation furnished for the delay in filing the appeal and to see if the facts and circumstances of the case permits us to condone the delay.

38. We have considered the applications filed for the condonation of delay and find the pleadings to be same in all of the said applications. It has been contended that the occasion to file appeals arose in view of the changed opinion of the Supreme Court as per the decision in **Unicorn Industries** dated 06.12.2019 and the appeals have been filed within the prescribed time from the date of the said decision.

39. Sh. Jagpaul Singh, learned counsel for the appellant in addition to the above submission argued that since the impugned orders of the CESTAT are based upon **SRD Nutrients** which view has been reversed by the Supreme Court in **Unicorn Industries**, thus there was a mistake of the Court which was writ large. The appeals are for the rectification of the said mistake. Accordingly,

in view of Section 17 of **The Indian Limitation Act, 1963,** appellant is entitled to get the delay condoned as the period for limitation in such cases would begin to run from the date on which the mistake had come to notice.

40. The respondents in each appeal have countered the above submission alleging that subsequent change of view by the Supreme Court will not give limitation for the filing of appeals. There is no explanation as to why the appeals could not be filed within 180 days of the service of the orders. Any other explanation would not suffice the purpose for condoning the delay. In fact appellant consciously decided not to file appeals and accepted the judgment as is reflected from the documents brought on record of some of the appeals in response to the delay condonation applications. The Act is a special and a self contained code which provides for the time for filing the appeal and even for condoning the delay, if any, for sufficient cause. Therefore Section 17 of the Limitation Act would not be applicable. Its application is restricted to cases where the limitation is prescribed under the Limitation Act itself.

41. It would be better to discuss some of the case law on the point of limitation so as to bring out the factors which would be necessary for deciding applications for condoning the delay in filing the appeals.

42. In **Collector Land Acquisition Anantnag and another vs. Mst. Katiji and others**, ***(1987) 2 SCC 107,*** the Supreme Court observed that in the matter of condonation of delay as no one stands benefited in lodging an appeal late and when substantial justice and technical considerations are pitted against each other, the cause of substantial justices deserves to be preferred, therefore, a liberal approach should normally be adopted in condoning the delay and that the State must be accorded the same treatment as a private party. Similar view

was expressed by the Supreme Court in **State of Nagaland vs. Lipok AO and others,** (***2005) 3 SCC 752*****.**

43. In **G. Ramegowda Major etc. vs. Special Land Acquisition Bangalore, (*1988) 2 SCC 142,*** it was laid down that condoning of the delay in filing the appeal is a discretionary power of the court and when the government files appeal and the delay occurs due to fraud and unusual conduct of the government pleaders, the court may normally condone the delay. The law of Limitation is undoubtedly the same for a private citizen and for the government authorities yet where the acts and omissions of the officers of the government indicates fraud or bad faith, the court should tilt in favour of the government so as to condone the delay.

44. The Supreme Court in **N. Balkrishnan vs. N. Krishnamurthy**, ***(1998) 7 SCC 123*** has observed that the object of fixing time limit for the institutions of suits or filing of appeals is not meant to destroy the rights of any party but is simply founded on public policy so as to fix a life span for the legal remedies in public interest and that the expression '***sufficient cause****'* should be construed liberally.

45. In ***Ram Nath Sao & ors. vs. Gobardhan Sao & ors., (2002) 3 SCC 195***, the Court in context with Section 5 of the Limitation Act wherein also the expression '*sufficient cause*' appears observed that whether explanation furnished would constitute '*sufficient cause*' or not will depend upon the fact of the each given case as there cannot be a straight jacket formula. It further observed that the expression '*sufficient cause*' should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to a party. Therefore, acceptance of

the explanation furnished should be the rule and refusal an exception, but in doing so the Courts should not lose sight of the fact that with the expiry of time valuable rights get accrued to the other party which should not be lightly defeated by condoning the delay in a routine manner. The Courts as such have to strike a balance vis-à-vis the corresponding rights of the parties looking to the resultant effects of the order.

46. The essentials for purposes of condoning the delay as culled out from the above authorities are as under:

i. The purpose of fixing limitation is to fix a life span for legal remedies and is founded on public policy.
ii. The state and the private party must be accorded the same treatment.
iii. When substantial justice and technical consideration are pitted against each other it is prudent to advance the cause of substantial justice.
iv. The power of condoning the delay is a discretionary power and normally a liberal approach should be adopted; and
v. When the delay is due to fraud and unusual conduct of the pleaders, the court should tilt in favour of the government in condoning the delay.

47. We are conscious of the above position of law in dealing with the applications for condoning the delay but would prefer to refer to some other precedents relied upon by the appellants.

48. Sh. Jagpaul Singh, learned counsel for the appellants has placed stiff reliance upon a decision of the Supreme Court in **Mahabir Kishore and others vs. State of Madhya Pradesh,** ***(1989) 4 SCC 1***.

49. In the aforesaid case, the government of Madhya Pradesh had charged 7 ½ % mahua and fuel cess on the auction money which was subsequently held to be illegal by the High court. Thus, the Government decided not to recover the extra amount anymore but took no decision with regard to the fate of the amounts already realized.

50. Admittedly, 7½ % so charged by the government was illegal and was realised under a mistake and without authority of law. Therefore, a suit was brought for refund of the amount so charged.

51. It was in view of the above facts in a suit for refund of the amount excessively charged in a suit based upon Section 72 of the Indian Contract Act, which provides that where money is paid by mistake to a person, he is liable to repay or return it, the court applied Section 17(1)(c) of The Limitation Act, 1963, and held that the limitation would run from the date of the knowledge of such mistake.

52. The aforesaid case was one where the limitation for filing the suit/appeal was provided under the Limitation Act and not under any special enactment. The Limitation Act provides that the limitation for such a suit would run from the date of knowledge. It was only in context with the aforesaid that the Supreme Court held that in a suit for refund of money realised by mistake, the limitation would run from the date of the knowledge. The said authority would not be applicable to a case where the limitation has to be calculated not from the date of knowledge but from the date of service of the order upon the party.

53. The aforesaid decision of the Supreme Court would not be applicable in the present case as the limitation for filling the appeal herein is not provided

under the Limitation Act but under the Special Act. Accordingly, the decision does not come to the rescue of the appellants.

54. In another decision relied upon in context with the above, is that of **Commissioner of Customs vs. Candid Enterprises**, (***2002) 9 SCC 764*.** In the aforesaid case, Customs Excise & Gold (Control) Appellate Tribunal (CEGAT) declined to condone the delay on part of the revenue in filing the appeal. The court held that as the order impugned was based upon fraud which nullifies everything, therefore, the Tribunal ought to have condoned the delay.

55. In the case we are dealing with, there is no allegation of fraud but only of a mistake, if any, committed by the court. Therefore, the principle that fraud vitiates everything would not come into play. If that be so, the analogy of Section 17 of The Limitation Act would also not be applicable.

56. In connection with the issue of limitation Section 35G of the Act is relevant and material. It provides for the limitation of 180 days from the date on which the order impugned is received by the party for the purposes of filing the appeal. It further provides that the High Court may admit an appeal even after the expiry of the above 180 days on being satisfied that there was sufficient cause for not filing the appeal within the above period.

57. It would be beneficial to reproduce the relevant provisions of Section 35G with regard to limitation and accepting appeals after the expiry of limitation as aforesaid:

> *"35G (2) (a) - Filed within one hundred and eighty days from the date on which the order appealed against is received by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] or the other party;*

xxxxx xxxxxx xxxxx

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period."

58. A reading of Section 35G (2)(a) would demonstrate that the appeal has to be filed within 180 days of the receipt of the copy of the order by the party. No other mode of calculation of the limitation has been laid down. It is an admitted position as borne out from the schedules that no appeal was preferred within the aforesaid time.

59. The appellant is calculating the limitation for filing of the appeals from the date of subsequent decision of the Supreme Court in the case of **Unicorn Industries**. This is simply misconceived for the reason that the statute does not provide for taking limitation for filing appeal from any other date except from the date of service/receipt of the copy of the impugned order.

60. The appeal is to be filed within 180 days of the receipt of the order and delay, if any, can any only be condoned if sufficient cause is shown for not filing the appeal within that period which obviously refers to the period of 180 days from the receipt of the copy of the order. In this regard the words '*within that period'* occurring in Sub-section (2A) are very important which emphasis submitting of explanation for not filing the appeal for the period referred to earlier, i.e., 180 days from the date of receiving of the order.

61. To put it differently, the Sub-Section (2A) of Section 35 G contemplates for recording satisfaction regarding sufficient cause for not filing the appeal within the period of 180 days as prescribed. Therefore, primarily explanation

has to be furnished for not filing the appeal within said 180 days from the receipt of the copy of the impugned order. The said period had expired in each case much before the decision was rendered in **Unicorn Industries**. There is no explanation on record why the appellant could not file the appeal within the said 180 days. Therefore, in view of the language used in Section 35G (2)(a) in the absence of any sufficient cause for not filing the appeal within that period, it would not be prudent and justifiable to condone the delay by this Court. Any explanation for the period subsequent to it is of no consequence.

62. In connection with above point the judgment and order of the Supreme Court in **Ajit Singh Thakur Singh and others vs. State of Gujarat**, ***AIR 1981 SC 733,*** clinches the issue and it clearly says that filing of an appeal only for the reason that the High Court had issued notice to the other side in some other cases is not a good cause. The appeal has to be filed within the limitation prescribed and the delay has to be explained for not filing the appeal within the said period.

63. The relevant paragraph of the aforesaid judgment reads as under;

> '6. *At the outset, it is urged by learned counsel for the appellants that the High Court erred in condoning the delay in filing the appeal, and the appeal should have been dismissed as barred by limitation. We have examined the facts carefully. It appears that initially the State Government took a decision not to file an appeal and it allowed the period of limitation to lapse. Subsequently, on certain observations made by the High Court while considering a revision petition by Bhulabhai that it was a fit case where the State Government should file an appeal and on notice being issued by the High Court to the State Government in the matter, the appeal was filed. It was filed three months after limitation had expired. A faint*

attempt was made to show that when the initial decision was taken not to file an appeal all the papers had not been considered by the department concerned, but we are not impressed by that allegation. The truth appears to be that the appeal was not filed at first because the State Government saw no case on the merits for an appeal, and it was filed only because the High Court had observed - and that was long after limitation had expired - that the case was fit for appeal by the State Government. Now, it is true that a party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstance arising before limitation expired it was not possible to file the appeal within tune. No event or circumstance arising after the expiry of limitation can constitute such sufficient cause. There may be events or circumstances subsequent to the expiry of limitation which may further delay the filing of the appeal. But that the limitation has been allowed to expire without the appeal being filed must be traced to a cause arising within the period of limitation. In the present case, there was no such cause, and the High Court erred in condoning the delay.'

64. The Division Bench of the Andhra Pradesh High Court in **Anandi Roller Flour Mills Limited, Hyderabad vs. State of Andhra Pradesh, *MANU/AP/0519/2001,*** held that subsequent change of law is not a sufficient cause for condoning the delay in filing an appeal or a petition.

65. Similar view has also been expressed by the Division Bench of Madras High Court in **Andal Sweet Stall and Tiffin Dining Hall Vs. State of Tamil Nadu, *MANU/TN/0180/1981.*** In the said case also the appellants started filing the appeals after a subsequent decision in one of the cases. The court refused to condone the delay in filing the appeal holding that the judgment on

the basis of which appeals are being filed was pronounced long after the expiry of period of limitation.

66. In view of the aforesaid facts and circumstances, we do not find any merit in the submission that the appellants are entitled to get the delay in filing the appeals condoned. There is no sufficient ground to condone the delay and, accordingly, delay condonation applications in all the appeals stand rejected.

67. Now coming to the merits of the case, whether the subsequent change in opinion by the Supreme Court on the interpretation of a particular provision of law, the appellants are entitled to reopen all the past cases which have been decided on the basis of the opinion of the Supreme Court that was prevailing as binding on the date of their decisions.

68. One of the objects and purpose of laying down the limitation for initiating proceedings or appeal is to fix a life span for legal remedies so that the litigation may come to a rest. Thus, where the limitation for taking any remedy against any particular order has expired long back, ordinarily said case is not liable to be reopened merely for the reason that subsequently the view of the court on the aspect decided by it has changed or that a different opinion has been expressed by the court in some other case. If such an action is permitted, there would be no finality to any decision.

69. In nine Judges Bench in **Mafatlal Industries Limited vs. Union of India,** ***1997 (89) E.L.T. 247(S.C.):MANU/SC/1203/1997: (1997)5SCC536*** in a situation where a manufacturer paid excise duty and failed before the adjudicating or the appellate authority and then kept quiet allowing the orders to become final against him, it was held he cannot claim refund of duty on the basis of subsequent decision of the court taking a contrary

view. The relevant portion of Paragraph no. 70 of the aforesaid judgment reads as under:

> '70. ……. *Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case……. Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? ……. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law…….'*

70. It was also held that merely because over a period of time, the Apex Court took a different view and over-ruled its early decision that did not constitute a sufficient ground for condoning the delay.

71. In **Tilokchand MotiChand and others vs. H. B. Munshi and other, *Manu/ SC/0127/1968: [1969]2SCR 824,*** it was observed as under:-

> *'Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutality obtained by another person on any other ground; this is for the reason that so far he is concerned, the*

decision has become final and cannot be reopened on the basis of a decision of any other person's case…'

72. The above principle so laid down by the Supreme Court clearly demonstrates that a decision which has become final and conclusive between the parties cannot be reopened on the basis of a subsequent decision taking a contrary view in the case of another person.

73. It may be profitable to refer to the case of **State of Gujarat and others vs. ESSAR Oil Limited and another, *(2012) 3 Supreme Court Cases 522,*** which holds that no refund can be ordered against a party, if that party has not been unjustly enriched or when it has acquired the benefit lawfully. Since the assessee have got the benefit of refund lawfully under the prevailing law, they cannot be directed to refund the same merely on the basis of change of opinion. Therefore, the appeals for the sole purpose to seek return of the amounts refunded in view of the decision of **SRD Nutrients** on the change of opinion subsequently are meaningless.

74. Applying the aforesaid principle in the cases at hand, since the assessee has been held entitled to the refund of the Educational cess and Secondary & Higher Educational cess on the basis of a judgment and order of the Supreme Court in case **SRD Nutrients** which was in vogue at the relevant time, the appellants are not entitled to make recovery of the said refunded amount on the basis of the subsequent decision of the Supreme Court rendered in the case of **Unicorn Industries.** If such an action is permitted, it will open a Pandora box and the *lis* between the parties which had attained finality will never come to an end. This would be against the public policy which envisages providing quietus to litigation at some stage.

75. In view of the facts and circumstances of the case, we find no merit in these appeals and the same are dismissed, first for the reason, they are barred by limitation, secondly, they are not maintainable and, lastly, the change of opinion of the court in a subsequent matter of another party would not give any leverage to the appellants to reopen the decisions which have attained finality.

76. The appeals are dismissed as aforesaid with no order as to costs.

(SANJAY DHAR)
JUDGE

(PANKAJ MITHAL)
CHIEF JUSTICE

JAMMU
23.05. 2022
Sunita.

Whether the judgment is reportable? Yes