CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Service Tax Appeal No.42213 of 2014

(Arising out of Order-in-Appeal No.153/2014-ST dated 10.07.2014 passed by Commissioner of Customs and Central Excise (Appeals), No.1, Foulk's Compound, Anaimedu, Salem 636 001)

M/s.K.K.S.K. Leather Processors (P) Ltd. **....Appellant**
R.N. Pudur,
Bhavani Main Road,
Erode 638 005.

VERSUS

The Commissioner of CGST & Central Excise **... Respondent**
Salem Commissionerate
No.1, Foulk's Compound,
Anai Medu,
Salem 636 001.

APPEARANCE :

Shri M. Saravanan, Consultant for the Appellant
Shri Harendra Singh Pal, Authorised Representative for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)

FINAL ORDER No.40390/2024

DATE OF HEARING : 05.04.2024
DATE OF DECISION : 05.04.2024

The present appeal is the third round of litigation by the appellant who is aggrieved by the rejection of refund of service tax paid on input services used for export of goods.

2. The appellant is an exporter of leather goods. They had engaged sales agents outside India to whom they paid sales commission. The appellant paid service tax on such sales commission paid to agents outside India under reverse charge basis as provided under Section 66A of Finance Act, 1994. As the services were availed in regard to export of goods, they claimed refund of the service tax paid under Notification No.41/2007 dated 06.10.2007. The period of dispute for which the service tax was paid, is from 01.10.2007 to 02.04.2008. The department rejected the refund claim observing that the exports have happened prior to 06.10.2007 (the date of notification) and therefore the appellant is not eligible for refund.

3. Against this, the appellant filed appeal before the Tribunal. As per Final Order No. 487/2011 dated 31.03.2011 the Tribunal remanded the matter with the directions to reconsider the issue. It was observed by the Tribunal that the decision in the case of *GTN Engineering (I) Ltd. Vs CCE, Coimbatore* – 2010 (256) ELT 625 (Tri.-Chennai) which held that the time period of one year prescribed under Section 11B was in regard refund of credit availed on inputs and capital goods only and not input services. This being refund of service tax, the Tribunal held that appellant would be eligible for refund as per Rule 5 of Cenvat Credit Rules, 2004 and the matter was remanded for reconsidering the eligibility of refund as per Rule 5 of CCR, 2004.

4. In such *de novo* adjudication, the original authority again rejected the refund holding that since the appellant has not availed cenvat credit, the refund is not eligible. It was also held by the original

authority that as the export has taken place prior to 1.10.2007 is hit by limitation as the refund claim was filed beyond one year from the date of export.

5. Against this, appellant filed appeal before the Commissioner (Appeals) who upheld the order passed by the adjudicating authority rejecting the refund claim.

6. Against the order of Commissioner (Appeals), the appellant again preferred an appeal before the Tribunal. As per Final Order No.40379/2013 dated 13.09.2013, the Tribunal held that in case of input services, the date of payment of service tax has to be taken into consideration for computing the period of limitation, and this being after 01.07.2007, the claim is filed within the time limit of one year and that the appellant is eligible for refund. The relevant part of the Final Order passed by the Tribunal is reproduced as under :

> "14. I have considered submissions on both sides. I find that the decision of the Madras High Court in the case of *GTN Engineering (I) Ltd*. (supra) was with reference to Cenvat credit of duty paid on inputs and capital goods as is seen in Para 4 of the said judgment. In the case of inputs and capital goods, there is no difficulty in applying clause (a) to Explanation B of Section 11B because it specifically provide for inputs and capital goods used in the manufacture of excisable goods. We are dealing with a situation, where input services used for marketing of finished goods exported is considered and service tax is paid on reverse charge mechanism. The service tax law requires payment of tax only on payment of consideration to the agent abroad from whom service is received. That being the case, the facts of this case cannot be equated with that in the case of *GTN Engineering (I) Ltd*. (supra) and the legal principle of implying necessary changes into a section of one Act made applicable for purposes of another Act cannot go to such extent to defeat the very objective of a beneficial scheme like grant of refund due on export. After coming to the conclusion that clause (a) to Explanation B will not apply, I have sequentially gone through the other clauses and I find that the most appropriate clause that will apply in this particular case, is clause (f), that is date of payment of service tax. **In this case, the applicant filed his claim within one-year from the date of**

> **payment of service tax and, therefore, I am of the view that the claim is filed within the time-limit and the appellant is eligible for refund. Therefore the appeal is allowed with consequential relief."**

7. The Tribunal categorically held that the appellant is eligible for refund and allowed the appeal with consequential relief.

8. However, the adjudicating authority instead of sanctioning the refund, has again adjudicated the matter. The Assistant Commissioner, Erode I Division passed Order-in-Original dt. 04.02.2014 rejecting the refund holding that the refund claim is it by time bar and also that the appellant has not availed cenvat credit. The original authority took the view that the Final Order dt. 13.09.2013 passed by the Tribunal had not been accepted by the Department on merits and the same was accepted only on monetary grounds and therefore not final.

9. Against such order, the appellant filed appeal before the Commissioner (Appeals), Salem who, vide order impugned herein dt. 10.07.2014 interestingly, upheld the order of rejection of refund passed by the adjudicating authority. Aggrieved by such order, the appeal is once again before the Tribunal.

10. The Ld. Consultant Shri M. Saravanan appeared and argued for the appellant. It is submitted that the Tribunal vide Final Order dt. 13.09.2013 had allowed the appeal after considering the issue of limitation and the availment of credit. The appellant had not registered with the Service Tax department and therefore had not availed credit of the service tax paid by them. It is not disputed that the appellant had paid service tax and had valid document to avail credit. As they

did not register with department was not able to avail credit as per records. It has been held by the Hon'ble Karnataka High Court in the case of *mPortal India Wireless Solutions P. Ltd. Vs C.S.T Bangalore* – 2012 (27) S.T.R. 134 (Kar.) that even if the assessee is not registered they are eligible for credit of refund of the service tax. Further, the issue of time bar was also considered by the Tribunal observing that the decision of the Hon'ble High Court in the case of *GTN Engineering (I) Ltd*. (supra) was not applicable as, in the present case, the refund sought is for service tax and not of duty paid on inputs or capital goods. All these issues have been considered by the Tribunal and the appeal was allowed. Instead of sanctioning the refund as per the consequential relief ordered by the Tribunal, the refund sanctioning authority has adjudicated the matter again which is highly erroneous.

10.1 Ld. Consultant relied upon the decision of Hon'ble High Court of Rajasthan in the case of *Bharat Sanchar Nigam Ltd. Vs Pr. Commissioner, CGST Commissionerate, Jaipur* – 2022 (61) G.S.T.L. 19 (Raj.) to submit that authorities below cannot ignore or give limited effect to Tribunal's order. The Hon'ble Supreme Court's judgement in *Union of India Vs Kamlakshi Finance Corporation Ltd*. – 1991 (55) ELT 433 (SC) was also relied.

11. The Ld. Consultant prayed that there may be order for sanction of refund and the appeal may be allowed.

12. Ld. A.R Shri Harendra Singh Pal appeared and argued for the Department.

13. Heard both sides.

14. The facts narrated above bring out an interesting situation wherein even after Tribunal allowed the appeal with consequential relief, the refund sanctioning authority has re-adjudicated the matter to reject the refund claim. The relevant part of the order passed by the Assistant Commissioner, Erode I Division dt. 04.02.2014 reads as under:

FINDINGS

"07. I have carefully gone through the refund claim and the Range Officer's verification report vide O.C.No. 1117/2013 dated 18.12.2013. I have given thoughtful considerations to the earlier orders passed by Original Adjudicating Authorities / Appellate Authorities relating to the present Refund Claim.

08. I find that the present Refund Claim has been filed by M/s KKSK Leather Processors (P) Ltd., Erode consequent to the ***Final Order No.40379/2013 Dt. 13-09-2013*** passed by Hon'ble CESTAT, Chennai. In the Final Order, the Hon'ble Tribunal has dealt with only the relevant date for filing the Refund Claim and has concluded that the claim is filed within the time-limit and the claimant is eligible for refund without going into the merits of the claim.

09. I also notice that the Commissioner of Central Excise, Salem has accepted the ***Final Order No.40379/2013 Dt. 13-09-2013*** [In Appeal No.ST/667/2012-SM] passed by Hon'ble CESTAT, Chennai ***on the monetary grounds and not on merits of the case*** vide letter C.No.IV/02/100/2010-STR Dated 17-01-2014. In this regard, I find that CBEC has issued instructions vide letter ***F.No.390/Misc/163/2010 JC Dated 12-12-2013 in para*** 2 and has, ***inter-alia***, stated the following :

> "2. Sub-Section 3 of Section 35R and Section 131BA provides that if an appeal has not been filed by the Department following instructions issued for not filing appeal below the monetary limit, no person, being a party in appeal, shall contend that the Department has acquiesced in the decision on the disputed issue by not filing appeal. ***In effect, the decisions / judgments accepted for reasons of monetary limit do not have precedent value.*** "

10. However, I have gone through the facts of the Refund Claim filed and the related litigations and considered the merits of the claim also. The claimant have filed a refund claim under ***Rule 5*** of Cenvat Credit Rules, 2004. I find that in ***para 5.3(3)*** of OIO C.No.IV/16/54/2009-ST-RF dated 23.7.2009, the Original Adjudicating Authority has stated that they have availed drawback under Customs, Central Excise Duties and Service Tax Draw Back Amendment) Rules, 2006. But as per Rule, no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties and Service Tax Drawback (Amendment Rules) 2006, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the (Service Tax Rules, 1994) in respect of such tax. The Rule 5 of CENVAT Credit Rules is related to refund of

Cenvat credit lying unutilized under closing balance. But in the instant case in hand. it is observed that the claimant ***had not availed any CENVAT Credit*** and there is no documentary proof for credit taken for the said amount and kept under closing balance as unutilised Cenvat Credit. They have not any documentary proof in support of their claim as above. Hence, if there is no closing balance of Cenvat Credit as on the date of Refund claim, there is no question of refund of unutilised Cenvat Credit. Thus, the claimant have not fulfilled the conditions prescribed under Rule 5 of Cenvat Credit Rules, 2004. ***Hence, the claimant is not eligible for refund under Rule 5 of CENVAT Credit Rules, 2004 on merits.*** As the claim is liable for rejection, I do not want to go into the applicability of unjust enrichment. In view of the above discussions, I hold that the claim is liable to be rejected on the following grounds:

(I) The claimant ***have not availed CENVAT Credit of Service Tax*** paid under reverse charge mechanism on commission paid to foreign agents under "Business Auxiliary Service";

(II) They ***have availed Drawback*** under Customs, Central Excise Duties and Service Tax Draw Back (Amendment) Rules, 2006;

(III) The claim is hit by time-bar as Commissioner of Central Excise, Salem has not accepted the ***Final Order No. No.40379/2013 Dt. 13-09-2013*** (In Appeal No.ST/667/2012-SM] passed by Hon'ble CESTAT, Chennai ***not on merits of the case but on the monetary grounds*** read with instructions issued by CBEC vide letter ***F.No.390/Misc/163/2010-JC Dated 12-12-2013.***

Accordingly, in view of the above discussion I pass the following Order:

ORDER

I therefore **reject** an amount of ***Rs.1,64,861/- (Rupees One Lakh Sixty Four Thousand Eight Hundred and Sixty One Only)*** under Section 11B of Central Act made applicable to Service Tax matters as per the Section 83 of Chapter V of the Finance Act, 1994."

15. It is held by the adjudicating authority that as the appellant has not availed cenvat credit and also the refund claim being time-barred, the appellant is not eligible for refund. Both the issues were thoroughly considered in the previous rounds of litigations and the Tribunal vide Final Order No.40379/2013 dated 13.09.2013 had held that the appellant is eligible for refund. Apart from this, it is also held that the said Final Order of the Tribunal dt. 13.09.2013 is not accepted by the

Department on merits and that the same is accepted only on monetary grounds as per the instructions issued by CBEC vide F.No.390/Misc/163/2010-JC Dated 12.12.2013. I am surprised by the audacity of the refund sanctioning authority to re-adjudicate the issue even after the Tribunal has allowed the appeal with consequential reliefs. When the Department has not filed any appeal, it is indeed acceptance of the order of the Tribunal. The Department then cannot deviate such acceptance on the basis of merits or monetary grounds. The refund has to be sanctioned to the appellant. The ligation policy put forward in every Budget is to reduce the litigation and to lessen the burden of public exchequer on litigations. This being the intention of the litigation policy, the department has readjudicated the matter and again put further rounds of litigations. These situations should not be allowed to recur or continue. It appears that the adjudicating authority has not understood para-2 of the CBEC instructions dt. 12.12.2013 issued in regard to litigation policy. It does not mean that the decision of the Tribunal can be flouted or refused to be given effect to. When not appealed by either side, the order passed by Tribunal is final. The department cannot sit in appeal on an order passed by the Tribunal. For this reason, I observe that a copy of this order has to be sent to the Principal Chief Commissioner, Chennai to give proper instructions and training so as to give effect to the orders passed by Tribunal, High Court and Supreme Court. The situation of adjudicating upon an order passed by the Tribunal should not happen. It is to be borne in mind that it amounts to contempt of court. Hierarchy of judicial system has to be followed and honoured. Though this is a fit case for imposing cost, I refrain from doing so.

16. The Hon'ble Apex Court in the case of *UOI Vs Kamlakshi Finance Corporation Ltd*. (supra) held as under :

> **[Judgment per : Ranganathan, J.].** - The respondent manufactures electrical insulation tapes. According to the respondent, the goods manufactured by it fall under Tariff Heading 85.47 of the Schedule to the Central Excise Tariff Act, 1985. On the other hand, according to the petitioner, the goods fall under Heading 39.19 of the same Schedule. The Assistant Collector of Central Excise, therefore, gave notice to the respondent to show cause why the product should not be classified under Heading 39.19. The assessee, in reply, pointed out that, in respect of its factory at Borivili, its claim that the goods were classifiable under Heading 85.46 and that Heading 39.19 had no application had been accepted by the Collector of Appeals. The Assistant Collector, however, did not accept the assessee's contention. He distinguished the order in respect of the Borivili plant on the ground that, there, the assessee's claim was for classification under Heading 85.46 and not 85.47. He held, by his order dated 4-1-1988, that the products in question fell under Heading 39.19.
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> **2.** The assessee preferred an appeal to the Collector (Appeals) who set aside the order of the Assistant Collector. He observed that reason given by the Assistant Collector for not following the order of the Collector of Central Excise (Appeals) on which the assessee had placed reliance before him was totally untenable. He set aside the order appealed against and directed the Assistant Collector to pass a reasoned and speaking order.
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> **3.** When the matter thus went back to the Assistant Collector he passed an order on 12-5-1989, reiterating the conclusion that had been reached by his predecessor. He also did not give any reasons as to why the order of the Collector (Appeals) in respect of the Borivili plant was not followed. Not only this, the assessee had placed before him a decision of the Central Excise and Gold Control Appellate Tribunal (`the Tribunal') in the case of *M/s. Chetna Polycoats (P) Ltd.*, reported in 1988 (37) E.L.T. 253 to a similar effect. The Assistant Collector distinguished it observing that the said decision had not been agreed to by the Department which had filed an appeal to the Supreme Court therefrom. The second order passed by the Assistant Collector was practically a repetition of the earlier order.
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> **4.** The assessee thereupon filed a writ petition in the Bombay High Court. The High Court quashed the order of the Assistant Collector and directed the department to allocate the matter to a competent officer to pass a proper order [1990 (47) E.L.T. 231 (Bom.)]. The Union of India has preferred this appeal. The learned Additional Solicitor General, appearing for the Union, fairly concedes that so far as the merits are concerned, the department can have no grievance, since the High Court has only set aside the order of the Assistant Collector and remanded the

matter back for a proper consideration and a proper order. We are, therefore, not called upon to enter into the merits of the classification in the present case except to observe that the decision of the Tribunal in the case of *M/s. Chetna Polycoats Pvt. Ltd.* was the subject-matter of Civil Appeal No. 2321 of 1989 preferred by the department which was dismissed at the stage of admission by this Court on 13th February, 1991 [1991 (53) E.L.T. A-28 (SC) - 1-5-1991].

5. The learned Additional Solicitor General, however, submits that the learned Judges have erred in passing severe strictures against the two Assistant Collectors who had dealt with the matter. He submitted that these officers had given reasons for classifying the goods under Heading 39.19 and not 85.46 and could do no more. He submitted that they acted *bona fide* in the interests of Revenue in not accepting a claim which, they felt, was not tenable.

6. Sri Reddy is perhaps right in saying that the officers were not actuated by any *mala fides* in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual *mala fides* but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35E confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs [Direct Taxes] comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assessee-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them.

9. With the above observations, this Special Leave Petition is dismissed."

17. The Hon'ble Rajasthan High Court in the case of *Bharat Sanchar Nigam Ltd*. (supra) held that when the entire order in original is set aside by Tribunal, the department cannot give limited effect to Tribunal's order restricting it to one demand only. The relevant paras read as below :

"10. From the materials on record what emerges is that in the show cause notice there were three different independent tax demands. One was for a sum of Rs. 12,62,95,889/- for providing services to use towers by the petitioner. Second one was Rs. 38,57,094/- on account of discrepancy in the taxable value shown in the ST-3 return vis-à-vis financial records and third was of Rs. 3,96,954/- under reverse charge mechanism in respect of goods contract services from 1-7-2012 onwards. The petitioner had filed a detailed reply to the show cause notice however in the entire reply only opposition was made to the proposed recovery of Rs. 12,62,95,889/-. In other words with respect to the other two heads of Rs. 38,57,094/- and Rs. 3,96,954/- there was no ground to oppose such demands. This reply to the show cause notice is quite elaborate which we have perused with the assistance of Learned Counsel for the parties and thereby come to this conclusion. In the appeal memo against the order of adjudication, averments have been made opposing both these recoveries in specific terms. However in the grounds in such appeal memo no specific grounds are included. All grounds only concern the opposition to the confirmation of demand of Rs. 12,62,95,889/- The prayer clause in the appeal memo is also specific and reads as under :-

"set aside the impugned order dated 6-8-2015 passed by the Ld. Commissioner wrongly ordering for recovery Service Tax demand of Rs. 12,62,95,889/- along with interest of Rs. 1,79,568, together with penalty of Rs. 12,62,95,889/- and Rs. 10,000/-; and"

11. Despite such facts, the Tribunal by the judgment dated 11-9-2018 has set aside the entire order-in-original and thus allowed the appeal as can be seen from the portion of this judgment reproduced hereinabove.

12. In view of such facts, in our opinion the Deputy Commissioner Service Tax could not have on his own interpreted the judgment of the Tribunal as being limited to striking down the demand of Rs. 12,62,95,889/-. Learned Counsel for the Revenue however vehemently contended that when there was no opposition to other demands in the reply filed to the show cause notice and when the appeal of the assessee was also confined only to the tax demand of Rs. 12,62,95,889/-, the judgment of the Tribunal must be seen in light of such facts. He may be right in pointing out that the assessee had not filed any grounds opposing these demands in the reply to the show cause notice and the prayer in the appeal memo is also limited to challenging the principal demand of Rs. 12,62,95,889/-. However it is not open for the subordinate authority to interpret the judgment of the superior Tribunal and bestow unto himself the powers to adjust the pre-deposit amount by coming to the conclusion that the order setting aside the order-in-original must be given limited effect. We are conscious that even in the judgment the Tribunal has not discussed any aspect of striking down the other two demands of Rs. 38,57,094/- and Rs. 3,96,954/-. Even in such circumstances it was the duty of the Deputy Commissioner to approach the Tribunal and seek rectification of the order. The other clear option was to challenge the same and have the offending portion of the judgment set aside by the High Court. Without resorting to either of these two remedies he could not have adjusted the pre-deposit amounts as he has done in the present case. He was thus labouring under a wrong belief and perhaps *bona fide* to protect interest of the revenue has passed the order which is challenged before us. His intention however would not be sufficient to save the order from the vice of illegality. He may if so advised challenge the judgment of the Tribunal even now before the High Court if he could make out good grounds for condonation of delay.

> **13.** Under the circumstances subject to above observations petition is allowed. Impugned orders are set aside. The adjustment of the pre-deposit amounts of the petitioner made by the Deputy Commissioner is quashed. The department shall refund the said sum within a period of four months from today. This would of course be subject to right of the department to file the appeal against the judgment of the Tribunal and if such appeal is allowed surely it would be open for the department to raise the demand of all such taxes from the petitioner. All pending applications are also disposed of."

18. In the result, the impugned order is set aside. The appeal is allowed with consequential relief, if any, with specific direction to sanction the refund and not to enter into another round of litigation.

(Order dictated and pronounced in open court)

Sd/-

(SULEKHA BEEVI. C.S)
Member (Judicial)

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