

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/85 /2005 - EX[DB]

Date 19/10/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BANSWARA TEXTILEMILLS LTD.
INDUSTRIAL AREA,DOHAD ROAD,BANSWARA(RAJ)
M/S BANSWARA TEXTILEMILLS LTD.

Appellant

Vs

Respondent

C.C.E. JAIPUR II

2010 EX[DB] dated 24-8-10

I am directed to transmit herewith a certified copy of Final order No. 727/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. JAIPUR II

N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.

2. Adv. / Consult SH. G.K. SARKAR, ADV., CIO
MR.K.K ANAND

A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24

3 S.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 Director Publications, Customs, Excise. I.P. Estate, New Delhi

7 M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

11 Easy Service Tax Online Dot Com Pvt.Ltd. 407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15

12 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)

13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

14 Office Copy

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16.HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.**

Date of hearing/ decision: 24.08.2010

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	See
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal No. 85 of 2005

[Arising out of Order-in-appeal No. 640(RM)CE/JPR-II/2004 dated 30.09.2004 passed by the Commissioner (Appeals-II) Customs & Central Excise, Jaipur].

M/s Banswara Textile Mills Ltd.,

Appellants

Vs.

CCE, Jaipur-II

Respondent

Appearance: Rep. by Sh. G.K. Sarkar, Advocate for the appellants.
Rep. by Sh. R.K. Verma, DR for the respondent.

**Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)**

FINAL Oral Order No. 727/10-EX.

Per: Shri Justice R.M.S. Khandeparkar:

Heard the learned Advocate for the appellants and DR for the respondent.

2. This appeal arises from order dated 30.09.2004 passed by the Commissioner (Appeals), Jaipur. By the impugned order, the appeal filed by the department against the order passed by the original authority has been allowed. The original authority namely the Assistant Commissioner by his order dated 30.07.2003 had dropped the proceedings which were sought to be initiated against the appellants by issuance of show cause notice dated 3.11.2000. The consequence of allowing the appeal filed by the department against the said order is that the demand made under the said show cause notice stands revived and confirmed. Being aggrieved, the appellants have filed the present appeal.
3. The appellants are the manufacturers of processed Cotton and Man Made Fabrics classifiable under Chapter 52, 54 and 55 respectively of the Central Excise Tariff Act, 1985. Under Notification No. 41/98-CE(NT) dated 16.12.98 the processed textile fabrics manufactured with the aid of hot air stenter were specified as the notified goods on which the duty of excise was to be levied and collected in accordance with the provisions of the Section 3A of the Central Excise Act, 1944. The appellants, therefore, filed the declaration dated 15.12.98 under Rule 3(1) of the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 and the Commissioner by his order dated 22.12.98 determined the annual production capacity of the appellants w.e.f. 16.12.98 to be Rs. 1547.04 lakhs

per annum and consequently Rs. 16.50 lakhs per month being the duty liability. The said provisional order was confirmed by order dated 10.02.99. However, on re-verification of the data furnished under declaration dated 15.12.98 by the appellants, it was observed that the galleries equal to 0.61 chamber installed or attached to a stenter were not to be included in the said determination finalized on 10.02.99. The Commissioner, therefore by his order dated 02.06.99 re-determined the annual production capacity and duty liability of the appellants w.e.f. 01.04.99 for their 11.61 chambers as Rs. 1632.8304 lacs per year and Rs. 17,41,500/- per months. Under letter dated 28.07.99, the appellants sought permission to increase the number of chambers to 14 and the said permission was granted under letter dated 06.08.99. Consequently, the appellants filed revised declaration dated 08.09.99. Accordingly, the annual production capacity and duty liability was determined for 14.8 chambers of the appellants w.e.f. 08.09.99 under order dated 05.10.99 as Rs. 2081.472 lakhs per annum and Rs. 22,20,000/- per month. Being aggrieved by the said order, the appellants filed Writ Petition No. 3080/99 before the Hon'ble Rajasthan High Court. An ex-parte stay order was granted on 08.09.99 directing non inclusion of the galleries in the stenter for the purpose of payment of duties. Accordingly, the appellants paid the duty @ Rs.21,91,500/- per month instead of Rs. 22,20,000/- per month as was decided under order dated 05.10.99 by the Commissioner, during the period from 01.11.99 to 29.02.2000. Therefore, subject to the decision of the Hon'ble Rajasthan High Court in the said writ petition, a show cause notice dated 03.11.2000 came to be issued to the appellants requiring the appellants to show cause as to why the said difference of about Rs.1,14,000/- should not be recovered from the appellants. The proceedings therein were contested by the appellants while contending that the issue as to

whether the duty liability could be assessed by including the length of gallery in the chamber or not stood settled in favour of the assessee consequent to the decision of the Hon'ble Supreme Court in the matter of **S.P.B.L. vs. Commissioner of Central Excise, Jaipur-II** reported in 2002 (146) ELT 254 (S.C.) and that the dismissal of the writ petition, which was filed before the Hon'ble Rajasthan High Court, would not entitle the department to claim the said amount. In fact, the said writ petition was disposed of being dismissed as withdrawn on 31.07.2002 and the said fact was communicated by the appellants to the department under their letter dated 17.06.2003. Upon hearing the parties, the Assistant Commissioner dropped the proceedings on the basis of the decision of the CEGAT confirmed by the Apex Court in the matter of **S.P.B.L.** case. Being aggrieved, the department carried the matter in appeal before the Commissioner (Appeals) which was allowed by the Commissioner (Appeals) Jaipur by the impugned order. The Commissioner (Appeals) has held that the dismissal as withdrawn of the writ petition filed by the appellants against the order of the adjudicating authority including the length of galleries for the purpose of assessment and determination of the duty liability has resulted in giving finality to the order passed by the Commissioner on 05.10.99 and, therefore, the appellants are liable to pay the short duty paid in terms of the show cause notice.

4. Learned Advocate for the appellants placing reliance in the decision of the Apex Court in the matter of **S.P.B.L.**, of the Tribunal in the matter of **CCE, Kanpur vs. Premium Suiting Pvt. Ltd.** reported in 2010 (96) RLT ONLINE 134 (CESTAT-DEL.), of the Bombay High Court in the matter of **Om Textile Pvt. Ltd. vs. CCE, Belapur Navi Mumbai** reported in 2006 (74) RLT 233 (Bom.), of the Delhi High Court in the matter of **Aman**

Medical Products Ltd. vs. Commissioner of Customs, Delhi reported in 2010 (250) ELT 30 (Del.), of the Apex Court in the matter of **Lajya Dyeing & Bleaching Works vs. Union of India** reported in 2003 (155) ELT 213 (S.C.) submitted that though the appellants had not challenged the order dated 05.10.99 by way of appeal and though the writ petition filed against the same was dismissed, nevertheless the law on the relevant point stood decided by the decision of the Apex Court in the matter of **S.P.B.L.** case in favour of the appellants' contention and therefore appellants were entitled to raise the said issue in the present proceedings in answer to the show cause notice issued by the department for recovery of alleged short paid duty. He further submitted that once the law is laid down on a particular issue by the Apex Court, merely because the decision of the lower authority on similar issue has not been challenged will not debar the party from resisting execution of such order of the lower authority subsequent to the decision by the Apex Court. He further submitted that the law laid down by the Apex Court in relation to the requirement of challenge to the order in assessment proceedings and in the absence thereof, the claim for refund being not maintainable would not apply to the cases where the department seeks to recover the duty contrary to the decision of the Apex Court.

5. On the other hand, DR placing reliance in the decision of the Tribunal in the matter of **Commissioner of Central Excise, Ahmedabad vs. Gopi Synthetics Ltd.** reported in 2004 (164) ELT 172 (Tri. –Mumbai), of the Apex Court in the matter of **CCE, Kanpur vs. Flock (India) Pvt. Ltd.** reported in 2000 (120) ELT 285 (S.C.), of the Larger Bench of the Tribunal in the matter of **Commissioner of Customs (Imp.), Nhava Sheva vs. Eurotex Indus. & Exports Ltd.** reported in 2007 (216) ELT 137 (Tri.LB)

and of the Bombay High Court in the matter of **Karan Associates vs. Commissioner of Customs (Import), Mumbai** reported in 2009 (236) ELT 23 (Bom.) submitted that the law on the point that in the absence of challenge to the assessment order, the assessee cannot dispute the liability arising under the assessment order has been well settled by the decision of the Apex Court as well as of the Tribunal. He further submitted that challenge to the order of the assessment has to be in accordance with the procedure prescribed under the statute and not otherwise. Failure in that regard cannot entitle the assessee to dispute the liability arising under such order, while contesting some other proceedings including the execution proceedings of such order. Being so, according to the DR since the order dated 05.10.99 deciding the duty liability of the appellants having not been challenged by way of appeal and the writ petition which was filed against the same having been dismissed as withdrawn, it is not open to the appellants to dispute the liability of the appellants arising under the said order dated 05.10.99.

6. Referring to the decision of the Bombay High Court in **Om Textile Pvt. Ltd.** it was sought to be contended on behalf of the department that same was in the facts of the case and does not lay down any proposition of law that in the absence of challenge to the assessment order, the duty liability arising under such order can be disputed in any other proceedings. The contention is sought to be countered on behalf of the appellants by referring to the decision of the Delhi High Court in the matter of **Aman Medical Products** and of the Apex Court in **Lajya Dyeing & Bleaching Works** case.

7. The facts of the case as narrated herein above are not in dispute. The main contention of the appellants is that though the order dated 05.10.99 finalising the annual capacity and the duty liability was not challenged by way of appeal, the same was challenged by way of writ petition before the Hon'ble Rajasthan High Court, however, during the pendency of the said writ petition, the Apex Court in **S.P.B.L.** case clearly decided the issue which was sought to be raised by the appellants in the said writ petition in favour of the appellants' contention and, therefore, there was no purpose left for pursuing the matter in the writ jurisdiction before the High Court and hence the appellants sought to withdraw the said petition and it was disposed of by ordering dismissed as withdrawn. In any case, the issue was answered by the Apex Court in favour of the contention which was sought to be raised on behalf of the appellants, much prior to the decision of the authority in the case in hand, and the fact that the said issue was answered in favour of the appellants' contention was brought to the notice of the adjudicating authority in the matter in hand. Since the law pronounced by the Apex Court is in the form of clarification, the same is retrospective in nature and hence for all purposes the decision of the adjudicating authority contrary to the said law laid down by the Apex Court would be unexecutable. Hence, according to the learned Advocate the lower appellate authority erred in interfering with the order passed by the adjudicating authority dropping the proceedings.

8. There is no doubt that the Apex Court in **S.B.P.L** case has confirmed the view taken by the Tribunal in the said case under order dated 04.01.2001. The Tribunal by referring to explanation-1 to Rule 5 of Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 2000 had held that the galleries were required to be excluded taking

into consideration the float drying machine and other equipments which are installed in or attached to a stenter for aiding the process of heat setting or drying of the fabrics. The challenge to the said decision was rejected holding that the arguments against the said views were rightly rejected by the Tribunal. Being so, the contention that galleries are to be excluded while finalizing the assessment and the duty liability in relation to the cases similar to that of to the appellants cannot be disputed. Equally the learned Advocate for the appellants is right in contending that the decision being of clarificatory in nature, it will have retrospective effect. The decision of the Apex Court in **S.P.B.L.** and of the Tribunal in **Premium Suiting Pvt. Ltd.** case are very clear in that regard.

9. It is, however, to be noted that as far as the case of the appellants is concerned, the same was decided much prior to the decision of the Apex Court, and the said decision was not challenged by way of appeal, though the order was appealable under the said Act. At the same time, the writ petition filed against the said order was dismissed as withdrawn. According to the DR, therefore, in the appellants' case, the issue stood finally decided in terms of order dated 05.10.99 and hence the duty liability arising thereunder could not be disputed by the appellants, except during the period till the stay order by the Rajasthan High Court was in force. In view of dismissal of writ petition, in any case, the stay stood vacated.

10. As already observed above, the point is sought to be made good by referring to the decision of the Apex Court in **Flock (India) Pvt. Ltd.** case as well as of the Bombay High Court in **Karan Associates** and of the Larger Bench of the Tribunal in **Eurotex Indus. & Exports Ltd.** case and the same is sought to be countered by referring to the Bombay High Court

judgement in **Om Textile Pvt. Ltd.** read with decision of Delhi High Court in **Aman Medical Products Ltd.** and Apex Court in **Lajya Dyeing & Bleaching Works** case.

11. In **Om Textile Pvt. Ltd.** case the Bombay High Court in para 12 of its decision to which attention was drawn, has held thus:-

“though the appellant did not challenge the correctness of the order dated 12th July, 1999 in independent and substantive proceedings, in respect to the show-cause notice, the appellant did raise objection to the correctness thereof. In our considered view, by the time the matter reached to the Tribunal, the law having been settled by the Supreme Court holding that the length of galleries having no fan or radiator attached to it cannot be taken into consideration while determining the numbers of chambers, the Tribunal was competent to consider and rather ought to have considered the applicability of law laid down by the Supreme Court in the case of **SPBL Limited** to the facts of the present case”.

12. Perusal of the order of the Bombay High Court in **Om Textile Pvt. Ltd.** case clearly discloses that the Hon’ble High Court proceeded on the basis that no appeal lay from the order dated 12th July, 1999 and there was no challenge in any independent or substantive proceedings to the said order. The relevant facts in that regard are clearly recorded in para 4 of the order which read thus:-

“It is true that the order dated 12th July, 1999 passed by the Commissioner of Central Excise, Mumbai-VI under Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 (hereinafter referred to as Rules 1998) was not challenged by the appellant by pursuing independent and substantive proceedings. Admittedly no appeal lay from the order dated 12th July, 1999. However, the appellant objected to the invocation of length or the gallery having no fan or radiator attached to it in counting the

number of chambers in response to the show-cause notice dated 4th January, 2000”.

It was in the background of above stated facts, the Hon’ble Bombay High Court held that the Tribunal was not right in sustaining demand on the basis of length of gallery contrary to the law laid down by the Apex Court in **S.P.B.L.** case and merely on the ground that the order dated 12th July 1999 had attained finality. In other words, the decision was on the basis that the order dated 12th July 1999 was not an appealable order and there were no challenge thrown to the said order in any independent or substantive proceedings and in those circumstances the authorities below including the Tribunal could not have ignored the decision of the Apex Court in **S.P.B.L.** case for confirming the demand.

13. In **Aman Medical Products** case, in para 5 of the decision to which attention was drawn, it was held thus:-

“The Tribunal has referred to the cases of CCE, Kanpur v. Flock (India) Pvt. Ltd., [2000 (129) ELT 285] and Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive), 2004 (172) ELT 145 (S.C.). In both these cases, referred to by the Tribunal there was an assessment order which was passed and consequently it was held that where an adjudicating authority passed an order which is appealable and the party did not chose to exercise the statutory right of appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that adjudicating authority had committed an error in passing his order. These judgements will therefore not apply when there is no assessment order on dispute/contest, like as is in the facts of the present case”.

14. The ratio of the decision of the Delhi High Court case is obviously that in cases where there is an assessment order, if it attains finality in the absence of challenge to the same, the correctness of such order cannot be questioned in some other proceedings by the party to the assessment proceedings whereas when there is no assessment order, the question of attaining finality to any dispute does not arise. While in the cases of former type, the decision of the Apex Court would apply whereas in the cases of later type, it would not apply.

15. In **Lajya Dyeing & Bleaching Works** case, the Apex Court in para 3 to which our attention was drawn has observed thus:-

“Thus, the only question before this Court is whether, on 14th July, 1995, there is an order of adjudication, we have been taken through the adjudication Manual as well as Section 35 of the Central Excise Act and Rule 213. It has been urged that a reading of the letter dated 14th July, 1995 makes it clear that it is not an order as contemplated under the Act. It is urged that the Department was to re-evaluate as per the guidelines laid down by this Court and that no such re-evaluation has taken place. It is urged that the letter dated 14th July, 1995 could not be considered to be an order of adjudication”.

16. In para 5 of the said decision, the Apex Court held thus:-

“The High Court, in the impugned judgement, has held that the demand made earlier is confirmed and therefore there is an adjudication. We are in agreement with the view expressed by the High Court. The order dated 14th July, 1995 makes it clear that a personal hearing was given on 22nd June, 1995. It sets out what has already been paid. Then it calls upon the appellants to pay the balance amount. Thus, there has been adjudication and there is a demand. It may be that this order is not in the format prescribed. It may also be that principles of natural justice were not followed but those are grounds on which the order could have been challenged. In fact, these

grounds were taken in the writ petition. However, those grounds were not pressed. We have, therefore, not looked into these aspects and express no opinion thereon".

17. The ratio of the decision of the Apex Court is to the effect that even though there is a challenge to an order before the Court, but when the matter comes for hearing certain grounds of challenge are given up and not pressed for, the ultimate order which is delivered does not amount to expression of any opinion or decision on those grounds which were not pressed for. We fail to understand the applicability of this decision in the matter in hand.

18. In **Flock (India) Pvt. Ltd.** case, the apex Court had held that in a case where an adjudicating authority has passed an order which is appealable under the statute, but the party aggrieved by such order does not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of such order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing its order. It was observed that if such position is not accepted, then the provisions for adjudication in the said Act and the Rules made thereunder and in particular the provision of appeal therein would lose their relevance and the entire exercise would be rendered redundant. It was specifically observed that if any doubt about the said position is to be accepted then it would run counter to the scheme of the Act and will amount to introducing an element of uncertainty in the entire process of levy and collection of excise duty and such position cannot be countenanced. Referring to the statutory provisions and rules made thereunder, it was observed that the provision indicates the importance attached to an order of the appellate or revisional authority under the statute

and therefore it was ruled that an order which is appealable under the said Act, if not challenged, then the same is not liable to be questioned and the matter is not to be re-opened in a proceeding for refund which is in the nature of execution of a decree/order. The specific ruling by the Apex Court in this regard is thus:-

“The provisions indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/ order”.

19. The order of the Apex Court in **Flock (India) Pvt. Ltd.** case clearly lays down the law that if the assessee fails to challenge the order passed in adjudication proceedings then it attains finality and thereupon it is not open to the assessee to dispute the correctness of any such order passed in adjudication proceedings. It has been further held by the Apex Court that it cannot be questioned in a proceedings which are in the nature of execution of such order passed in adjudication proceedings. While holding so, it has also been observed that the proceedings for refund are in the nature of execution of such order.

20. The Bombay High Court in **Karan Associates** case has held that merely because the assessment order was not a speaking order or detailed order, it would not cease to be an order of assessment under the statute and if such order is not challenged in the manner known to law, it would attain the finality. In fact, it was held thus:-

“The argument of the appellant that unless an appealable speaking order is passed, the importer cannot file an appeal against the assessment order is without any merit. Assessment order passed on the bill of entry is an appealable order and the same can be challenged even in the absence of a speaking order. In other words, in the absence of a speaking order, it cannot be said that the assessment order is not appealable. Where an assessment order is passed without giving reasons and in spite of repeated requests reasoned order is not passed, proceedings can be initiated for setting aside the assessment order passed on the bill of entry. In the present case, save and accept writing letters no proceedings have been initiated for setting aside the assessment order. Therefore, the fact that the assessing officer has not passed a speaking order would not entitle the appellant to claim partial refund of duty paid as per the assessment order”.

21. The Larger Bench of the Tribunal in **Eurotex Indus. & Exports** case after taking note of the decision of the Apex Court in **Flock (India) Pvt. Ltd., and Priya Blue Industries Ltd. vs. Commissioner** reported in 2004 (172) ELT 145 (SC) held that the refund claim is not maintainable unless and until the assessment order in pursuance of which the duty was paid has remain unchallenged.
22. Considering the law laid down by the Apex Court, it is abundantly clear that unless the assessee challenges the main order wherein the duty liability has been fixed, he cannot dispute the executability of such order in the proceedings which are initiated in the nature of execution of such order. The recovery proceedings under the said Act in relation to the order determining the duty liability consequent to the assessment proceedings, are nothing but in the nature of execution of a decree. Being so, unless the assessee is able to establish that the order passed by the adjudicating authority has been subjected to review by way of appellate order, he had no

option but to comply with the liability arising under such adjudication order. It is a different case when such an adjudication order is passed by an authority who has no jurisdiction to pass the order. Absence of jurisdiction renders the order to be nullity. Certainly, the issue of nullity could be raised in any proceedings. But when an order is passed by an authority having jurisdiction to pass such an order, merely because there is some irregularity in arriving at the finding based on which the duty liability is calculated that cannot render the exercise to be without jurisdiction. Such an order has necessarily to be challenged by following the procedure known to law. In case of order without jurisdiction one need not even follow appellate proceedings. Such an order can be challenged even under writ jurisdiction. Whether such proceedings would be entertained or not on the ground of availability of alternative remedy to the party is a totally different issue but the nullity resulting from absence of jurisdiction can be raised in any proceedings and at any stage. But the irregularity or correctness of the order passed by the authority having jurisdiction cannot be challenged otherwise then by following the procedure prescribed under the statute. Or else, the order would attain finality. Once the order attains finality, the obligations arising under the order are required to be complied with.

23. The decision of Bombay High Court in **Om Textile Pvt. Ltd.** is not contrary to what we have stated above. In the said case, the High Court was informed that the order dated 12th July, 99 was not appealable and it could be challenged only by way of independent and substantive proceedings. In that respect, it was observed that the objection to the correctness could have been raised in the proceedings initiated for recovery of the duty. With utmost respect the observations are contrary to the rulings by the Apex Court

in Flock (India) case. It has been specifically held in Flock (India) case and at the cost of repetition, we may reproduce relevant portion which reads:

“The provisions indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/ order”. **In other words in the proceedings in the nature of execution of an order question of challenging the correctness of the findings in the main order does not arise.** In fact, that is the law laid down by the Apex Court in plethora of decision delivered from 1969 onwards. (Emphasis supplied)

24. In the case in hand, it is not in dispute that the duty liability of the appellant was ascertained and determined under the order dated 05.10.99. It is also undisputed fact that the said order is appealable under Section 35B of the said Act. It is also undisputed fact that no appeal was filed against the said order dated 05.10.99. Admittedly, the writ petition which was filed was not pursued and was ultimately dismissed as withdrawn. The contention that the dismissal was allowed consequent to the decision of the Apex Court in S.P.B.L. is not correct. The writ petition was dismissed on 3rd July 2002. The decision of the Apex Court in S.P.B.L. was delivered on 17th September, 2002. Undoubtedly, prior to that the Tribunal had decided the matter on 04.01.2001. Evidently the petition was not pursued consequent to the decision of excluding the galleries while determining the duty liability. It is pertinent to note that the exclusion of gallery has been confirmed only in specified cases i.e. where the gallery has no fan or radiator attached to it. In

cases where the gallery having some other equipment or utilization for the entire process of heating, setting or drying of fabrics was not the subject matter of the decision and that has been clarified by Bombay High Court in **Om Textile Pvt. Ltd.** case wherein it was observed that the law has been laid down by the Hon'ble Supreme Court that the length of gallery having no fan or radiator attached to it cannot be taken into consideration while determining the number of chambers. Therefore, before excluding the gallery, it will be necessary to ascertain the facts situation and thereupon arrive at the correct findings. Such an exercise is not permissible in execution proceeding. This is an additional ground which would justify the view taken by the Commissioner (Appeals) in the impugned order.

25. As already observed above, the decision of the Delhi High Court rather than lending any support to the contention canvassed on behalf of the appellants, justifies the view taken by the Commissioner (Appeals). Therein relying upon the Apex Court decisions in *Priya Blue Industries and Flock (India)* it was observed that in cases where there are assessment orders and they are not challenged by way of appeal, it is not open to the parties to such proceedings to question the correctness of such orders in refund proceedings, while holding that the same proposition may not be attracted in cases where no assessment order is passed.

26. The order of the Tribunal in **Premium Suiting Pvt. Ltd.** was merely on the point that where the judgement of the Hon'ble Supreme Court is of clarificatory nature regarding a provision of law, it would be retrospectively effective. It has nothing to do with the obligation of an assessee arising under unchallenged assessment order.

27. For the reasons stated above, we do not find any infirmity in the impugned order and therefore, the appeal fails and is hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/