CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT No. I

Customs Appeal No. 41713 of 2017

(Arising out of Order in Appeal No. 357 & 358 / 2017, dated 26.04.2017 passed by the Commissioner of Customs (Appeals II), 60 Rajaji Salai, Custom House, Chennai 600 001)

Escorts Kubota Limited **...Appellant**
No.15, Medavakkam Road
Sholinganallur
Chennai 600 119

Versus

Commissioner of Customs **...Respondent**
Chennai II Commissionerate
Custom House, No.60, Rajaji Salai,
Chennai 600 001

AND

Customs Appeal No. 41714 of 2017

(Arising out of Order in Appeal No. 357 & 358 / 2017, dated 26.04.2017 passed by the Commissioner of Customs (Appeals II), 60 Rajaji Salai, Custom House, Chennai 600 001)

Escorts Kubota Limited **...Appellant**
No.15, Medavakkam Road
Sholinganallur
Chennai 600 119

Versus

Commissioner of Customs **...Respondent**
Chennai II Commissionerate
Custom House, No.60, Rajaji Salai,
Chennai 600 001

APPEARANCE:

For the Appellant :Ms. U. Fasila, Advocate for the Appellant
For the Respondent: Mr. N. Mohan, Authorised Representative

CORAM :
HON'BLE MR. AJAYAN T.V. MEMBER (JUDICIAL)

FINAL ORDER Nos.41123-41124/2026

DATE OF HEARING :15.10.2026
DATE OF DECISION:28.10.2026

Per AJAYAN T.V.

M/s. Escorts Kubota Ltd., the appellant herein, assails the common Order in Appeal C. Cus. II No.357 and 358/2017 dated 26.04.2017 (the impugned order) passed by the Commissioner of Customs (Appeals II), Chennai, whereby the two appeals preferred by it against orders confirming recovery of refund of Special Additional Duty of customs were dismissed, without the merits being entered upon, for want of the pre deposit of seven and a half per cent required by Section 129E of the Customs Act, 1962 (the Act). The appeals were instituted in the name of M/s. Kubota Agricultural Machinery India Pvt. Ltd., by which name the appellant figures throughout the proceedings below. That company having stood amalgamated with M/s. Escorts Kubota Ltd., an application for change of name was moved and allowed, and the cause title stands amended accordingly.

2. The appellant manufactures agricultural machinery, engines and construction equipment. In December 2012, and again between September and November 2013, it imported a Kubota tractor B2420, a rotary for KRM 180D, a Kubota rice planter and allied machinery (the subject goods) under eight Bills of Entry and paid, besides the other duties of customs, Special Additional Duty levied under Section 3(5) of the Customs Tariff Act, 1975 (SAD) aggregating Rs.12,52,720/-. Notification No.102/2007-Cus. dated 14.09.2007 grants exemption from SAD by way of refund where the importer, on the subsequent sale of the imported goods within India, pays the appropriate sales tax or value added tax. Board's Circulars No.6/2008-Cus. dated 28.04.2008 and No.16/2008-Cus. dated 13.10.2008 lay out instructions on the procedure to be adopted for such refund. The subject goods stood exempted from value added tax within the State of Tamil Nadu by G.O. Ms. No.50

dated 27.03.2012, so that the rate of tax borne on their subsequent sale was nil.

3. The appellant accordingly applied for refund. The Assistant Commissioner of Customs (Refunds) adjudicated those applications and sanctioned the refunds by two orders in original. By Order in Original No.33770/2015 dated 13.11.2014, which came to be generated on 06.01.2015, he sanctioned Rs.2,93,478/- relating to Bill of Entry No.8851563 dated 24.12.2012, and by Order in Original No.34008/2015 dated 24.11.2014 he sanctioned Rs.9,59,242/- relating to the seven Bills of Entry of September to November 2013.

4. The Commissioner of Customs, Chennai IV, thereafter called for and examined those orders in exercise of the power of review conferred by Section 129D of the Act. He took the view that a sale bearing a nil rate of value added tax is not a sale on which appropriate value added tax has been paid and that the condition in paragraph 2(d) of Notification No.102/2007-Cus. therefore remained unsatisfied. The review led to two consequences. The first was that the orders sanctioning refund were agitated before the Commissioner of Customs (Appeals) at the Department's instance. The second was that, while those appeals were pending, the officer who had sanctioned the refunds issued two show cause cum demand notices under Section 28(1) of the Act proposing to recover the very sums he had himself directed to be paid. Show Cause cum Demand Notice No.46/2015 dated 17.11.2015 related to Rs.2,93,478/- and Show Cause cum Demand Notice No.60/2015 dated 30.11.2015 was with respect to Rs.9,59,242/-, each notice being based upon the identical ground urged in the appeals preferred by the Revenue before the appellate authority.

5. The sequence of dates is of consequence. Notice No.46/2015 was issued on 17.11.2015, whereas the Commissioner (Appeals) allowed the Department's appeal touching that refund only on

29.12.2015 by Order in Appeal No.1215 to 1217/2015. Notice No.60/2015 was issued on 30.11.2015, whereas the corresponding Order in Appeal No.261/2016 came to be passed on 11.03.2016. On the date of each notice, therefore, the order sanctioning the refund stood unreversed and held the field, and the proceeding by which the Department had chosen to have it displaced was pending before a superior authority at its own instance.

6. By each of the two Orders in Appeal, the Commissioner (Appeals) allowed the Department's appeal and directed the lower adjudicating authority to initiate action to recover the refund with applicable interest. The appellant preferred appeals against both orders to this Tribunal. The appeal against Order in Appeal No.261/2016 was at first dismissed ex parte by Final Order No.41872/2016 dated 10.10.2016 for want of appearance. That order was recalled upon an application for rectification, and by Final Order No.41377 to 41380/2017 dated 28.07.2017 the appeal was allowed, this Tribunal holding, on the authority of *Gazal Overseas v. Commissioner of Customs, New Delhi, 2016 (332) E.L.T. 767 (Tri. Del.)* that a nil rate of sales tax or value added tax is itself the appropriate rate and that payment at that rate answers the condition of the notification. Earlier, by Final Order No.40889 to 40898/2017 dated 02.06.2017, reported as *2017 (6) TMI 565 (CESTAT Chennai)*, this Tribunal had allowed the appellant's appeals arising out of Order in Appeal No.1215 to 1217/2015 upon the same reasoning. These Final Orders were not carried further by the Department and both have attained finality.

7. The proceedings under Section 28 meanwhile ran their own course, and the outcome thereof is of relevance. By Confirmed Demand Notice No.30/2016 dated 16.12.2016 the Assistant Commissioner confirmed recovery of Rs.9,59,242/- under Section 28(8) of the Act with interest under Section 28AA, holding that it was in view of Final Order No.41872/2016 dated 10.10.2016 that

the appellant was liable to repay. By Confirmed Demand Notice No.33/2016 dated 26.12.2016 the Assistant Commissioner confirmed recovery of Rs.2,93,478/- under Section 28(1) with interest under Section 28AA, holding in terms that it was in view of the findings of the Commissioner (Appeals) in Order in Appeal No.1215 to 1217/2015 that the appellant was liable to repay. Neither notice rests upon any reasoning independent of those two orders.

8. Against the two demand notices, the appellant preferred appeals to the Commissioner of Customs (Appeals). They were presented on the ninetieth day, that is to say, on the last day of the period of limitation read with the period which that authority is empowered to condone, and they were presented through the Sevottam facilitation counter. The appeals were filed without the pre deposit having been made. The Commissioner (Appeals) treated them as incomplete appeals and dismissed both by the impugned order. He held that the mandatory pre deposit of seven and a half per cent had not been made. He went on to hold against the appellant that the appeals had been filed on the ninetieth day, leaving no scope for any further communication or clarification, and that they had been routed through Sevottam instead of being lodged directly in the Appeals Section, which would have afforded an occasion to point out the deficiency. He recorded that he was constrained to decide the appeals without extending any opportunity for further communication or personal hearing, owing to what he described as the time limit factor envisaged under Section 128 of the Act. Aggrieved by the impugned order, and having preferred these appeals, the appellant is now before this Tribunal.

9. On the institution of these appeals, the appellant deposited Rs.1,25,272/-, being ten per cent of the amounts in dispute. The appeals were heard on 15.10.2026. At the close of the hearing, learned counsel for the appellant sought leave to file written

submissions, which was granted, and those submissions have since been filed and considered.

10. Ms. U. Fasila, learned Advocate for the appellant, contended that the question of entitlement to refund arising out of these very refund applications stands concluded in the appellant's favour by Final Order No.40889 to 40898/2017 dated 02.06.2017 and Final Order No.41377 to 41380/2017 dated 28.07.2017, both of which have attained finality and bind the parties. Once the sanction of refund has been upheld, she would urge, nothing survives of a demand founded upon the premise that the refund was erroneous. She drew the attention of this Tribunal to paragraph 5.3 of Circular No.6/2008-Cus., which states that the notification carries no stipulation that the rate of sales tax or value added tax must equal or exceed the rate of additional duty of customs, and to the reasoning in *Gazal Overseas supra* that where the appropriate rate is nil, the appropriate tax paid is also nil.

11. Ld. Counsel further argued that the notices were void from inception. An order sanctioning refund under Section 27 of the Act is an order of adjudication, the only remedies against it are an appeal under Section 128 or a direction under Section 129D, and the Refund Authority could not presume his own order to be erroneous and proceed under Section 28 to undo it. Reliance was placed upon *Eveready Industries India Ltd. v. CESTAT, Chennai, 2016 (337) E.L.T. 189 (Mad.)*, *S.K. Timber and Co. v. Commissioner of Customs (Port), Kolkata, 2021 (377) E.L.T. 454 (Tri. Kolkata)*, and *Shyam Timber Pvt. Ltd. v. Commissioner of Customs, (2023) 9 Centax 287 (Tri. Ahmd.), affirmed in Commissioner of Customs v. Shyam Timber Pvt. Ltd., (2025) 28 Centax 137 (Guj.)*.

12. As to the pre deposit, she maintained that the requirement of Section 129E stands satisfied by the deposit of Rs.1,25,272/- made before this Tribunal, that the objection taken in the

impugned order is therefore untenable, and that these appeals ought to be decided finally so that litigation which has already run for more than a decade is not prolonged by a remand.

13. Shri N. Mohan, learned Authorised Representative for the respondent, reiterated the findings in the impugned order. He relied upon *Sunil Kumar Patwari v. Additional Commissioner, Airport and Air Cargo Complex, NSCBI Airport, 2025 (6) TMI 1028 (Calcutta High Court)*, to submit that Section 129E erects an absolute embargo, that the Commissioner (Appeals) is forbidden to entertain an appeal unless the deposit is made, and that an appellate authority which dismisses an appeal upon that ground commits no error.

14. Having heard these rival contentions and perused the materials available on record, this Tribunal finds that four questions arise for determination:

i. Whether appeals presented within time but unaccompanied by the statutory deposit could be dismissed in the manner in which the Commissioner (Appeals) dismissed them?

ii. Whether this Tribunal, hearing an appeal from an order which did not touch the merits, may dispose of these appeals finally or must remit them?

iii. Whether the notices dated 17.11.2015 and 30.11.2015 could be issued under Section 28 of the Act while the Department's own appeals against the orders sanctioning refund were pending, and, if so, upon what footing they stood?

iv. Whether anything survives of these demands in the light of the Final Orders since passed by this Tribunal?

15. These questions are considered *in seriatim*. On the first question, this Tribunal is unable to accept the appellant's contention as it was framed. Section 129E, as substituted with effect from 06.08.2014, provides by clause (i) that the Commissioner

(Appeals) shall not entertain an appeal under sub section (1) of Section 128 unless the appellant has deposited seven and a half per cent of the duty in dispute, and by clause (iii) that the Tribunal shall not entertain an appeal against an order referred to in clause (b) of sub section (1) of Section 129A, that is to say an order of the Commissioner (Appeals), unless the appellant has deposited ten per cent of the duty in dispute. The deposit required of an appellant before the first appellate authority and that required of an appellant before this Tribunal are therefore distinct obligations attaching to distinct appeals. The sum of Rs.1,25,272/- deposited on the institution of these appeals is the deposit which clause (iii) requires for these appeals, and it cannot be read as retrospective compliance with clause (i), which governed the appeals filed before the Commissioner (Appeals). To the extent that the appellant contends that the requirement of Section 129E stood duly complied with before that authority, the contention fails. The discretion to dispense with the deposit which the earlier provision conferred has been withdrawn, and to that limited extent the Calcutta High Court in *Sunil Kumar Patwari supra* correctly states the position that the appellate authority is powerless to entertain an appeal unaccompanied by the deposit.

16. That is not, however, the end of the matter, and the impugned order cannot be sustained upon the reasoning it adopts. An appeal presented within time but unaccompanied by the statutory deposit is a defective appeal and not a nullity. The embargo in Section 129E is upon entertaining such an appeal. It is neither a prohibition upon its presentation nor a command to extinguish, unheard, an appeal which the appellant remains able to perfect. A Division Bench of the Bombay High Court, construing the corresponding provision in Section 35F of the Central Excise Act, 1944 as amended in 2014 and applied to service tax, said as much in *Sportina Payce Infrastructure Pvt. Ltd. v. Union of India, 2019 (365) E.L.T. 439 (Bom.)*, holding that the provision only prohibits the appellate authority from entertaining the appeal on merits,

that where the deposit is made within a reasonable time of the dismissal the appellate authority should recall the order of dismissal and hear the appeal, and that such a recall is a procedural review which every quasi judicial authority may make in its inherent jurisdiction even in the absence of an express power. The Hon'ble High Court relied upon the principle laid down in *Grindlays Bank Ltd. v. Central Government Industrial Tribunal, 1980 (Supp.) SCC 420* in this regard. The jurisdictional High Court had held likewise, and in stronger terms, in *Classic Builders (Madras) Pvt. Ltd. v. CESTAT, Chennai, 2016 (42) S.T.R. 668 (Mad.)*. That was a service tax appeal governed by Section 35F of the Central Excise Act, 1944, which Section 83 of the Finance Act, 1994 applies to service tax and which is in pari materia with Section 129E of the Act, and the dismissal under challenge had been made by this Tribunal in 2013, under the provision as it stood before the amendment of 2014. The Division Bench held that where the statute does not prohibit restoration of an appeal dismissed for want of the deposit, the power to restore exists and is inherent, and that the Tribunal cannot deprive a party of the substantive right to prefer an appeal on the mere ground that there is a violation of procedure. If procedure, which is the handmaid of justice, were entrusted with the power of the mistress, the Court observed, the consequences would be disastrous, and substantive justice cannot be permitted to take the back seat, allowing the procedure to occupy the front seat. That principle applies with greater force under the provision as it now stands. The default in that case was in breach of a specific direction of the Tribunal, whereas here there was no direction at all, only a statutory condition which the appellant remained free to satisfy. If an order of dismissal may be recalled upon a belated deposit, it follows *a fortiori* that the deficiency ought to have been pointed out before the appeal was dismissed at all.

17. The reasons which the Commissioner (Appeals) gave for denying the appellant even that much do not withstand scrutiny, and this

Tribunal is constrained to record its disapproval of them. He held it against the appellant that the appeals had been presented on the ninetieth day. A party which presents an appeal on the last day available to it exercises a right the statute confers and commits no delinquency, and the imminence of the expiry of limitation is a circumstance affecting the appellant's own position and not a dispensation from the duty of the authority to hear. He held it against the appellant that the appeals had been routed through the Sevottam counter, a facility created by the Department itself for the convenience of the citizen. An assessee cannot be visited with an adverse consequence for using a channel which the Department has created for the receipt of papers. He then declined a personal hearing altogether, although Section 128A(1) of the Act obliges the Commissioner (Appeals) to give an appellant an opportunity of being heard if it so desires, and although nothing prevented him from issuing a short notice of the deficiency. The principles of natural justice required at the least that an appellant whose appeal was to be dismissed for a curable defect be told of that defect before the dismissal. The shortness of the time remaining was, upon his own showing, a consequence of the date on which the appeal reached him, and it furnished no warrant for setting aside the elementary obligation to hear before deciding. Rules of procedure are the handmaids of justice and not its mistress, and where a party is not guilty of laches and nothing forbids relief, one should not get entangled in the cobweb of procedure but should do substantial justice, as the Supreme Court put it in *Commissioner of Sales Tax, U.P. v. Auriaya Chamber of Commerce, Allahabad, 1986 (25) E.L.T. 867 (S.C.)*. The admonition in *Madras Port Trust v. Hymanshu International, 1979 (4) E.L.T. (J 396) (S.C.)*, that it is high time governments and public authorities ceased to rely upon technical pleas for the purpose of defeating the legitimate claims of citizens and did what is fair and just, applies with full force to the manner in which these two appeals were disposed of.

18. In fairness to the Revenue, it has to be said that the appellant was not free from blame. The amended Section 129E had been in force for more than two years when these appeals were filed, and greater vigilance would have avoided much of this controversy. The default was nevertheless curable, and the consequence visited upon it was not one the statute authorises. It is therefore held that the dismissal of the appeals without notice of the deficiency and without any hearing cannot be sustained.

19. The second question, i.e., whether this Tribunal, hearing an appeal from an order which did not touch the merits, may dispose of these appeals finally or must remit them, needs a closer look. It is noticed that in *Commissioner of Central Excise, Chandigarh v. SmithKline Beecham Consumer Health Care Ltd., 2003 (157) E.L.T. 497 (S.C.)*, the Commissioner (Appeals) had dismissed an appeal for failure to comply with a direction for pre deposit and had not gone into the merits. The Hon'ble Supreme Court observed that the only question before the Tribunal was whether pre deposit was required or not, that the Tribunal had chosen to go into the merits and to decide the appeal on merits also, and that this should not have been done. The order then records that the parties were agreed that the matter be sent back to the Commissioner (Appeals) with the pre deposit dispensed with, and it was so directed.

20. That decision belongs to a statutory regime which no longer exists. Under the proviso to the corresponding provision as it then stood, the appellate authority had a discretion, upon an application, to dispense with the deposit, and it was in the exercise of that discretion that the direction in *SmithKline Beecham* came to be made. The Tribunal's scrutiny was accordingly directed at the correctness of a discretionary direction, which is precisely why the permissible question was framed as whether pre deposit was required or not. Under Section 129E as substituted there is no application, no direction and no discretion.

The deposit is a statutory condition of the same order as the period of limitation, and the question whether it was required or not no longer exists. The relief which the Supreme Court granted, namely a remand upon the deposit being waived, is equally a relief which no appellate forum can now grant. A decision whose premise and whose remedy have both been removed by amendment cannot be applied mechanically to the altered provision.

21. This Tribunal is conscious that distinguishing the regime does not by itself answer the caution which underlies that decision, which is that an appellate forum ought not to decide what the forum below has never considered. A further consideration governs the present case which was not present in *SmithKline Beecham*, and it is decisive. The demands under challenge before this Tribunal claim no life of their own. Each of the two demand notices states expressly that the liability to repay arises in view of an order of the Commissioner (Appeals) or of this Tribunal, and each of those orders has since been set aside or recalled by this Tribunal. To hold that a demand falls with the order upon which it is expressly founded is not to adjudicate the merits afresh. It is to work out the consequences of this Tribunal's own orders, which is an exercise in judicial discipline and not in original adjudication. It is upon this consideration that the competence of this Tribunal to dispose of these appeals finally rests.

22. The Supreme Court has lately restated, in *Maria Martins v. Noel Zuzarte, 2026 INSC 376*, the three conditions upon which a court may take note of subsequent events, namely that the event be brought promptly to its notice, that it be brought consistently with the rules of procedure so that the opposite party has an opportunity of meeting or explaining it, and that it have a material bearing upon the right to relief. Each is satisfied here. The Final Orders were placed before this Tribunal by an application under Rule 23 of the Customs, Excise and Service Tax Appellate Tribunal

(Procedure) Rules, 1982, the learned Authorised Representative had full opportunity to deal with them, and they go to the whole of the relief claimed.

23. Now to address the third question, it can be seen that the appellant's case, put at its highest, is that an order sanctioning refund under Section 27 is an order of adjudication, that the only remedies against it are an appeal under Section 128 or a direction under Section 129D, and that Section 28 can never be invoked to recover what has been sanctioned by such an order. For that proposition reliance was placed principally upon *Eveready Industries India Ltd. v. CESTAT, Chennai, 2016 (337) E.L.T. 189 (Mad.)*, where the jurisdictional High Court held that once an application for refund is allowed upon adjudication the expression erroneous refund cannot be applied to the amount refunded, and that one authority cannot be permitted to say in a collateral proceeding that what was done by another authority was an erroneous thing. The same approach is found in *Commissioner of Customs and Central Excise, Tirupati v. Panyam Cements and Minerals Industries Ltd., 2016 (331) E.L.T. 206 (A.P.)*, and in *Shyam Timber Pvt. Ltd. v. Commissioner of Customs, (2023) 9 Centax 287 (Tri. Ahmd.)*.

24. Attractive as the proposition is, this Tribunal is unable to accept it in that absolute form, and says so because authority which binds this Tribunal points the other way. In *Grasim Industries Ltd. v. Commissioner of Central Excise, Bhopal, 2011 (271) E.L.T. 164 (S.C.)*, the Supreme Court held in paragraph 13 that the recovery provision confers a right to issue a show cause notice where, according to the Department, duty has been erroneously refunded, that upon such a notice the assessee has to show cause why the amount should not be recovered from him, and that in such a case there is no question of filing any appeal, the appropriate remedy provided by that provision being available. Earlier, in *Asian Paints (India) Ltd. v. Collector of Central Excise,*

Bombay, 2002 (142) E.L.T. 522 (S.C.), the Court had held that the recovery provision and the review provision operate in different fields and are invoked for different purposes, and that to read them otherwise would render the review provision virtually ineffective.

25. That reasoning was reaffirmed, and with some emphasis, in *Commissioner of Central Excise, Mumbai I v. Morarjee Gokuldas Spg. and Wvg. Co. Ltd., (2023) 4 Centax 418 (S.C.)*. In this case, the Hon'ble Supreme Court recorded its disapproval of a High Court which had declined to follow *Asian Paints* although that decision had been pressed upon it, and held in paragraph 8 that once an order in original sanctioning refund has been set aside in a proceeding under the review provision taken within the time prescribed by it, there is no question of any further notice under the recovery provision, the necessary consequence following from the order of review itself. The jurisdictional High Court has also taken this view in a later decision. In *Premier Cotton Textiles v. Commissioner of CGST, Coimbatore, 2019 (368) E.L.T. 465 (Mad.)*, where notices had been issued to recover a rebate already allowed without any appeal having been filed against the order allowing it, the Court held that the recovery provision contemplates five distinct situations of which duty erroneously refunded is the fifth, that to accept the argument now advanced would render that fifth limb otiose, and that the provision must be read in the manner laid down in *Grasim Industries* and by the Larger Bench of the Tribunal whose view Asian Paints approved. That the Court was exercising writ jurisdiction at the stage of a notice, and declined to interfere for that additional reason, does not detract from the reasoning upon the interplay of the two provisions, which is express.

26. It is right to record that *Grasim Industries* does not appear to have been placed before the Division Bench which decided *Eveready Industries*, for it finds no mention among the authorities

there considered, and that the High Court of Andhra Pradesh in *Panyam Cements* distinguished *Grasim Industries* upon the footing that the claimant there was not the person who had borne the incidence of duty. This Tribunal need not pause upon whether that distinction is a sufficient answer to what was said in paragraph 13 of Grasim Industries, for the resolution of that question is not necessary to the decision here. It is enough to hold, as this Tribunal holds, that the broad proposition that Section 28 can never be invoked to recover a refund sanctioned upon adjudication cannot be accepted in the face of *Grasim Industries, Asian Paints and Morarjee Gokuldas*. To that extent the foremost of the grounds urged by the appellant fails. These three decisions were not cited at the Bar, but that does not relieve this Tribunal of the obligation to apply them. The law declared by the Supreme Court binds every court and tribunal in the country under Article 141 of the Constitution. The Supreme Court has recently emphasised, in *New India Assurance Company Limited v. Dolly Satish Gandhi and Anr., 2026 INSC 498*, that while counsel owe a duty to bring to the notice of the Court judgments that do not aid their case as well as those that do, the entire burden cannot be placed on counsel, and that the Court itself has "an independent tri-fold duty, to apply correct law even if the counsel does not cite the same, ensure consistency with precedent, and avoid per incuriam decisions". The omission is the more noticeable on the side of the Revenue, in whose favour these decisions run. To have answered the question of the Department's power under Section 28 without regard to these decisions would have been to render precisely the kind of decision against which that caution is directed. The issue to which they have been applied, namely whether Section 28 could be invoked at all, was the appellant's own principal ground, and the one on which its learned counsel, upon seeking and obtaining leave to file written submissions, had further elaborated. This Tribunal has therefore done no more than answer, according to the law that binds it, the very question the appellant put before it.

27. *S.K. Timber and Co*. calls for a word of its own, both because the written submissions rested heavily upon it and because it is a decision of this Tribunal. It is a decision of a coordinate Bench and is distinguishable for the reason that what was decided there turned upon a feature which the Bench expressly recorded as being beyond dispute; and which is absent here; namely that the order sanctioning the refund had never been reviewed and never been challenged at all. In such circumstances, the notice under Section 28 having been issued some three and a half years after the sanction, was stated to be upon a mere presumption that the refund was erroneous. It was in that setting that the Bench held that the Revenue could not reopen the matter without first resorting to Section 128. The position before this Tribunal is the converse. The Department did review the orders in original under Section 129D, did carry them before the Commissioner (Appeals) under Section 128, and did succeed there. *S.K. Timber and Co.* therefore does not govern this case. Nor can it be read as holding that a notice under Section 28 becomes impermissible once the Department has also resorted to Section 128, for no such question arose before that Bench.

28. This Tribunal must also record, with respect, a reservation upon the width of what is said in that decision. The sole authority invoked there upon the point was *ITC Ltd. v. Commissioner of Central Excise, Kolkata IV, 2019 (368) E.L.T. 216 (S.C.)*, which holds that the expression any person in Section 128 is of wide amplitude and that an order of self assessment is itself appealable. That decision governs the appealability of assessments and the necessity of having an assessment modified before refund is claimed upon it. It does not consider Section 28, which itself contemplates the recovery of duty erroneously refunded, and it cannot be read as having withdrawn that limb of the section. Neither *Grasim Industries* nor *Asian Paints* appears to have been placed before that Bench, and *Morarjee Gokuldas* was then two years away. To the extent that *S.K. Timber and Co*. is

read as laying down the broad proposition that recourse to Section 28 is never open while an order sanctioning refund subsists, this Tribunal is unable, with respect, to follow it.

29. The appellant's objection does not succeed in its narrower form either. That form of the argument is that, whatever the general competence of the Department under Section 28, the course actually adopted was impermissible, since upon a single set of observations made in review the Department set two proceedings in motion, the one before the Commissioner (Appeals) and the other before the officer whose orders were under challenge in that appeal, upon the identical ground and in respect of the identical sums. The argument cannot be accepted. *Grasim Industries* and *Asian Paints* hold that the recovery provision and the review provision operate in different fields, and the Department's resort to the one did not disable it from the other. A notice of this kind issued while the appeal is pending serves an evident purpose. Section 28(1), as it then stood, required the notice to be issued within one year from the relevant date, which for duty erroneously refunded is the date of refund. The Department could not tell when its appeals would be decided, and the second of them was in fact decided only on 11.03.2016, more than thirteen months after the refund in question had been sanctioned. It is true that upon *Asian Paints* and *Morarjee Gokuldas* a successful review would itself have carried the recovery, so that no notice under Section 28 was in law necessary. But a precaution which the law renders unnecessary is not on that account an abuse of a power which the law confers.

30. Nor does the record bear out the apprehension that the officer prejudged the appeals or exposed the appellant to recovery twice over. He did not adjudicate the notices until the appellate orders had been passed, and when he did, he confirmed the demands upon nothing but those orders. The notices thus operated, in substance, as notices in aid of the Department's appeals, and the

rule that a quasi judicial authority cannot review its own order does not touch a power which Section 28 expressly confers. The third question is accordingly answered against the appellant. The notices were open to the Department to issue, and they stood or fell with the appellate orders in aid of which they came to be adjudicated. This Tribunal cannot, however, leave the notices without a remark upon the manner of their preparation. Neither notice says that it is issued to protect the revenue pending the Department's appeals, or so much as mentions those appeals. Each simply adopts the observations made in review and proposes recovery as though no other proceeding were pending upon the same question. A notice which proposes to recover money from a citizen is not a formality. Where it is issued to protect the revenue pending an appeal, it should say so, so that the assessee knows the basis upon which it is called upon to answer, and it should be prepared with the care its consequences demand.

31. The fourth question admits of a short answer, for upon the record nothing survives of these demands. Confirmed Demand Notice No.30/2016 dated 16.12.2016 confirmed the demand of Rs.9,59,242/- upon the stated premise that, in view of Final Order No.41872/2016 dated 10.10.2016, the appellant was liable to repay. That Final Order was an ex parte order which this Tribunal recalled, and in its place the appeal was allowed by Final Order No.41377 to 41380/2017 dated 28.07.2017. Confirmed Demand Notice No.33/2016 dated 26.12.2016 confirmed the demand of Rs.2,93,478/- upon the stated footing that, in view of the findings of the Commissioner (Appeals) in Order in Appeal No.1215 to 1217/2015, the appellant was liable to repay. That Order in Appeal was set aside by this Tribunal by Final Order No.40889 to 40898/2017 dated 02.06.2017. Each demand therefore rests upon a foundation which has been removed, and a demand which is expressly consequential upon an order cannot outlive that order. The same conclusion follows from the character of the show cause notices themselves. As held in answer to the third question, Show

Cause cum Demand Notice No.46/2015 and Show Cause cum Demand Notice No.60/2015 were not adjudicated upon any independent assessment of the refund claims. They were kept pending until the Department's appeals had succeeded, and were then confirmed solely on the strength of Order in Appeal No.1215 to 1217/2015 and Final Order No.41872/2016 respectively. Once this Tribunal set aside the first of those orders and recalled the second, and held on merits that the refunds had been rightly sanctioned, the only basis upon which the notices were confirmed ceased to exist, and the confirmed demands fall with it. *Morarjee Gokuldas* bolsters this view. It holds that where an order sanctioning refund is set aside in proceedings taken on review, the recovery follows from the order passed in those proceedings, and no separate notice under the recovery provision is required. A demand confirmed under Section 28 for no reason other than that the review had succeeded is therefore no more than a means of giving effect to the outcome of that review, and it cannot be enforced once that outcome has been reversed.

32. The substantive dispute has fared no better. The single ground upon which the refunds were said to be erroneous was that a sale bearing a nil rate of value added tax is not a sale upon which appropriate tax has been paid. That ground was rejected by this Tribunal in the appellant's own case, upon these very refund applications and these very orders in original, by the two Final Orders already mentioned, following *Gazal Overseas supra*. Both have attained finality and bind the parties. There is accordingly no subsisting foundation, whether formal or substantive, upon which these demands can survive.

33. It remains to consider whether this Tribunal should nonetheless remit these appeals to the Commissioner (Appeals) so that they may be heard upon the deficiency being made good, which is the course adopted in *Sportina Payce* and in *Classic Builders*. The answer lies in the difference between those cases and this one.

There the merits were alive and had never been examined by anyone, so that restoration restored something capable of decision. Here the orders upon which the demands were founded have been set aside by this Tribunal and the substantive question stands concluded between these very parties. The Commissioner (Appeals) upon remand could do nothing but record as much, judicial discipline leaving him no choice but to follow the Final Orders of this Tribunal. A remand whose outcome is foreclosed is an empty formality.

34. The law is set against remands of that kind. The Bombay High Court held in *Commissioner of Central Excise, Pune I v. Syntel International (P) Ltd., 2015 (39) S.T.R. 27 (Bom.)*, that though the power to remand is implicit in appellate power it ought not to be exercised routinely, and that it is particularly to be avoided in revenue matters, which should attain finality expeditiously. The Supreme Court reaffirmed the same approach in *Suvej Singh v. Ram Naresh, 2025 INSC 1405,* observing that while the earlier view was to remit wherever the principles of natural justice had been breached, that view has changed with the passage of time, the object being to curtail litigation and not to generate it, and that any unnecessary remand by a higher court generates a fresh round of litigation which should be avoided. That authority is relied upon only on the question whether to remit, and not as displacing *SmithKline Beecham*, which addresses a different question, namely the scope of the Tribunal's jurisdiction in an appeal from an order which did not reach the merits. These appeals concern imports of 2012 and 2013 and refunds sanctioned in 2014. To send the parties back now would serve no purpose the law recognises.

35. Before concluding, this Tribunal must say a word upon the whole course of these proceedings. The sum at stake is Rs.12,52,720/-. To hold on to it, the appellant has been made to contest two sets of proceedings running abreast upon one and the same question,

through two rounds before the first appellate authority and two rounds before this Tribunal, over more than a decade, upon a question which this Tribunal had decided in *Gazal Overseas* on 02.09.2015, before the first of the show cause notices was even issued. Speaking of a comparable experience in *Aluminium Corporation of India Ltd. v. Union of India, 1978 (2) E.L.T. 452 (S.C.)*, Krishna Iyer, J. observed that to return what has been taken wrongly is as much a duty and grace of government as to levy relentlessly and fully what is due, that default in either brings down the confidence of the community in the Administration, and that it is regrettable that a party should have been put to two expensive and elongated litigations to recover a relatively small sum. Those words fit this case. No authority may retain money which the law gives it no title to keep, as was held in *Salonah Tea Company Ltd. v. Superintendent of Taxes, Nowgong, 1988 (33) E.L.T. 249 (S.C.)*, and whatever has been recovered from the appellant in enforcement of these demands, together with the amount deposited under Section 129E, must accordingly go back to it.

36. The conclusions are summarised as follows. The appeals presented to the Commissioner (Appeals) were defective and not *non est*, the defect was curable, and their dismissal without notice of the deficiency and without any hearing was contrary to Section 128A(1) of the Act and to the principles of natural justice, though the appellant's contention that Section 129E stood complied with before that authority is not accepted. The broad proposition that Section 28 can never be invoked to recover a refund sanctioned upon adjudication is not accepted either. The notices were not invalid for having been issued while the Department's own appeals upon the very same ground were pending, but having been adjudicated in aid of those appeals and confirmed upon nothing but the orders passed in them, they stood or fell with those orders. Nothing survives of the demands, each being expressly consequential upon an order which this Tribunal has set aside or

recalled, and the substantive question having been concluded in the appellant's favour by Final Orders which have become final. No useful purpose would be served by a remand. The impugned order is accordingly liable to be set aside and the appeals are to be allowed.

37. In view of the aforesaid analysis, the impugned Order in Appeal C. Cus. II No.357 and 358/2017 dated 26.04.2017 is set aside. Confirmed Demand Notice No.30/2016 dated 16.12.2016 and Confirmed Demand Notice No.33/2016 dated 26.12.2016, and the proceedings initiated by Show Cause cum Demand Notice No.46/2015 dated 17.11.2015 and Show Cause cum Demand Notice No.60/2015 dated 30.11.2015, are set aside. Customs Appeal Nos.41713 and 41714 of 2017 are allowed with consequential relief in law, if any, including refund of the sum of Rs.1,25,272/- deposited under Section 129E of the Act and of any amount recovered from the appellant in enforcement of the demands hereby set aside.

(Order pronounced in the open court on 28.10.2026)

(AJAYAN T.V)
Member (Judicial)

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