IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	18.01.2020
Pronounced On	25.01.2021

CORAM

THE HON'BLE **MR.JUSTICE C.SARAVANAN**

W.P.No.1879 of 2007
and
M.P.Nos.1 of 2007 & 01 of 2008

(Through Video Conferencing)

The Daily Thanthi,
86, E.V.K.Sampath Road,
Chennai – 600 007.
Rep. by its General Manager,
Administration. ... Petitioner

Vs.

1.Commissioner of Customs (Appeals),
60, Rajaji Salai, Custom House,
Chennai – 600 001.

2.Assistant Commissioner of Customs,
Refunds, Custom House,
Chennai – 600 001. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus calling for the records of the first respondent culminating in his Order-in-Appeal No.C.CUS.844/06 bearing

Ref.C3/659/R/2006-SEA dated 21.11.2006 and quash the same and direct the respondents to refund of a sum of Rs.88,44,510/- along with interest @ 12% per annum from 31.03.2005 (i.e. date of Supreme Court Judgment) till the date of payment.

For Petitioner : Mr.S.Murugappan

For Respondents : Mrs.Apaarna Nandakumar, CGSC.

ORDER

This Writ Petition has been filed by the petitioner to direct the respondents to refund the amount of Rs.88,44,510/- paid by the petitioner during the pendency of its appeal before the Hon'ble Supreme Court in C.A.Nos.3558 and 3559 of 2000 along with interest at 12% per annum from 31.03.2005 (i.e. date of Supreme Court Judgment) till the date of payment.

2. The said appeal was filed against Final Order Nos.203-205 dated 07.02.2005 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Chennai [CEGAT for brevity]. CEGAT which is now called as the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) had partly allowed and partly dismissed the petitioner's appeals vide the aforesaid common order.

3. The aforesaid amount of Rs.88,44,510/- was paid by the petitioner on 21.03.2001 “under protest” pending disposal of the above appeals before the Hon'ble Supreme Court in C.A.Nos.3558 and 3559 of 2000 as the Hon'ble Supreme Court had merely ordered notice on the respondents while admitting the appeal on 17.07.2000. The stay petition filed by the petitioner against Final Order Nos. 203-205 dated 07.02.2005 of the CEGAT was also dismissed on 6.11.2000.

4. Under these circumstances, a recovery notice was issued on 29.09.2000 to the petitioner, which called upon the petitioner to pay the aforesaid amount. Therefore, the petitioner paid the aforesaid amount “under protest” on 21.03.2001. Eventually, the Hon’ble Supreme Court allowed the appeal filed by the Petitioner on 07.04.2005. Under these circumstances, the petitioner approached the respondents and thereafter before this Court in the present writ petition.

5. The facts relevant to the present case are detailed hereinafter. The petitioner had earlier imported certain machineries for its printing purpose and availed the benefit of Customs Notification No.114/1980-Cus dated

19.6.1980.

6. The petitioner filed 3 bills of entries. These bills of entries were assessed by the proper officer of the Customs Department under Section 17 of the Customs Act, 1962 and the benefit of the exemption under the aforesaid Customs Notification was allowed to the petitioner at the time of clearance during October 1986, February 1987 and July 1987.

7. However, the petitioner was thereafter issued with 3 Show Cause Notices under Section 28 of the Customs Act, 1962 as detailed below and the benefit of aforesaid exemption notification was sought to be denied to the petitioner:-

Bill of Entry No. and Date	***Show Cause Notice No.***	***Differential Duty Payable***
3769 - 27.10.1986	S8/340/87 SIB	Rs.41,17,258.00
4233- 25.02. 1987	S8/221/87 SIB	Rs.43,18,699.00
9006- 20.07. 1987	S8/238/87 SIB	Rs.45,25,811.70

8. These Show Cause Notices culminated in a Common Order Nos.S8/221, 238, 240 & 340/87 SIB/24/87 dated 15.06.1988 of the Commissioner of the Customs (formerly Collector of Customs).

9. The petitioner therefore filed writ petition in W.P.No.7801 of 1988 before this Court. By an order dated 26.04.1993, W.P.No.7801 of 1988 came to be disposed with a direction to the petitioner to approach CEGAT, Chennai.

10. Under these circumstances, the petitioner approached CEGAT. Ultimately, CEGAT, Chennai as it was called then disposed these appeals by its Final Order Nos.203-205/2000 dated 07.02.2000 and partly set aside the demand for a sum of Rs.41,17,258/- covered by Bill of Entry No.3769 dated 27.06.1986 in Show Cause Notice No.S8/340/87 SIB on the ground of time bar.

11. CEGAT, Chennai however confirmed a demand for a sum of Rs.88,44,510/- (43,18,699.00 + 45,25,811.70) with respect to the other two imports covered under two other bills of entry and show cause notices

referred to above.

12. It was under these circumstances, the petitioner filed C.A.Nos.3558 and 3559 of 2000 before the Hon'ble Supreme Court and the above amount was paid "under protest" by the petitioner on 21.03.2001 pending disposal of its appeals in C.A.Nos.3558 and 3559 of 2000.

13. As mentioned above, the Hon'ble Supreme Court vide order dated 31.03.2005 allowed C.A.Nos.3558 and 3559 of 2000 filed by the petitioner with the following observations:-

> "10. *This appeal must, however, be allowed on the short ground that the respondent authorities have taken an inconsistent stand. From the narration of facts it is clear that the Commissioner had proceeded on the basis of the capacity of the imported machines and not their actual production. The show cause notice had also been issued on this basis. The Tribunal, on the other hand, has categorically rejected the "capacity test" and has come to the conclusion that the capacity was irrelevant. It held that the interpretation of the notification in fact shows that the only test was whether the output of a machine in one hour was 30,000 copies per hour in actuality and not whether the machine was designed or capacity of X or Y at speeds P & Q."*

14. Pursuant to the favourable disposal of the above appeals on 31.03.2005 by the Hon'ble Supreme Court, the petitioner preferred a refund

claim before the 2nd respondent on 18.05.2005. The office of the Deputy Commissioner of Customs therefore issued letter dated 06.01.2006 and called upon the petitioner to furnish their books of account from the date of payment of aforesaid amount till date for ruling out bar of unjust enrichment under Section 27 of the Customs Act, 1962.

15. The petitioner resisted the aforesaid attempt and tried to establish before the Deputy Commissioner of Customs that the amount that was paid by it was merely a pre-deposit pending disposal of the appeals and not a "duty" for the purpose of refund under Section 27 of the Customs Act, 1962 and therefore the petitioner was not required to establish unjust enrichment.

16. The Deputy Commissioner of Customs (Refunds) granted personal hearing to the petitioner on 19.01.2006. During the hearing, the petitioner explained that the amount that was paid by it on 21.03.2001 vide miscellaneous challan was pursuant to a recovery notice issued to it pending disposal of its appeals before the Hon'ble Supreme Court in C.A.Nos.3558 and 3559 of 2000 and therefore the amount that was paid was not a "duty" and therefore question of invoking the doctrine of "unjust enrichment"

under Section 27 of the Customs Act, 1962 did not arise.

17. It was submitted that the amounts were paid long after clearance of the imported machineries and therefore it was absurd to invoke "unjust enrichment" as question of "unjust enrichment" does not arise at all.

18. The 2nd respondent however rejected the refund claim and passed Order-in-Original No.5430 of 2006 bearing reference File No.S25/7550736/2005 (Refunds) dated 30.08.2006.

19. By the said order, the 2nd respondent sanctioned the refund claim to the petitioner under Section 27 of the Customs Act, 1962 and ordered the same to be credited to the Consumer Welfare Fund of India. The operative portion of the said order reads as under:-

> "The claimant contends that differential duty, on account of the said imports, was paid 12 years after the import clearance thereby leaving no room for the importer to pass the burden in any subsequent transaction.
> The Hon'ble Tribunal Judgments in the case of **Plas Pack Industries Vs CCE., Ahmedabad** - reported in 2004 (167) ELT 422 and **Silwester Textiles P Ltd** Vs. **CCE., Mumbai,** reported in 2003 (156) ELT 216 (T)

> has been relied upon by the claimant. The Hon'ble Tribunal had held that whenever and wherever duty has been paid subsequent to clearance of goods, at the instance of the Department, the appellant could not have passed on the duty benefit to their customers at the time of clearance of the goods. However, this contention of the appellant is also not acceptable as the goods are imported capital goods. The total value of capital goods will not be absorbed during single financial year as would in the case of any raw material; hence the argument of payment of duty at later date holds no good."

20. Under these circumstances, the petitioner filed an appeal before the 1st respondent Commissioner of Customs (Appeals). Vide impugned order in Appeal No.C.CUS.844/06 dated 21.11.2006 bearing reference No.C3/659/R/2006-SEA, the 1st respondent remanded the case back to the 2nd respondent to decide the issue de novo on the ground as to whether the incidents customs duty had been passed on to the consumer or not.

21. Pursuant to Order-in-Appeal No.C.CUS.844/06 dated 21.11.2006 bearing Reference No.C3/659/R/2006-SEA of the 1st respondent Commissioner of Customs (Appeals), the office of the Deputy Commissioner of Customs (Refunds) vide communication dated 29.11.2006 also called upon the petitioner to produce documentary evidence to

substantiate that there was no "unjust enrichment".

22. Aggrieved by the impugned Order in Appeal No.C.CUS.844/06 dated 21.11.2006 bearing Reference No.C3/659/R/2006-SEA passed by the 1st respondent, the petitioner has filed this writ petition to quash the order of the 1st respondent and to consequently direct the respondents to refund the amount paid by the petitioner pending disposal of the appeals before the Hon'ble Supreme Court together with interest at 12% per annum from 31.03.2005 till the date of payment.

23. The learned counsel for the petitioner Mr.S.Murugappan submitted that the amount was paid by the petitioner "under protest" pending the appeals before the Hon'ble Supreme Court as no stay was granted against the common order of the CEGAT and only notice was ordered. Therefore, a recovery notice dated 29.09.2000 was issued to the petitioner and therefore, the amount was paid by the petitioner on 21.03.2001 "under protest".

24. It is therefore submitted that the refund of the amount paid pending disposal of appeals cannot be subject to the doctrine of "unjust

enrichment".

25. The learned counsel for the petitioner submitted that the issue was *no longer res-integra* and was squarely covered by a plethora decisions of the Courts and Tribunal and therefore prayed for allowing this writ petition. He placed reliance on the following decisions of the Hon'ble Supreme Court:-

i. **Gujarat Insecticides Ltd.,** Vs **Union of India**, 2005 (183) E.L.T. 9 (Guj.,)
ii. **Union of India** Vs **Gujarat Insecticides Ltd.,** 2015 (326) E.L.T 428 S.C.)
iii. **Parle International Ltd.,** Vs **Union of India**, 2001 (127) E.L.T.329 Guj.)
iv. **Sinkhai Synthetics & Chemicals Pvt. Ltd.,** Vs **C.C.E.,Aurangabad,** 2002 (143) E.L.T 17 (S.C.)
v. **Commissioner** Vs **Parle International Ltd.,** 2005 (188) E.L.T. A81 (S.C.)
vi. **Commissioner of Central Excise, Mumbai** Vs **Allied Photographics India Ltd.,** 2004 (166) E.L.T. 3 (S.C.)
vii. **Sahakari Khand Udyog Mandal Ltd.**, Vs **Commissioner of Central Excise & Customs,** 2005 (181) E.L.T. 328 (S.C.)
viii. **Union of India** Vs **Solar Pesticide Pvt. Ltd.,** 2000 (116) E.L.T. 401 (S.C.)
ix. **Collr of Customs, Madras** Vs **Indo-Swiss Synthetic Gem Mfg. Co, Ltd.,** 2003 (162) E.L.T. 121 (Mad.)
x. **Commissioner of Customs, Chennai** Vs **Venkateswara Hospitals,** 2015 (323) E.L.T. 359 (Mad.)
xi. **Commissioner of Customs, Cochin** Vs **Westfort Hi-tech**

Hospital Ltd., 2018 (361) E.L.T. 355 (Ker.)

xii. **Golden Iron & Steel Forgings** Vs **Commissioner of Customs, Mumbai**, 2003 (157) E.L.T. 650 (Tri. - Del.)

xiii. **Grasim Industries** Vs **Commissioner of Central Excise, Chennai,** 2003 (157) E.L.T. 123 (Tri. - Chennai)

xiv. **SRF Ltd** Vs **Commissioner of Customs, Chennai,** 2006 (193) E.L.T. 186 (Tri. - LB)

xv. **Commissioner of Central Excise, Chennai** Vs **Grasim Industries,** 2015 (318) E.L.T.594 (S.C.)

xvi. **ModipinFibre Co.,** Vs **Commissioner of Central Excise, Ghaziabad,** 2004 (173) E.L.T. 168 (Tri. - Del.)

xvii. **Plas Pack Industries** Vs **Commissioner of Customs & Central Excise, Ahmedabad,** 2004 (167) E.L.T 422 (Tri. - Mumbai)

xviii. **Silwester Textiles Pvt. Ltd.,** Vs **Commissioner of Central Excise, Mumbai,** 2003 (156) E.L.T. 216 (Tri. - Mumbai)

xix. **Commissioner of Customs, Ahmedabad** Vs **Mahalaxmi Exports,** 2009 (233) E.L.T. 105 (Tri. - Ahmd.)

xx. **Commissioner of Customs** Vs **Mahalaxmi Exports**, 2010 (258) E.L.T. 217 (Guj.)

xxi. **Commissioner of Central Excise, Pune** Vs **Rocket Engineering Corporation Ltd.,** 2014 (306) E.L.T. 33 (Bom.)

xxii. **Commissioner of Central Excise, Chandigarh** Vs **Modi Oil & General Mills, 2007** (210) E.L.T. 342 (P & H)

xxiii. **Commissioner of Customs, Cochin** Vs **Shree Simandar Enterprises**, 2012 (283) E.L.T. 369 (Ker.)

26. He also referred to the few other decisions of this Court in **Commissioner of Central Excise** Vs **UCAL**, 2014 (306) ELT 26 and

several decisions of the Tribunals, wherein, amounts paid pending appeals were ordered to be refunded.

27. The learned counsel for the petitioner specifically relies on the decision of the Hon'ble Gujarat High Court in **Gujarat Insecticides Ltd.,** Vs. **Union of India**, 2005 (183) E.L.T. 9 (Guj.,) as affirmed in **Union of India** Vs. **Gujarat Insecticides Ltd.,** 2015 (326) E.L.T 428 (S.C.) and therefore prays for allowing the present writ petition.

28. The learned counsel for the petitioner also drew my attention to paragraph No.86 of decision of the Hon'ble Supreme Court in the case of **Mafatlal Industries Limited and others** Vs. **Union of India (UOI) and others,** reported in 1997 (89) ELT247.

29. He submits that only in case of refund of amounts paid in excess as duty pursuant to an order of assessment under Section 17 of the Customs Ac, 1962, question of invocation of unjust enrichment can be justified. He further submits that the imported goods were cleared after assessment of the respective bills of entries after the benefit of Customs Notification

No.114/1980-Cus dated 19.06.1980 was allowed to the petitioner and on payment of duty under Section 12 of the Customs Act, 1962.

30. He further submits that after the exemption was granted to the petitioner on the imported machineries, the exemption was sought to be denied to the petitioner and therefore Show Cause proceedings were initiated against the petitioner which culminated in an adverse order of the Commissioner and CEGAT.

31. It is further submitted that even before the CEGAT, there was a complete waiver of pre-deposit under Section 129E of the Customs Act,1962 and thereafter the appeal was taken up on merits and was disposed by the CEGAT by partly allowing and partly dismissing the petitioner's appeal before it.

32. It is submitted that under these circumstances, against the order of the CEGAT, Civil Appeal Nos.3558 - 3559 of 2000 was filed before the Hon'ble Supreme Court. Since the payment was made pending disposal of the appeal, question of subjecting the petitioner to Section 27 of the

Customs Act, 1962 was wholly misplaced.

33. As the said order was eventually set aside by the Hon'ble Supreme Court by its final order dated 06.11.2000 in Civil Appeal Nos.3558 - 3559 of 2000, the petitioner became entitled to the amounts paid by the petitioner pending the appeals.

34. It is submitted that the petitioner had not claimed refund of any amount that was paid as duty under Section 12 of the Customs Act, 1962 but refund of amount paid pending disposal of the appeals before the Hon'ble Supreme Court, as the Hon'ble Supreme Court had declined to grant stay in Civil Appeal Nos.3558-3559 of 2000 vide order dated 06.11.2000.

35. He therefore submits that the amount paid by the petitioner vide Miscellaneous Challan on 21.03.2001 was not a “refund of duty or interest” under Section 27 of the Customs Act, 1962 during the material time and therefore the question of invoking unjust enrichment did not apply.

36. It was further submitted that it was not even necessary to file an application for refund as per circular dated 02.01.2002 bearing reference

No.C.B.E. & C Circular F. No.275/37/2000-CX.8A of the Central Board of Excise and Customs.

37. The learned counsel for the respondent Mrs.Apaarna Nandakumar submits that the amount which was paid by the petitioner in the year 2001 was not a pre-deposit within the meaning of Section 129E of the Customs Act, 1962 and therefore the amount paid by the petitioner has to pass a mandatory test of "unjust enrichment" as is contemplated under Section 27 of the Customs Act, 1962.

38. In this connection, the learned counsel for the petitioner drew my attention to few passages from the decision of the Hon'ble Supreme Court in the case of **Mafatlal Industries Limited and others** Vs. **Union of India (UOI) and others,** 1997 (89) ELT 247.

39. She further relies on the decision of the Hon'ble Supreme Court in the case of **Allied Photographic India Limited** Vs. **Commissioner of Central Excise Mumbai-II,** 2004 (166) E.L.T. 3 (S.C.). A specific reference was made to paragraph 7 which reads as under:-

7.Before analysing Section 11B, it is important to note that there is a difference between making of refund and claiming of refund. Section 11B was inserted in the said Act w.e.f 17.11.1980. Under Sub-clause (e) to Explanation B to Section 11(B)1, where assessment was made provisionally the relevant date for commencement of limitation of six months was the date of adjustment of duty as final assessment. Entitlement to refund would thus be known only when duty was finally adjusted. Sub-clause (e) referred to limitation in cases covered by Rule 9B which dealt with duty paid under provisional assessment. The said rule started with a non-substantiate clause. Rule 9B (1)(a) to (c) indicated the circumstances in which the proper officer would allow provisional assessment. Rule 9B(4) dealt with clearance of goods provisionally assessed whereas Rule 9B(5) dealt with adjustment of provisionally assessed duty against finally assessed duty. The said Rule 9B was a complete code by itself. On compliance with the conditions therein, the proper officer was duty bound to refund the duty without requiring the assessee to make a separate refund application. **The said rule, therefore, provided for making of refund.On the other hand, Section 11B(1) dealt with claiming of refund by the person who has paid duty on his own accord.**In this connection, Section 4 of the said Act is relevant. In the case of Bombay Tyre (supra) it has been held that Section 3 of the Act refers to levy of duty whereas Section 4 dealt with assessment. Assessment means determination of the tax liability. Under the Act, duty was payable by the manufacturer on his own account. Hence, under Section 11B(1), such a person had to claim refund by making an application within six months from the relevant date except in cases where duty was paid under protest in terms of the proviso. **However, even in such cases, the person claiming refund had to pay the duty under protest in terms of**

prescribed rules. A bare reading of Section 11B(1), therefore, shows that it refers to claim for refund by the proper officer under Rule 9B.

40. She also drew my attention to the decision of the Gujarat High Court in **Ajni Interiors** Vs. **Union of India and Ors**., MANU/GJ/1628/2019. She submits that the Gujarat High Court has taken a contra view while dealing with a similar circumstances. She submits that view was recently affirmed by the Hon'ble Supreme Court by its order dated 20.2.2020 while dismissing the appeal of the assessee therein in SLP (Civil) Diary No.3952 of 2020 reported. She therefore submits that the decision of the Gujarat High Court in **Gujarat Insecticides Ltd.,** Vs. **Union of India**, 2005 (183) E.L.T. 9 (Guj.) though affirmed by the Hon'ble Supreme Court earlier cannot be taken as a binding precedent.

41. The learned counsel for the respondent therefore submitted that the amount that was paid during the pendency of the appeals before the Hon'ble Supreme Court was not a pre-deposit. It was a "duty" paid "under protest" and therefore the petitioner had also rightly made a refund claim on 13.04.2005.

42. It is submitted that even in the said letter the petitioner had clearly stated that the amount that was to be refunded was the "customs duty" amounting to a sum of Rs.88,44,510/- and therefore this Writ Petition filed for a direction to refund ignoring Section 27 of the Customs Act, 1962 was liable to be dismissed.

43. The learned counsel for the respondent further referred to the decision of the Hon'ble Supreme Court in **Grasim Industries** Vs. **Commissioner of Central Excise, Chennai –III**, 2015 (318) E.L.T.594 (S.C.), wherein, it was held the doctrine of "unjust enrichment" applies even to capital goods. Finally, the learned counsel for the respondent submitted that the impugned order which has been challenged in this Writ Petition has merely remanded the case back to the Assistant Commissioner of Customs to examine and pass appropriate order and therefore this Writ Petition was liable to be dismissed.

44. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent.

45. Before proceeding with the merits of the case, I shall first answer the fundamental question as far as jurisdiction of this Court to entertain this writ petition.

46. The Hon'ble Supreme Court held that "***So far as the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32 is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.***"

47. Again in **UOI** Vs. **Mangal Textiles Mills (I) P Ltd.**, (2010) 14 SCC 553, the Hon'ble Supreme Court observed that the power to issue prerogative writ petition under Article 226 of the Constitution of India is plenary in nature and cannot be curtailed by other provisions of the Constitution or a Statute.

48. Thus, this Court has jurisdiction to entertain a writ petition even if it is assumed that provisions of the Section 27 of the Customs Act, 1962 are attracted or an alternate remedy exist. It would be unfair to relegate the petitioner to an alternate remedy at this distant point of time after a lapse of 13 years since the filing of this writ petition either to CESTAT or to the 2nd respondent to comply with the directions of the 1st respondent in the facts of this case. Hence, this case is examined on merits and disposed.

49. Before dealing further, I shall proceed to deal with the objection of the learned counsel for the respondents based on the decision of the Gujart High Court in **Ajni Interior** Vs. **Union of India** MANU/GJ/1628/2019.

50. The Court there dealt with a facts situation where the amount was deposited pending investigation and not during the pendency of the appeal. The amount was not paid "under protest". Therefore, the Hon'ble Gujrarat High Court rejected the prayer for refund.

51. Therefore, it cannot be said that the said decision was an authority to hold that amount paid pending investigation was an amount paid pending disposal of the appeal.

52. The Hon'ble Supreme Court in para 92 in **Mafatlal Industries** Vs **UOI,** 1997 (89) ELT 247 : (1997) 5 SCC 536 has observed as follows:-

> **92.** ……..**Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11-B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned counsel.**

53. Again in para 91, the Hon'ble Supreme Court in **Mafatlal**

Industries Vs **UOI,** 1997 (89) ELT 247 : (1997) 5 SCC 536 has also observed as follows:-

> "***All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so***."

54. The Hon'ble Supreme Court in **Mafatlal Industries Ltd** Vs. **Union of India**, 1997 (89) ELT 247 : (1997) 5 SCC 536 has also observed as follows:-

> "***We do not think it is possible to agree. Such a holding would run against the very grain of the entire philosophy underlying the 1991 Amendment. The idea underlying the said provisions is that no refund shall be ordered unless the claimant establishes that he has not passed on the burden to others. Sub-section (3) of the amended Section 11-B is emphatic. It leaves no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. There is no reason why an exception should be made in favour of such claims which would nullify the provision to a substantial degree. So far as "lack of incentive" argument is concerned, it has no doubt given us a pause; it is certainly a substantial plea, but there are adequate answers to it. Firstly, the rule means that only the person who has actually suffered loss or prejudice***

would fight the levy and apply for refund in case of success. Secondly, in a competitive market economy, as the one we have embarked upon since 1991-92, the manufacturer's self interest lies in producing more and selling it at competitive prices — the urge to grow. A favourable decision does not merely mean refund; it has a beneficial effect for the subsequent period as well. It is incorrect to suggest that the disputes regarding classification, valuation and claims for exemptions are fought only for refund; it is for more substantial reasons, though the prospect of refund is certainly an added attraction. It may, therefore, be not entirely right to say that the prospect of not getting the refund would dissuade the manufacturers from agitating the questions of exigibility, classification, approval of price lists or the benefit of exemption notifications. The disincentive, if any, would not be significant. In this context, it would be relevant to point out that the position was no different under Rule 11, or for that matter Section 11-B, prior to its amendment in 1991. Sub-rules (3) and (4) of Rule 11 (as it obtained between 6-8-1977 and 17-11-1980) read together indicate that even a claim for refund arising as a result of an appellate or other order of a superior court/authority was within the purview of the said rule though treated differently. The same position continued under Section 11-B, prior to its amendment in 1991. Sub-sections (3) and (4) of this section are in the same terms as sub-rules (3) and (4) of Rule 11; if anything, sub-section (5) was more specific and emphatic. It made the provisions of Section 11-B exhaustive on the question of refund and excluded the jurisdiction of the civil court in respect of all refund claims. Sub-rule (3) of Rule 11 or sub-section (3) of Section 11-B (prior to 1991) did not say that refund claims arising out of or as a result of the orders of a superior authority or court are outside the purview of Rule 11/Section 11-B. They

> ***only dispensed with the requirement of an application by the person concerned which consequentially meant non-application of the rule of limitation; otherwise, in all other respects, even such refund claims had to be dealt with under Rule 11/Section 11-B alone. That is the plain meaning of sub-rule (3) of Rule 11 and sub-sections (3) and (4) of Section 11-B (prior to 1991 Amendment). There is no departure from that position under the amended Section 11-B.***

55. The above observation was made in the context in response to the following submission of the assessee in **Mafatlal Industries Ltd versus Union of India** 1997 (89) ELT 247 : (1997) 5 SCC 536:-

> "*There is no reason why a person who becomes entitled to refund of duty as a result of appellate or court order should also be made to apply and satisfy all the requirements of sub-sections (1) and (2) of Section 11-B (amended) when he is entitled to such refund as a matter of right. Shri Nariman submits that if a manufacturer/assessee, who succeeds in vindicating his claim after a long fight — may be, up to this Court — and applies for refund is asked to satisfy that he has not passed on the burden of tax to another, he would rather keep quiet than fighting the levy. There would be no incentive for him to file the appeal/appeals or approach the higher courts which also involves substantial expense. If after all this fight and expense, he is to be denied the refund on the ground that he has passed on the burden of duty to third parties, why should he fight and spend money for fighting the litigation, says the counsel. Shri Sorabjee and Shri Salve too emphasised this aspect and said that this*

> *situation would lead to many an undesirable consequence. The assessing/approving officer (original authority) would become the monarch; whatever he says would be the law since there would be nobody interested in challenging his order. Illegal levies would become the order of the day. Such a situation, the learned counsel point out, is neither in the interest of law nor in the interest of consumer or the larger public interest. It is accordingly submitted that it would be just and proper that the amended Section 11-B is held not to take in refund claims arising as a consequence of appellate or a superior court order.*

56. It must be also recalled in the aforesaid decision of the Gujarat High Court in **Ajni Interior** Vs. **Union of India**, MANU/GJ/1628/2019 referred to *supra*, the decision of the Hon'ble Supreme Court in **Mafatlal Industries Ltd** Vs. **UOI**, 1997 (98) ELT 247 : (1997) 5 SCC 536 has not been taken note, wherein, it has clearly held that "***Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11-B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned counsel".***

57. Though paragraph No.92 in **Mafatlal Industries Ltd** Vs. **UOI** 1997 (98) ELT 247 : (1997) 5 SCC 536 as extracted above was not noted by the Gujarat High Court in **Ajni Interiors** case referred to *supra*, it is clear that both paragraph No.91 and paragraph No.92 of the decision of the Hon'ble Supreme Court in **Mafatlal Industries Ltd.** Vs. **Union of India** 1997(89) ELT 247 : (1997) 5 SCC 536 that not only amounts paid pending investigation but also disposal of appeals are subject to refund procedure under Section 11B of the Central Excise Act, 1944 and Section 27 of the Customs Act, 1962.

58. If the above passages in paragraph Nos.91 and 92 the Hon'ble Supreme Court can be said to have laid down the law, then all refund of amounts paid for the purpose of pre-deposit under Section 129E and Section 131 of the of the Customs Act, 1962 and Section 35F and 35N of Central Excise Act, 1944 are also to be governed by Section 27 of the Customs Act, 1962 and Section 11B of the Central Excise Act, 1944 respectively.

59. If the above passage in 91 of the **Mafatlal Industries** Vs. **UOI**,

1997 (89) ELT 247 : (1997) 5 SCC 536 was to be considered as law declared by the Hon'ble Supreme Court under Art.141 of the Constitution of India, this writ petition has to be dismissed without further deliberation.

60. Therefore, several decisions Courts, in **Gujarat Insecticides Ltd.** Vs. **Union of India**, 2005 (183) E.L.T. 9 (Guj.) as affirmed by the Hon'ble Supreme Court in **Union of India** Vs. **Gujarat Insecticides Ltd.**, 2015 (326) E.L.T. 428 (S.C.), Bombay High Court in **Suvidhe Ltd.** Vs. **Union of India,** 1986 (82) E.L.T. 177 (Bom.) and decision of the Hon'ble Supreme Court in **Union of India** Vs. **Suvidhe Ltd**. (2016) 11 SCC 808, in **Mahavir Aluminium** Vs. **CCE,** (1999) 6 SCC 65 , in **Commr. of Customs (Import)** Vs. **Finacord Chemicals (P) Ltd.,** (2015) 15 SCC 697, in **Commr. of Customs (Import)** Vs. **Finacord Chemicals (P) Ltd.,** (2015) 15 SCC 697, **UCAL Fuels systems Case**, 2014 (306) ELT 26(Mad) and few other decisions, wherein, it has been held that refund of pre-deposit made pending appeal were outside the purview of Section 27 of the Customs Act, 1962 and 11B of the Central Excise Act, 1944 would have to be construed as having passed contrary to decision of the Hon'ble Supreme Court in **Mafatlal Industries Ltd** Vs. **UOI**, 1997(98) ELT 247 : (1997) 5 SCC 536.

61. In **Suvidhe Ltd.** Vs. **Union of India**, (1996) 82 ELT 177 (Bom), the Bombay High Court had held that the claim raised by the Department in the show cause notice is thoroughly *dishonest and baseless*. It held that in respect of a deposit made under Section 35-F, provisions of Section 11-B can never be applicable. A deposit under Section 35-F is not a payment of duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief.

62. The decision of the Bombay High Court was challenged before the Hon'ble Supreme Court. The view was followed / approved in **Mahavir Aluminium** Vs. **CCE,** (1999) 6 SCC 65 , in **Commr. of Customs (Import)** Vs. **Finacord Chemicals (P) Ltd.,** (2015) 15 SCC 697, in **Commr. of Customs (Import)** Vs. **Finacord Chemicals (P.) Ltd.,** (2015) 15 SCC 697 and few other decisions.

63. The dicta / ratio of the Bombay High Court **Suvidhe Ltd.** Vs. **Union of India**, (1996) 82 ELT 177 (Bom) was affirmed by the

Hon'ble Supreme Court in **Union of India** Vs. **Suvidhe Ltd**., (2016) 11 SCC 808.

64. In fact, the Central Board of Excise and Customs accepted the decision of the Bombay High Court in **Suvidhe Ltd.** Vs. **Union of India**, (1996) 82 ELT 177 (Bom) and released guidelines on 02.01.2002 vide CBEC Circular bearing reference F.No.275/37/2000-CX for refund of pre-deposits made under Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962. The said clarification followed the decision of Bombay High Court's in **Nelco Ltd.** Vs. **Union of India,** (2002) 144 ELT 56 (Bom) as the departments appeal was dismissed by the Hon'ble Supreme Court in **Union of India** Vs. **Nelco Ltd**. vide its order dated 26-11-2001 in SLP (C) No. 21100 of 2001.

65. The clarification of the Central Board of Excise and Customs is reproduced below:-

F.No. 275/37/2000-CX.8A
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Excise & Customs)
Legal Cell

New Delhi, the 2nd January, 2002.

1. All Chief Commissioners of Customs / Central Excise.
2. All Director Generals
3. A11 Commissioners of Central excise
4. All Commissioners of Customs.
5.

Sub:- Return of deposits made in terms of Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 – Reg.

1. The issue relating to refund of pre-deposit made during the pendency of appeal was discussed in the Board Meeting. It was decided that since the practice in the Department had all along been to consider such deposits as other than duty , such deposits should be returned in the event of the appellant succeeds in appeal or the matter is remanded for fresh adjudication.

2. It would be pertinent to mention that the Revenue had recently flied a Special Leave Petition against Mumbai High Court's order in the matter of NELCO Ltd, challenging the grant of interest on delayed refund of pre-deposit as to whether:

   i. the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,
   ii. the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.

   The Hon'ble Supreme Court vide its order dated 26.11.2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be construed in the light of its earlier judgment in the case of Suvidhe Ltd. and Mahavir Aluminium that the law relating to refund of pre-deposit has become final.

3. **In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11 B(1) of the Central Excise Act,1944 or under Section 27(1} of the Customs Act, 1962 need not be insisted upon. A simple letter from the**

person who has made such deposit, requesting the return of the amount, along with an attested xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested xerox copy of the Challan in Form TR 6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant / Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications already made under the relevant provisions of the Indirect Tax Enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly. bank guarantees executed in lieu of cash deposits shall also be returned.

4. The above instructions may be brought to the notice of the field formations with a request to comply with the directions and settle all the claims without any further delay. Any deviation and resultant liability to interest on delayed refunds shall be viewed strictly.

5. All the trade associations may be requested to bring the contents of this circular to the knowledge of their members and the trade in general.

6. Kindly acknowledge receipt.

(Lakhinder Singh)
Joint Secretary to the Government of India

66. The Chennai Commissionerate also circulated the above clarification vide Trade Notice No.03/2002 dated 17.01.2002. Again Circular No. 802/35/2004-CX dated 08.12.2004 was issued by the Central Board of Excise and Customs, wherein, it was emphasised that such amounts should be refunded immediately as non-returning of the deposits

attracts interest that has been granted by the Tribunal in a number of cases. Paragraph Nos.3 to 5 of the said circular read as under:-

> 3. The Board has noted the observations of the Hon'ble Supreme Court in its order dated 21.9.2004 and has decided that pre-deposits shall be returned within a period of three months of the disposal of the appeals in the assessee's favour.
>
> 4. Accordingly, the contents of the Circular No. 275/37/2000-CX.8A dated 02.01.2002, as to the modalities for return of the pre-deposits are reiterated. It is again reiterated that in terms of Hon'ble Supreme Court's order such pre-deposit must be returned within 3 months from the date of the order passed by the Appellate Tribunal/Court or other Final Authority unless there is a stay on the order of the Final Authority/CESTAT/Court, by a superior Court.
>
> 5. Delay beyond this period of three months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the concerned defaulting officers. All concerned are requested to note that default will entail an interest liability, if such liability accrues by reason of any orders of the CESTAT/Court, such orders will have to be complied with and it may be recoverable from the concerned officers.

67. The observations of the Hon'ble Supreme Court in **Mafatlal Industries Ltd** Vs. **UOI**, 1997(98) ELT 247 : (1997) 5 SCC 536 in paragraph 91 and 92 were made without considering the operations of other provisions of the Act and therefore cannot construed as having laid down

the law. It cannot be said that the Hon'ble Supreme Court has laid down a proposition of law on the other provisions of the respective Acts.

68. No order was required either under Section 129E or Section 35F of the respective enactments for deposit the disputed duty or penalty as a condition for hearing the appeal. Only when a person seeks for waiver or partial waiver, an order was required to be passed. These provisions have been liberalized in 2014. Now the maximum amount of pre-deposit has now been capped to 7.5% at the stage of first appeal and 10% at the stage of second appeal before the CESTAT.

69. When the appeals were filed by the petitioner before the Hon'ble Supreme Court, the petitioner was enjoined to pay the sums due to the Government as a result of an order passed under sub-section (1) of Section 129-B of the Customs Act, 1962 and 35C of Central Excise Act, 1944 in accordance with the order so passed by CESTAT.

70. As per these provisions, notwithstanding a reference has been made to the High Court or to the Supreme Court or an appeal has been

preferred to the Supreme Court under the Act, Section 131 of the Customs Act, 1962 and/or Section 35N of the Central Excise Act, 1944, as the case may be, payments are to be made.

71. It should be also noted that Section 129E of the Customs Act, 1962 (as also Section 35F of the Central Excise Act,1944) contemplates pre-deposit of the duty or penalty confirmed by the adjudicating authority as a condition for entertaining appeal.

72. Similarly, as per Section 131 of the Customs Act, 1962 (as also Section 35N of the Central Excise Act, 1944), an importer or the manufacturer as the case are required to pay the "sums due" to the Government as a result of the order of the CESTAT in accordance of the order when such order of the CESTAT is put to jeopardy by way of appeal or reference before the High Court or Supreme Court.

73. Deposits under Section 129E and Section 35F of the Central Excise Act, 1944 are made as a condition for hearing. Whereas, payments under Section 131 of the Customs Act, 1962 and Section 35N of the Central

Excise Act, 1944 are not made as a condition for hearing appeal or reference before the High Courts or the Supreme Court.

74. There are payments which were required to be made at the stage of first appeal and 2nd appeal before the Appellate Commissioner and the Tribunal (CESTAT formerly CEGAT) but were waived by these appellate bodies under the scheme of the Act.

75. Therefore, the payments under Section 131 of the Customs Act, 1962 and Section 35N of the Central Excise Act, 1944 are payments which were delayed. Payments under all these provisions are also in the nature of pre-deposit are under the Act pending disposal of the appeals whether before the Appellate Commissioner and CESTAT or the High Court. They are not paid as duties.

76. Such payment will partake the colour of a "duty" only if the importer or the manufacturer accepts the decision of the CESTAT and does not put such order/decision to jeopardy by way of an appeal or reference.

77. Thus, if such payments are made pending appeal for want of stay order, it has to be considered as pre-deposit akin to the amounts deposited

under Section 129E of the Customs Act, 1927/Section 35F of the Central Excise Act, 1944. Therefore, the amount that was paid by the petitioner pending its appeal was not "duty" though miscellaneous challan slows payment of duty, nevertheless it has to be considered as amount paid for the purity of Section 131 of the Customs Act, 1962.

78. This Court is therefore of the considered view that the amounts paid during the pendency of the appeals before the Hon'ble Supreme Court has to be construed as having paid "under protest" for the purpose of Section 131 of the Customs Act, 1962 in a similar manner under Section 265 of the Income Tax Act, 1961 and refund of such amounthas to be considered outside the purview of sting of "unjust enrichment" in Section 27 of the Customs Act, 1962.

79. Further, the question of subjecting a person to the rigours of "unjust enrichment" under the aforesaid provisions of the Customs Act, 1962 is attracted only where a refund claim is made on the duty paid or interest borne.

80. Section 27 of the Customs Act, 1962 as it reads could be pressed

into service only in the case of refund of the any amount paid as "duty" in pursuance of an order of assessment or on the interest borne thereon by such person.

81. It must be also recalled that Section 17 of the Customs Act, 1962 provides a machinery for assessment of duty. Under the scheme of the Act, customs duty is payable only pursuant to an order of assessment or final assessment where pre-assessment is resorted under Section 18 of the Customs Act, 1962.

82. Section 18 of the Customs Act, 1962 which deals with provisional assessment was amended only in 2006, wherein, in the context of refund of amount pursuant to final assessment was subjected to "unjust enrichment".

83. Though in the present case there was no provisional assessment but only revision of assessment long after clearance under Section 28 of the Customs Act, 1962, it is to be noticed that even if duty was paid provisionally pending final assessment under Section 18 of the Customs Act, 1962, provisions of Section 27(5) of the Custom Act, 1962 would not

have been attracted to the petitioner when the petitioner became entitled to refund.

84. The Hon'ble Supreme Court in **Mafatlal Industries** Vs **UOI**, 1997 (89) ELT 247 while dealing with payment of duty "under protest" under Rule 233B of the Central Excise Rules, 1944 as it stood in the context of Rule 9B of the aforesaid Rules held that **both recoveries and refunds are to be not be governed by Section 11A and 11B of the Central Excise Act, 1944**. In Para 104, the Court observed as under:-

> **104. "** Rule 9-B provides for provisional assessment in situations specified in clauses (*a*), (*b*) and (*c*) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be"**. <u>Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be</u>**. However, if the final orders passed under sub-rule (5) are appealed against — or questioned in a writ petition or suit, as the case

> may be, assuming that such a writ or suit is entertained and is allowed/decreed — then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B(5) reagitating the issues already decided under Rule 9-B — assuming that such a refund claim lies — and is allowed, it would obviously be governed by Section 11-B. It follows logically that position would be the same in the converse situation.

85. In order to get over the situation arising out of observation in paragraph No.104 of **Mafatlal Industries Ltd**. case referred to *supra*, the Central Government brought an amendment to Sub-Rule (5) of Rule 9B of the Central Excise Rules,1944 vide Notification No.45/99-CE (NT) dated 25-6-1999, by adding a proviso thereto.

86. The effect of the proviso was that even after finalisation of the provisional assessment under Rule 9-B(5), if it is found that an assessee was entitled to refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of Section 11-B of the Act.

87. In **CCE** Vs. **TVS Suzuki Ltd.**, (2003) 7 SCC 24, the Hon'ble Supreme Court held that "Merely because the departmental authorities took a long time to process the application for refund, the right of the assessee does not get defeated by the subsequent amendment made in Sub-Rule (5) of Rule 9-B.

88. It was held that the Commissioner of Central Excise and CEGAT were, therefore, justified in holding that the claim for refund made by the respondent had to be decided according to the law laid down by this Court in ***Mafatlal Industries Ltd***. case referred to *supra* and would not be governed by the proviso to Sub-Rule (5) of Rule 9-B."

89. Therefore, the amount paid by the petitioner on 21.03.2001 as a consequence of the recovery notice issued by the office of the Customs Department long after the completion of assessment and clearance of the imported goods pending its appeals before the Honourable Supreme Court cannot be said to be a "duty" for the purpose of Section 27 of the Customs

Act, 1962. Therefore, presumption under section 28D of the Customs Act 1962 that the incidence of duty paid has been passed on to the buyer cannot be inferred.

90. Amounts paid pursuant to an adverse order passed under Section 28 of the Customs Act, 1962 whether under Section 129E or under Section 131 of the Customs Act, 1962 are not "duty" for the purpose of Section 27 of the Customs Act.1962.

91. In **Union of India** Vs. **Suvidhe Ltd.**, (2016) 11 SCC 808, the Hon'ble Supreme Court held that provisions of Section 11B can never be applicable for refund of the amount deposited by way of pre-deposit under Section 35F for availing the remedy of an appeal. It must be recalled that Section 11B of the Central Excise Act, 1944 is *parimateria* with Section 27 of the Customs Act,1962.

92. The Court further held that a deposit under Section 35F (which is *parimateria* with Section 129E of the Customs Act,1962) is not a payment of duty but only a pre-deposit for availing the right of appeal. Such

amount is bound to be refunded when the appeal is allowed with consequential relief. There the Hon'ble Court castigated the conduct of the department by observing *"In our judgment, the claim raised by the Department in the show-cause notice is thoroughly dishonest and baseless."*

93. The above ratio of the Hon'ble Supreme Court will equally apply to amounts paid in terms of Section 131 of the Customs Act, 1962 or under Section 35N of the Central Excise Act, 1944 as amounts that paid under these provisions are pre-deposit pending appeals though not paid as a condition for filing appeal under Section 129E of the Customs Act,1962 and Section 35F of the Central Excise Act, 1944.

94. It must be also recalled that the Hon'ble Supreme Court in **Mafatlal Industries Ltd** Vs. **UOI**, 1997 (98) ELT 247 : (1997) 5 SCC 536 was only concerned with the constitutional validity of the twin amendments to Section 11B of the Central Excise Act, 1944 and Section 27 of the Customs Act, 1962 in 1991.

95. The Hon'ble Supreme Court was really not concerned with the assessment procedures under the respective enactments. However, in the course of discussion while upholding the constitutional validity of the amendments to Section 11B of the Central Excise Act, 1944 and Section 27 of the Customs Act, 1927, the Hon'ble Supreme Court has made several observations while attempting questions and answers that were posed by the counsel for the manufacturer and importers.Therefore, all the observations in the said decision cannot be considered to have laid down the law.

96. It is to be also noted that the Hon'ble Supreme Court in **Mafatlal Industries Ltd** Vs. **UOI,** 1997 (98) ELT 247 : (1997) 5 SCC 536 did not examine the specific issue from perspective of Section 129E and Section 131 of the Customs Act, 1962 and Section 35F and 35N of Central Excise Act, 1944.

97. Therefore, not all observation of the Hon'ble Supreme Court can be said to have laid down the law as the Hon'ble Supreme Court was not concerned with the other provisions of the respective enactments.

98. The decision of the Hon'ble Supreme Court in **Assistant Collector of Customs and Ors.** Vs. **Anam Electrical Manufacturing Co. and Ors.,** MANU/SC/1205/1997 cannot be said to have laid any law. It has merely given certain guidelines to be followed while refunding the amounts collected as duty.

99. In fact, the Hon'ble Supreme Court in **CCE** Vs. **ITC Ltd.,** (2005) 13 SCC 689 while dealing with interest on delayed refund of amount deposited under Section 35F has held as under:-

> The issue in this appeal and in several other appeals is whether the pre-deposit made as a precondition for the hearing of the appeal under **Central Excise Tariff Act, 1985*** was, on the assessee being ultimately successful, refundable to the assessee with interest. The learned Solicitor General has taken instructions and has stated before this Court that the Central Board of Excise and Customs proposes to issue a circular in connection with the payment of interest on all such pre-deposits. A draft copy of the proposed circular has been handed over to this Court. Having regard to the contents of the draft circular we direct compliance with the final order impugned before us and payment of interest in terms of the draft circular. The draft circular shall be appended to and the contents form part of this order. The appeal is disposed of in view of this order any judgment of any

> High Court holding to the contrary will no longer be good law.
>
> (*Central Excise Act, 1944)

100. Coming to the decision of the Hon'ble Supreme Court in **CCE** Vs. **Allied Photographics India Ltd.,** (2004) 4 SCC 34 which was relied by the learned counsel for the respondent, it is to be noted that it is not relevant as the question of law involved in said civil appeal before the Court was as follows:-

> "Whether a claim for refund after final assessment is governed by Section 11-B of the Central Excise Act, 1944?"

101. The above decision was rendered in the context of the above question that fell for consideration before the Hon'ble Supreme Court. It was in that context, the Hon'ble Supreme Court made few observations. Therefore, the said decision cannot be relied by the respondent in this case.

102. The above decision is not an authority for amounts pre-deposited

under Section 129E or under Section 131 of the Customs Act, 1962 or under the akin provisions under Section 35F and 35N of the Central Excise Act, 1944.

103. A supplementary issue which fell for consideration was whether the doctrine of "unjust enrichment" in Section 11B of the Central Excise Act 1994 was applicable to the facts of the case in **CCE** Vs. **Allied Photographics India Ltd.,** (2004) 4 SCC 34, having regard to the fact that manufacturer had paid the differential disputed excise duty "under protest" from 01.03.1974 to 31.10.1984 after the assessment was finalized in favour in view of the judgment of this Court in **Union of India** Vs. **Bombay Tyre International Ltd**., (1984) 1 SCC 467 : 1984 SCC (Tax) 17 : AIR 1984 SC 420 and had passed to the incidence of the duty to the appellant who was a distributor of the manufacturer.

104. Thus, the point for determination before the Hon'ble Supreme Court in **CCE** Vs. **Allied Photographics India Ltd.,** (2004) 4 SCC 34 was whether the respondent who was the distributor therein who had stepped into the shoes of the manufacturer who had earlier paid the duty "under

protest" was entitled to refund without complying with Section 11B of the Central Excise Act, 1944. Answering this point, the Court held as follows:-

> "That the price charged by the manufacturer for sale of the goods represented the real value of the goods for assessment of excise duty. In the case of *Atic Industries Ltd.* v. *H.H. Dewa* [(1975) 1 SCC 499 : 1975 SCC (Tax) 135 : AIR 1975 SC 960] this Court has held that the resale price charged by a wholesale dealer who buys goods from the manufacturer cannot be included in the real value of excisable goods in terms of Section 4 of the said Act. Therefore, it is clear that the basis on which a manufacturer claims refund is different from the basis on which a buyer claims refund. The cost of purchase to the buyer consists of purchase price including taxes and duties payable on the date of purchase (other than the refund which is subsequently recoverable by the buyer from the Department). Consequently, it is not open to the buyer to include the refund amount in the cost of purchase on the date when he buys the goods as the right to refund accrues to him at a date after completion of the purchase depending upon his success in the assessment. Lastly, as stated above, Section 11-B dealt with the claim for refund of duty. It did not deal with making of refund. Therefore, Section 11-B(3) stated that no refund shall be made except in terms of Section 11-B(2). Section 11-B(2)(*e*) conferred a right on the buyer to claim refund in cases where he proved that he had not passed on the duty to any other person. The entire scheme of Section 11-B showed the difference between the rights of a manufacturer to claim refund and the right of the buyer to claim refund as separate and distinct. Moreover, under Section 4 of the said Act, every payment by the manufacturer whether under protest or under

> provisional assessment was on his own account. The accounts of the manufacturer are different from the accounts of a buyer (distributor). **Consequently, there is no merit in the argument advanced on behalf of the respondent that the distributor was entitled to claim refund of "on-account" payment made under protest by the manufacturer without complying with Section 11-B of the Act.**

105. Thus, the decision of the Hon'ble Supreme Court in **CCE** Vs. **Allied Photographics India Ltd.,** (2004) 4 SCC 34 is not applicable to the facts of the case and has not relevance. The decision of the Gujrat High Court in **Ajni Interior** Vs. **Union of India,** MANU/GJ/1628/2019 as affirmed by the Supreme Court is to be viewed having rendered contrary to the law in **Union of India** Vs. **SuvidheLtd.,** (2016) 11 SCC 808.

106. Further, from a reading of the provisions, it is clear that only refund of "duty" or "interest thereon" under Section 27 of the Customs Act, 1962 are governed by the doctrine of "unjust enrichment" under Section 27 of the Customs Act, 1962.

107. Pre-deposits as a condition under Section 129E of the Customs Act, 1962 or under Section 35F of the Central Excise Act, 1944 are not

governed by the Section 27 and 11B of the respective enactments.

108. In fact, even under the scheme of these two enactments, for payment of interest on delayed refund of "duty" and "interest thereon" are treated separately under Section 27A and Section 11B respectively of the respective enactments from payment of interest on refund of pre-deposit made under Section 129E of the Customs Act, 1962 or under Section 35F of the Central Excise Act, 1944 under Section 129EE and 35FF of the respective enactments.

109. In this case, though the amount paid by the petitioner on 21.03.2001 was not paid pursuant to any order under Section 129E of the Customs Act, 1962 of CESTAT, nevertheless, it is to be emphasised the payment was to be treated as "pre-deposit" under Section 131 of the Customs Act, 1962.

110. In fact, under the scheme of the respective enactments till the amendments in 2014, under Section 129E and 35F of the respective enactments, an aggrieved person was mandatorily required to pre-deposit

the amount of duty or penalty at the time of filing of appeal as a condition for the appeal to be heard by the Commissioner (Appeals) or by the CESTAT (formerly CEGAT) under the respective enactments.

111. However, on demonstration of "undue hardship" on account of such pre-deposit", such a person could pray for waiver of pre-deposit of such amount before the Commissioner (Appeals) or by the CESTAT (formerly CEGAT).

112. It must be also recalled that during the period in dispute, the onus of assessment of duty was on the proper officer of the customs after a bill of entry was filed for assessment by an importer. Customs duty was payable by an importer on the duty assessed in the bill of entry by the proper officer after examination and testing of the imported goods.

113. Further, under Section 28C of the Customs Act, 1962, every person who is liable to pay duty on any goods shall at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice and other like documents, the amount of such duty

which will form part of the price at which such goods are to be sold. In this case, the petitioner had imported the capital goods for its printing purpose.

114. Though Section 28C was not in the Act during 1987-1988 when the imported goods were assessed a duty by the proper officer under Section 17 of the Customs Act, 1962 and was incorporated only in 1991, nevertheless, indicates that only refund of excess customs duty paid or interest borne thereon as the case may be pursuant to an order of assessment was to be refunded under Section 27 of the Customs Act, 1962.

115. Only if excess duty was paid pursuant to an order of assessment under Section 17 , Section 18 or under Section 19 of the Customs Act, 1962, refund of such duty would subject to compliance of Section 27 of the Customs Act, 1962 and not the amount paid as a consequence of recovery proceeding arising out of an order passed under Section 28 of the of the Customs Act, 1962 at the appellate stage in terms of Section 131 of the Act.

116. In this case, it cannot be said that the amount that was paid pending the appeals was pursuant to an order of assessment before clearance

of the goods from the customs barriers. The imported goods were not assessed to duty provisionally under Section 18 of the Customs Act, 1962 and cleared later. Imported machines were assessed to duty under Section 17 and cleared on the duty assessed by the proper officer.

117. The amount that was paid by the petitioner was the amount that was affirmed as payable by the CESTAT pending the appeal before the Hon'ble Supreme Court. The amount that was paid "under protest" at the appellate stage was long after the imported goods were cleared and assessed to duty. The petitioner has not sought for refund of amount paid as duty under Section 17 of the Customs Act, 1962. There is no evidence to suggest that the imported goods were also sold to a third party.

118. Therefore, amounts deposited in terms of Section 131 of the Customs Act, 1962 or Section 35N of the Central Excise Act, 1944 has to be refunded without insisting on such importer or manufacturer satisfying the requirement of "unjust enrichment" as in the case of pre deposit under Section 129E of the Customs Act, 1927/Section 35F of the Central Excise Act, 1944.

119. In the light of the above observation, this Court is of the view that the 2nd respondent was not justified in subjecting the petitioner to limitation prescribed under Section 27 of the Customs Act, 1962. Therefore, the impugned order is liable to be interfered in this Writ Petition.

120. The petitioner is however not entitled to interest at 12% as was prayed by the petitioner. The petitioner is entitled to interest at the rates prevailing for refund under notifications issued from time to time under Section 129EE of the Customs Act, 1962 for refund of pre-deposit made under Section 129E of the Customs Act, 1962 as the amount paid by the petitioner on 21.03.2001 was in the nature of pre-deposit under Section 131 of the Customs Act, 1961.

121. Such interest will be payable on a sum of Rs.88,44,510/- for the period commencing after the expiry of three months of date of the Hon'ble Supreme Court's order dated 31.03.2005 in C.A.Nos.3558 and 3559 of 2000.

122. The 2nd respondent shall therefore calculate the amounts and pay the amounts to the petitioner within a period of three months from the date

of receipt of a copy of this order. In the light of the above observation, the writ petition is allowed with consequential relief. No cost. Consequently, connected Miscellaneous Petitions are closed.

25.01.2021

Internet : Yes / No
Index : Yes / No

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Notes:-In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

C.SARAVANAN, J.

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To
1.Commissioner of Customs (Appeals),
60, Rajaji Salai, Custom House,
Chennai – 600 001.

2.Assistant Commissioner of Customs,

Refunds, Custom House,
Chennai – 600 001.

Pre-Delivery Order
in
W.P.No.1879 of 2007 and
M.P.Nos.1 of 2007 & 01 of 2008

25.01.2021