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2023:BHC-OS:9012-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 4193 OF 2022

M/s. Cummins Technologies India Private Limited)
Having its registered office at : Cummins India Office Campus Tower-A 2nd 4th & 8th Floor, Survey 21 Balewadi, Pune–4110045)
Through its Authorized Signatory Mr.Amit Avachat : 9011010427)...**Petitioner**

V/s.

1 **Union of India**)
Through the Ministry of Finance, Represented by is Secretary, Department of Reveneu, Having its Office at North Block, New Delhi)

2 **Principal Commissioner of Customs**)
Import Refund Section, Having his Office at Air Cargo Complex Sahar Andheri East, Mumbai – 400099)

3 **Assistant / Deputy Commissioner**)
Refund Section, ACC Mumbai, Having his office at : Air Cargo Complex Sahar, Andheri (East), Mumbai-400099)...**Respondents**

Mr. Rahul Totala a/w. Mr. Ashwin Poojari i/b. RT Legal, Advocate for the Petitioner.

Mr. Pradeep S. Jetly, Senior Advocate a/w. Mr. Jitendra B. Mishra, Advocate for the Respondents.

Mr. Rafiq Dada, learned Senior Advocate along with Advocate Mr. Zubair Dada, Amicus Curiae.

CORAM : NITIN JAMDAR AND ABHAY AHUJA, JJ.

RESERVED ON : 2 MAY 2023
PRONOUNCED ON : 28 AUGUST 2023

JUDGMENT (PER COURT):

1. This Petition impugns the rejection of a refund claim of Rs.38,90,832/- vide order dated 8 November 2019 passed by the Respondent no.3-Assistant Commissioner of Customs, Refund Section, ACC, Mumbai, as being time barred and not sustainable under Section 27 of the Customs Act, 1962, (the "Customs Act") and seeks a direction to the Respondent no.3 to refund the said amount to the Petitioner. Additional affidavit dated 6 August 2021 has also been filed by the Petitioner in support of the Petition.

2. The Petitioner, being a company incorporated under the Companies Act, 1956, engaged in the business of designing, manufacturing and distributing, importing various raw materials to manufacture and distribute exhaust after treatment systems. While importing the raw material, vide three bills of entry no.2297141, 2297232 and 2297331 respectively, Petitioner paid IGST of

Rs.38,90,832/- on 5 July 2017. Thereafter, Petitioner paid an amount of Rs.42,08,551/- on 11 July 2017 in respect of the three bills of entry.

3. It is submitted on behalf of the Petitioner that, in 2019, while conducting an internal audit, the Chartered Accountant of the Petitioner viz. U.V.Bodas & Co. noticed the mistake that Petitioner had paid an excess customs duty of Rs.38,90,832/- by making payment of Rs.42,08,551/- on 11 July 2017 instead of a differential of Rs.3,17,719/-.

4. Thereafter, Petitioner engaged with the Customs Department. By an email dated 10 July 2019 from the Icegate Service Manager addressed to Petitioner regarding pending confirmation of the payment made by the Petitioner, Petitioner was informed that Petitioner's issue had been resolved by rejection of the main challan due to less duty payment and the user could do the full payment of the same amount and take refund from the Custom location for the previously paid amount. The said communication is at page 116 which forms part of Petitioner's additional affidavit in support of the Writ Petition.

5. It is submitted that Petitioner was required to pay an additional IGST viz. differential duty of Rs.3,17,719/- (R.42,08,551.00 – Rs.38,90,832.00) but instead of paying the differential amount, Petitioner paid Rs.42,08,551/- on 11 July 2017 causing excess duty payment of Rs.38,90,832/-.

6. On 30 July 2019 Petitioner filed an application claiming refund of customs duty paid in double/ excess as per the prescribed format under Section 27 of the Customs Act, 1962, also declaring that the excess / double duty claimed as refund has not been passed on to any other person by the importer / buyer. The said declaration is usefully reproduced as under :

> *"Declaration*
> *I/We CUMMINS TECHNOLOGIES INDIA PVT LTD hereby declare that-*
>
> *(a) the contents of the refund claim as per form above are true and correct to the best of my/our information and belief;*
>
> *(b) the amount and the ground for which this refund claim has been filed has not been previously claimed and paid; and that*
>
> *(c) The excess/double duty claimed as refund has not been passed on to any other person by this importer/buyer.*
>
> *Date – 30.07.2019*
> ***For CUMMINS TECHNOLOGIES INDIA PVT LTD***
>
> ***Authorised Signature***
>
> *(emphasis supplied)"*

7. On 8 November 2019, Respondent no.3 rejected the claim of refund as time barred and not sustainable under Section 27 of the Customs Act, as the application was filed beyond a period of one year from the date of payment of duty. For the sake of convenience the said order of rejection is quoted as under :

"OFFICE OF THE PRINCIPAL COMMISSIONER
OF CUSTOMS;(IMPORT)
REFUND SECTION, AIR CARGO COMPLEX, SAHAR
ANDHERI(EAST), MUMBAI-400 099.

F.No.S/3-MISC-177/19-20/CRC-1/ACC(R)(1) *Date:08.11.2019*

To,

M/s. Cummins Technologies India Pvt. Ltd.,
GAT No. 311/1B, At Post Kasar, Amboli 34 Taluka,
Mulshi (Paud), Pune-412111.

Sub : Refund application of Rs. 38,90,832/-reg.

During the scrutiny of the submitted documents along with refund application it is found that:

(III) The duty paid against these Bs/E is in July, 2017and you have filed the refund in this Section on 24.10.2019 for the same. And as per Section 27 of the Customs Act, 1962:

27. Claim for refund of duty;- 3[1] Any person claiming refund of any duty or interest,-
(a) paid by him; or
(b) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, ***Before the expiry of one year, from the date of payment of such duty or interest*** *the refund claim should be filed within one year after payment of duty.*

> *In the present case the refund claim filed by you is* ***Time Barred*** *and is not sustainable as per Section 27 of the Customs Act, 1962. Therefore, you are requested to collect your documents.*
>
> *(Vinod Nautiyal)*
> *Asstt. Commissioner of Customs*
> *Refund Section,ACC, Mumbai."*

8. Aggrieved by the aforesaid order of rejection of the claim for refund of excess duty paid, Petitioner has filed this Petition on 14 September 2020 seeking to quash and set aside the said order with further direction for refund of the amount of Rs.38,90,832/- to the Petitioner.

9. We have heard Mr. Rahul Totala with Mr.Ashwin Poojari, learned Counsel for the Petitioner and Mr. Pradeep Jetly, learned Senior Counsel and Mr.J.B.Mishra for the Respondents.

10. Counsel for the Petitioner has submitted the following propositions for the consideration of this Court in support of the Petition :

(i) Section 27 of the Customs Act is not applicable to the facts of the case since admittedly the excess amount paid by the Petitioner of which refund is sought is neither towards duty nor any interest; the

application of the Petitioner is in fact only for return of excess moneys paid by Petitioner under a mistake not disputed by the Respondents either in the reply affidavit or in the submissions;

(ii) The excess amount retained by the Respondent authorities is in violation of Article 265 of the Constitution of India and it is the fundamental duty of the Respondents to return the same to the Petitioner as the same amounts to unjust enrichment apart from being illegally withheld from 11 July 2017;

(iii) There is no delay or laches on the part of the Petitioner in approaching the authority for seeking refund of the excess amount in as much as upon receipt of knowledge of the *bonafide* mistake committed by Petitioner of making payment in excess, Petitioner has immediately within 20 days taken steps as they were advised in law for seeking return of the same. It is submitted that the Petitioner was intimated the mistake by the Chartered Accountant on 2 July 2019; thereafter, the customs department sent an email to Petitioner on 10 July 2019 and Petitioner made an application for refund on 30 July 2019, which is within twenty days;

(iv) Alternatively, it is submitted that the limitation period prescribed under Section 27 of the Customs Act is not applicable, more

particularly in the background of the email dated 10 July 2019 from the Customs Department. It is submitted that in any event, in view of Section 29 (2) of the Limitation Act, 1963, the application for refund before the authority was within time as the limitation would begin from the date of knowledge of the mistake and not from the date of making of the excess payment;

(v) It is submitted on behalf of the Petitioner that the rejection order dated 8 November 2019 was received by Petitioner by speed post on 18 November 2019; thereafter, in view of the surge in the Covid -19 virus there was a lock down imposed in the country from March 2020; Petitioner has filed the Writ Petition on 14 September 2020 and although it would appear that the Writ Petition has been filed three years after the date of the excess payment on 11 July 2017, however, in view of the *suo- moto* decision of the Supreme Court with regard to the extension of limitation period due to Covid, the intervening period from 15 March 2020 to 28 February 2022 stands excluded and therefore, the writ petition has been filed within a period of three years from the date of excess payment and within a few months from the date of receipt of communication rejecting the request of Petitioner. Therefore, there is no laches in filing the Writ Petition.

11. Learned Counsel draws the attention of this Court to the decisions of the Hon'ble Apex Court in the case of *Vedanta Limited vs. Commissioner of Customs (Port) and Another*[1] and *Salonah Tea Co. Limited and Others vs. Superintendent of Taxes, Nowgong and Others*[2] in support of his contentions.

12. The Respondents have opposed the Petition and filed reply dated 6 January 2021. Mr. Pradeep Jetly, learned Senior Counsel for the Respondents would firstly submit that the refund application as filed by Petitioner was not maintainable. Learned Senior Counsel would submit that Petitioner self-assessed the three Bills of Entry and paid IGST on the same; even the excess payment of duty was out of the self-assessment which attained finality in view of the failure to challenge the same by either party. Learned Senior Counsel would submit that if the Petitioner was aggrieved by the self-assessment (which is also an assessment order), Petitioner ought to have filed an appeal against the same and only on setting aside the said assessment, the refund application could have been filed. Learned Senior Counsel would rely upon the decision of the Hon'ble Supreme Court in the case of *ITC Ltd.*

1 (2017) 12 SCC 744
2 (1988) 1 SCC 401

Vs. Commissioner of Central Excise, Kolkata IV[3], in support of his contention. He submits that the said decision of *ITC Ltd. Vs. Commissioner of Central Excise, Kolkata IV (supra)* has also been followed by the Hon'ble Supreme Court in the case of *Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad Vs. Standard Consultants Ltd.*[4] Learned Senior Counsel would submit that it is an admitted position that Petitioner has not challenged the assessment order till date and therefore, Petition is liable to be dismissed on this ground alone.

13. Mr. Jetly would next submit that the refund application being barred by limitation was correctly rejected by the authorities. Learned Senior Counsel would submit that the payment of duty was made by Petitioner on 5 July 2017 and on 11 July 2017; as per Section 27 of the Customs Act, which is the only provision pertaining to refund of duty, the refund application is to be made within a period of one year from the date of payment of duty. However, in the present case Petitioner had filed the refund application only on 30 July 2019 i.e. after more than two years of payment of duty and therefore, the Respondent No.3 was right in rejecting the claim on the ground of limitation. Learned

3 2019 (368) ELT 216(SC)
4 2022 (381) ELT 582 (SC)

Senior Counsel submits that the authorities had no power to grant the refund and were bound by the provisions of Section 27.

14. Mr. Jetly further submits that the impugned order dated 8 November 2019 rejecting the refund claim of Petitioner was appealable before the Commissioner (Appeals) under the provisions of Section 128 of the Customs Act. However, the appeal was to be filed within a period of sixty days and the Commissioner (Appeals) had power to condone the delay for further period of only thirty days. However, the Petitioner has failed to file the appeal within the maximum period of ninety days, which expired on 16 February 2020, considering that the impugned order was dated 8 November 2019. Learned Senior Counsel would submit that even if the date of receipt of the impugned order i.e. 8 November 2019 was considered, even then the appeal is time barred. He would submit that the said period of ninety days has expired much before the date of 15 March 2020 and therefore, the benefit of the *suo moto* order of the Hon'ble Apex Court extending or excluding the time period between 15 March 2020 and 28 February 2022 on account of the Covid- 19 pandemic would not be available to the Petitioner. Learned Senior Counsel, therefore, submits that the order has attained the finality and cannot be re-opened in writ

jurisdiction and therefore Petition is liable to be rejected on this ground alone.

15. Learned Senior Counsel draws the attention of this Court to the decisions of the Apex Court in the case of *Assistant Commissioner (CT) LTU. Kakinada and others Vs. Glaxo Smithkline Consumer Healthcare Limited*[5] and *Collector of Central Excise, Chandigarh vs. M/s Doaba Co-operative Sugar Mills Ltd, Jalandhar*[6] in support of his contentions.

16. In rejoinder, Mr. Totla, learned Counsel for Petitioner would submit that although the Petitioner does not dispute that the payment of duty was on the basis of self-assessment made while paying the duty and therefore, the submission of the Respondents that Petitioner ought to have challenged or modified the self-assessment order prior to the filing of the application for refund has been made may appear attractive, however, the same will not apply to the facts of the present case, more particularly, since the application of the Petitioner has not been rejected on this ground and there is no dispute on the payment of duty by the Petitioner nor have the Respondents issued any notice to the Petitioner that the duty assessed was incorrect.

5 (2020) 19 SCC 681.
6 1988(Supp) SCC 683.

17. Being of the *prima facie* view that a decision on the submissions as above would have widespread ramifications, we deemed it appropriate to appoint amicus curiae, to assist us on the issue of applicability of the limitation prescribed for seeking refund under Section 27 of the Customs Act where excess duty has been paid as in the facts of this case, keeping in mind Article 265 of the Constitution of India which requires that no tax can be collected without authority of law and requested Mr. Rafiq Dada, learned Senior Counsel of this Court along with Counsel Zubair Dada to assist the Court.

18. The learned Amicus Curiae have very meticulously taken us through the law thus far on the subject by drawing our attention to the following decisions:

1. M/s Hindustan Cocoa Products Ltd Vs. The Union of India and Ors.[7]

2. M/s Parijat Construction Vs. Commissioner of Central Excise, Nashik.[8]

3. Salonah Tea Co. Ltd. and Ors. Vs. Superintendent of Taxes, Nowgong and Ors. (supra).

4. M/s DHL Express India Pvt. Ltd. Vs. The Commissioner of Service Tax, Bengluru Service Tax-1.[9]

7 1994 SCC OnLine Bom, 169.
8 Central Excise Appeal No. 306 of 2016.
9 CSTA No.5/2018 of Karnataka High Court.

5. UPL Limited Vs. Union of India and Ors.[10]

6. Vedanta Limited Vs. Commissioner of Customs (Port) and Anr. (supra)

7. Commissioner of Income Tax Vs. Velingkar Brothers.[11]

8. Guru Charan Industrial Works vs. Union of India and Ors.[12]

9. Collector of Central Excise, Chandigarh Vs. M/s Daoba Co-Operative Sugar Mills Ltd., Jalandhar. (supra).

10. Assistant Commissioner (CT) LTU, Kakinada and Ors. Vs. Glaxo Smith Kline Consumer Health care Limited. (supra).

11. Mafatlal Industries Ltd. and Anr. Vs. Union of India and Ors.[13]

19. After taking us through the aforesaid decisions, Mr.Dada, would submit that if monies including duty or tax or cess are paid under a bonafide mistake of law or fact then the limitation under the provisions of Section 11-B of the Excise Act or under Section 27 of the Customs Act would not apply and the claim for return of the same is to be made within the time prescribed under the general law of limitation from the date of discovery or knowledge of the said bonafide mistake.

20. A perusal of the decisions in the cases of *M/s. Hindustan Cocoa Products Vs. The Union of India and Others (supra), M/s Parijat*

10 R/Special Civil Application No. 2239 of 2019 dated 28 July 2021
11 2007(3) Mh. L. J.
12 (1988) 33 ELT 648
13 (1997) 5 SCC 536

Construction Vs. Commissioner of Central Excise, Nashik (supra), Commissioner of Central Excise (Appeals) Vs. KVR Constructions[14] suggest that earlier it was only payments made under a mistake of law would not fall within the purview of Section 11-B of the Excise Act or Section 27 of the Customs Act, however later on, as observed by the Karnataka High Court in the case of *M/s DHL Express India Pvt. Ltd Vs. The Commissioner of Service Tax, Bengluru Service Tax-1 (supra),* and subsequent decisions that a payment made even under a mistake of fact would not fall within the purview of Section 11-B of the Excise Act or Section 27 of the Customs Act. In fact it was also observed that a mistake of law does not cease to be a mistake by lapse of time and the claim for refund can be preferred within three years from the date of discovery or knowledge of the mistake and that the date of payment was not a relevant consideration. In other words, in such cases, the limitation provided in Section 11-B of the Excise Act or Section 27 of the Customs Act from the date of payment of duty to file for refund of the amount paid in excess would not be applicable.

21.1 However, it was in the Gujarat High Court decision in the case of *UPL Limited vs. Union of India and Ors. (supra),* that it was

14 2012(26)STR 195(KAR)

held that payment made on account of a *bonafide* mistake would not be covered by the limitation under Section 27 of the Customs Act.

21.2 In that case Petitioner therein had imported certain goods for which total amount of Rs. 17,25,172/- was deposited in IDBI Bank towards customs duty and for which e-payment receipt was issued by the authority on 11 April 2016. Petitioner therein had imported another consignment of goods and had paid an amount of Rs. 95,07,943/- on 12 April 2016 on the next date of the earlier first deposit. It was the case of the Petitioner that it was supposed to pay customs duty for the second consignment of Rs. 77,82,771/-, however, due to oversight and bonafide mistake, the Petitioner paid an amount of Rs. 95,07,943/- adding the earlier amount of Rs. 17,25,172/-. Having come to know about the same an application in Form 102 under Section 27 of the Customs Act was filed with the Respondent authority on 24 January 2018 and the ground of claim was stated to be that the duty amount of Rs. 17,25,172/- was paid twice through oversight and mistake and therefore, the same was liable to be refunded. It was argued on behalf of the Petitioner that Petitioner was supposed to pay only the customs duty of Rs. 77,82,771/-, however, through oversight and bonafide mistake an amount of Rs. 17,25,172/- came to be added, which was

already paid on 11 April 2016 for another consignment claiming that this additional amount paid was not a duty nor a claim of any benefits under any other head under the customs law but merely a mistake committed by Petitioner in paying duty for some goods on two occasions and therefore, the same could not be treated as duty as referred to in Section 27 of the Customs Act and therefore the limitation thereunder would not be applicable. After hearing the parties, the Gujarat High Court recorded that the aforesaid facts were undisputed, however, because of the bonafide mistake committed on the part of Petitioner he added the amount of Rs. 17,25,172/-, which was already paid towards customs duty just prior to one day before the second payment and that it was also not in dispute that the excess amount was paid by the Petitioner and that the authority had rejected the claim only on the ground of limitation.

21.3 After examining the provisions of Section 27 and 27A of the Customs Act and relying upon the other similar decisions of the Gujarat High Court, it was held that the Petitioner had made an application within reasonable time and on that ground also he would be entitled to refund of excess payment of customs duty.

22. From the aforesaid discussion, it would emerge that any payment made under a bonafide mistake of law or fact would not fall within the provisions of law with respect to refund of claims of duty such as Section 11-B of the Excise Act which is similar to Section 27 of the Customs Act, thereby meaning that no claim for refund of such an amount would be hit by the limitation prescribed therein. The limitation to make a claim in such a case would be the general law of limitation as prescribed under the Limitation Act, 1963.

23. Therefore, the question that arises is, firstly, whether there has been a mistake and whether the said mistake in having paid excess or double duty, in the present case, was bonafide or not.

24. The Petitioner is a limited company incorporated in the year 1994 and registered under the Companies Act, 1956. It statedly has eight divisions, namely, Cummins Turbo Technologies, Cummins Emission Solutions, Cummins Business Services, Cummins Fuel Systems India, Cummins Technical Center India, Phaltan Engine Plant, Global Analytics Center, Supply Chain Operations. It is also a leading global designer, integrator, manufacturer and distributor of exhaust after

treatment systems and components for 'on and off-highway' medium duty, heavy duty and high horsepower engine markets and expected to be conducting its affairs and management in a diligent manner guided by professionals.

25. In the course of its business, Petitioner has been importing various materials to manufacture and distribute exhaust after treatment systems; while importing the said materials Petitioner paid IGST for imports made vide three bills of entry nos.2297141, 2297232 and 2297331 of a total of Rs.38,90,832/- on 5 July 2017. It is the Petitioner's case that pursuant to request by the Respondent, to pay differential duty, instead of paying difference in duty, the Petitioner has paid an amount of Rs.42,08,551/- on 11.7.2017 in respect of the three bills of entry resulting in payment of excess or double duty.

26. This Writ Petition has been filed *inter alia* submitting as under:

> *"3. The present Petition seeks to challenge the arbitrary inaction on the part of Respondent nos.2 and 3 for issuing letter dated 08.11.2019 (herein after referred as "impugned order") rejecting the refund application filed by the Petitioner for the amount paid in twice against the same import vide three bill of entries nos. 2297141, 2297232 and 2297331 respectively. The Respondent no.3 has rejected the refund application of the Petitioner on the ground that, the refund application filed by the Petitioner is time barred in pursuant to Section 27 of the Customs Act, 1962.*

4. The Petitioner is constrained to file this Writ Petition challenging the impugned order issued by Respondent no.3, for rejecting the lawful refund claim of the Petitioner to which he is legally entitled. Also, the law does not prescribe any legal remedy to the Petitioner to challenge the veracity of the letter rejecting the refund claim before any appellate authority. Therefore, the Petitioner has no other option but to file the instant Writ Petition.

5.1 The Petitioner was incorporated in the year 1994 and one of its division Cummins Emissions Solutions is engaged in the business of global designing, integrator, manufacturer and distributor of exhaust after treatment systems and components for 'on and off-highway' medium duty, heavy duty and high horsepower engine markets.

5.2 Petitioner has been importing various materials to manufacture and distribute exhaust after treatment systems. While importing the said materials Petitioner paid the appropriate duty i.e. IGST for the imports made vide three bill of entries nos.2297141, 2297232 and 2297331 respectively. The Petitioner had paid IGST of total Rs.38,90,832/-. Annexed herewith and marked as Exhibit A to copy of bill of entries and Exhibit B to the details of payment of IGST.

5.3 In view of the above table, the difference in amount of duty paid by the Petitioner on 5/7/2017 and 11/7/2017 occurred because on 5/7/2017 the Petitioner paid the duty i.e., IGST and thereafter Respondent asked the Petitioner to pay the difference duty. However, the Petitioner instead of paying the differential duty, they paid the whole duty amount again inadvertently.

5.4 The duty against the import was paid twice therefore the Petitioner filed a refund application dated 30.7.2019 for excess amount paid on 05/07/2017 to the Assistant/Deputy Commissioner of Customs Air Cargo Complex, Sahar Andheri Mumbai 400099. Annexed herewith and marked as Exhibit C to the copy of refund application dated 30.07.2019.

5.5 Thereafter, the Assistant Commissioner of Customs i.e. Respondent no.3 issued a order dated 08.11.2019 rejecting the refund application filed by the Petitioner on the ground that the refund application filed by the Petitioner is not within the prescribed time limit as given under Section 27 of the Customs Act, 1962. Annexed herewith and marked as Exhibit D to the copy of order dated 08.11.2019.

5.6 However, in the instant matter, the Petitioner has filed refund application on 30.07.2019 for the amount which was paid twice which is deposit which was paid on 05.07.2017.

5.7 Further the Respondent no.3 while rejecting the refund application issued a mere letter rejecting the lawful refund claim of the Petitioner on the ground of limitation. It is pertinent to note that, the impetuous manoeuvre of the Respondent no.3 of issuing a letter cannot be challenged before any appellate authority as the law doesn't prescribe any provision for the challenging the same.

5.8 The Petitioner states that the Respondent no.3 has acted arbitrarily under the guise of discretion and has infringed the constitutional right of the Petitioner depriving him of its rightful amount of refund claim against the excess amount paid for imports made.
5.9 Being aggrieved, by inaction and arbitrariness of the Respondent no.3, the petitioner begs to prefer the present Writ Petition under Article 226 of the Constitution of India, inter alia, on the following amongst other grounds :

GROUNDS

b. The Respondent failed to acknowledge the fact that, the amount paid in excess by the Petitioner against the import made cannot take the nature of duty as prescribed under Section 27 of the Customs Act, 1962 and hence the applicability of Section 27 of the Customs Act, 1962 does not arise.

e. According to Section 27 sub-section 3(1) of the Customs Act, 1962, 'Any person claiming refund of any duty or

interest' : Paid by him or borne by him, may make an application in such form and such manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year from the date of payment of such duty or interest the refund claim should be filed within one year after payment of duty.

k. The impugned order is violative of Article 265 of the Constitution of India which provides that "no tax shall be levied or collected except by authority of law". Any letter refusing the refund of rightful amount of excess payment made by the Petitioner lacks the authority sanctioned under Article 265 of the Constitution. As already submitted above, the impugned order retaining the lawful money of the Petitioner have been issued without authority of law and in violation of Article 265 of the Constitution of India. Hence, the impugned order, which is repugnant to Article 265 of the Constitution of India inasmuch as they seek to levy service tax without the authority of law are liable to be quashed.

6. The Petitioners state that, considering the facts of the case if the reliefs prayed for are granted, no prejudice would be caused to the Respondents and on the other hand if, the same is refused, the Petitioners would suffer grave injustice and irreparable loss. <u>The balance of convenience lies in favour of the Petitioner as the refund is sought for the money being paid twice by mistake</u>."

(emphasis supplied)

27. In the additional affidavit filed on behalf of the Petitioner, in support of the Writ Petition, it is stated on oath that it is the email dated 10.7.2019 from the Customs Department insisting that Petitioner make payment of unpaid challan reflecting on the ICEGATE portal

which has resulted in double duty payment on duty on 5.7.2017. It is submitted in the Petition as well as in the affidavit that the Petitioner paid duty twice on 5.7.2017 and 11.7.2017 and because they paid excess on 5.7.2017, the Petitioner filed refund application dated 30.7.2019 under Section 27 of the Customs Act for refund of excess amount paid on 5.7.2017 to the Assistant/Deputy Commissioner of Customs Air Cargo Complex, Sahar, Andheri, Mumbai in proper format which came to be rejected by an order dated 8.11.2019 on the ground that the refund application filed by the Petitioner was not within the prescribed time limit under Section 27 of the Customs Act. It has been submitted that Petitioner had filed refund application for an amount which was paid twice and which was a deposit and the rejection on the ground of limitation is invalid and illegal as the same cannot be challenged before any Appellate Authority as the law does not prescribe any provision for challenging the same and therefore the Respondent no.3 has acted arbitrarily depriving the Petitioner of its rightful amount of refund claimed against the excess duty amount paid for the imports made.

28. Except for saying in paragraph 6 of the Petition, that the Petitioner is seeking refund of duty being paid twice by mistake, and that amount paid in excess by the Petitioner cannot take the nature of duty as prescribed in Section 27 of the Customs Act and that the impugned order is violative of Article 265 of the Constitution of India, there is no pleading or any material to show or establish or demonstrate that the said mistake was bonafide. As elucidated above, if the act of having paid excess duty has been a mistake, then the same should have been a bonafide mistake.

29. Petitioner, as noted above, is a corporate involved in various kinds of businesses, having eight divisions expected to be guided and advised by a professional set of Managers as well as Chartered Accountants. To demonstrate bonafides, a corporate of the stature of the Petitioner ought to demonstrate that due care and diligence were exercised. Admittedly, although the payment of excess duty was made in July, 2017, it is only in 2019 that while conducting an internal audit, the mistake that Petitioner had paid excess customs duty was noticed and it is only thereafter that pursuant to a certificate dated 2.7.2019 by

Petitioner's Chartered Accountants that Petitioner engaged with the Customs Department.

30. The certificate dated 2 July 2019 issued by the Petitioner's Chartered Accountant is reproduced as under :

> *"U. V. BODAS & CO.*
> *CHARTERED ACCOUNTANTS*
> *Flat No.2, Yashodhan Complex, 1561, Sadashiv Peth Pune – 411030*
> *Phone : 24333628 Call : 9823008217 Email : uvbodas@gmail.com*
>
> *CERTIFICATE*
>
> *We have verified the books of account and other relevant records maintained by M/s. Cummins Technologies India Private Limited, having registered office at Cummins India Office Campus, Tower A 2nd, 4th and 8th floor, Survey 21 Balewadi Pune 411045. (herein after called the 'Company'). Based on verification of such records as produced to us and as per the information and explanation given to us, we hereby certify that :*
>
> 1. *The Company had imported components and cleared through Customs authorities vide Bill Of Entry Nos. 2297141, 2297232 and 2297331. The Company had paid IGST of total Rs.38,90,832 (Rs. 87,077 Rs. 7,32,344 and Rs. 30,71,411 respectively).*
>
> 2. *The Company had filed a claim of refund of the said IGST paid, as the same is paid twice against the import of the components.*
> 3. *As per the consistent accounting practice followed by the Company, the said IGST paid is has not been added to the cost of manufacture of the end product nor any ITC credit availed.*
>
> 4. *The said amount of IGST paid thereon, (total amount Rs.38,90,832), is shown as receivable in the 'General Leger' of the Company, up to the date of this report.*

Hence, the above refund claim Rs.38,90,832 made by the Company does not amount to unjust enrichment.

For U.V.Bodas & Co.
FRN 101537W
Chartered Accountants

Sd/- Illegible

U.V.Bodas
Proprietor
M. No. 041343
Pune
2nd July, 2019
UDIN : 19041343AAAALU2933"

31. All that the Certificate states is that based on verification of such records as produced to them and as per the information and explanation given to them by the Petitioner, they have certified that the Company filed a claim for refund of the IGST paid as the same was paid twice against the import of the components. That as per the accounting practice, the said IGST has not been added to the cost of manufacture of the end product nor any ITC credit has been availed of; that the amount of IGST has been shown as a receivable in the general ledger of the Company and therefore the said refund claimed does not amount to unjust enrichment. Nowhere does the Certificate state as to the circumstances under which such a mistake had occurred, what efforts were taken to exercise due care and diligence so that the said mistake could be said to be a bona fide mistake; it has not even been

considered necessary to mention or explain the same in the said certificate. There is no whisper of the time or the circumstances under which the said mistake was discovered by the Petitioners. It appears that the said certificate had been issued at the behest of the Petitioner itself and the certificate nowhere suggests that the Chartered Accountants had discovered the mistake at a point in time and brought it to the notice of the Petitioner.

32. Thereafter, the following communication dated 10.7.2019 was received from the Respondent Customs :

> *"Pending confirmation | Incident IM00817480 is pending for the confirmation*
>
> *Dear Sir/Madam,*
>
> *In reference to your an incident number IM00817480, your issue has been resolved. Solution is : Mentioned Challan is rejected with 03 (less duty payment error code. According to the 03 case user can follow the rules, user can reassess the BE from the Custom Location with same amount which has been already paid and inform the ice gate immediately. <u>User can do the full payment which is reflecting in unpaid challan and take refund from the custom location for the previous paid amount</u>.*
>
> *(emphasis supplied)"*

33. A perusal of the said communication would indicate that the Petitioner was advised to re-assess the bill of entry from the custom location with same amount which had been already paid and to inform

ICEGATE immediately; the Petitioner was advised to make the full payment which was reflecting in the unpaid challan and then take refund from the custom location for the previous paid amount. However, Petitioner has in the additional affidavit stated that in view of the said email of 10.7.2019 and upon insistence of the department the Petitioner made payment of unpaid challan reflecting on the ICEGATE portal. That, in our view, is completely fallacious in as much as the second payment dated 11 July is of the year of 2017 whereas the email of 10 July from the Respondent Authorities is of the year 2019. The Petitioner clearly has no explanation for the two year delay in filing the refund application on 30.7.2019 and is somehow or the other now unsuccessfully attempting to explain the delay by completely illogical sequence of events which cannot be countenanced in fact or in law. The Petitioner it seems to us is not approaching this Court with clean hands.

34. It is unbelievable and rather surprising that the Petitioner's management as well as the Chartered Accountants missed out this rather glaring financial spectacle. Limited companies are expected to conduct their management and affairs professionally and with due care and diligence. There is no explanation, whatsoever, on the fact that

Petitioner, despite being a public listed company, could not have discovered the lapse in time. What due care and diligence was exercised by Petitioner or its Management is also not specified. And after the mistake was discovered then why was an appeal not filed in time. This is nothing short of negligence; Petitioner has not been able to demonstrate that the mistake was bonafide. In our view, such lapses cannot be condoned for considering the Petitioner's prayers.

35. Further, it is not in dispute that the Petitioner itself has in the facts of this case considered the payment made to be excess duty and also made an application under Section 27 of the Customs Act for refund of duty. Therefore, now to say that the amount paid in excess by the Petitioner against import made cannot take the nature of duty as prescribed under Section 27 of the Customs Act or that the impugned order was therefore violative of Article 265 of the Constitution of India would in our view not be tenable in the facts of this case. Even an admission by the Respondents that excess duty has been paid would in our view not make any difference.

36.1 The Petitioner has relied upon the decision of the Hon'ble Supreme Court in the case of *Vedanta Limited vs. Commissioner of Customs (Port) and Anr. (supra)*. The Petitioner therein had filed application for refund of the amount of the customs duty paid in excess as the goods for export were short shipped. The Commissioner of Customs had rejected the refund application as being made beyond the prescribed time. The Hon'ble Supreme Court held that the provisions of Section 27 of the Customs Act would not apply to the case on its plain language and accordingly directed refund of the excess amount of customs duty to be paid within a specified time.

36.2 The decision in the case of *Vedanta Limited vs. Commissioner of Customs (Port) and Another (supra)* would not apply to the facts of this case, as in that case the goods were short shipped, which meant no duty could be levied and there is no finding that the mistake was not bonafide, but that is not the case here. In the facts of the present case, the Petitioner has not been able to establish that the mistake was bonafide.

37.1. True that in the case of *Salonah Tea Co. Ltd. and others vs. Superintendent of Taxes, Nowgong and Ors. (supra),* the Hon'ble Apex

Court held that it is not only a mistake of law but also mistake of fact that would exclude the application of Section 11-B of the Excise Act or Section 27 of the Customs Act and that a limitation of a period of three years from the date of knowledge about the mistake was usually followed in case of a refund of tax made under mistake, however, as observed earlier, the mistake of law or fact has to be bonafide and as we have held that the Petitioner has not been able to establish that the said mistake was bonafide, the said decision would not assist the Petitioner.

37.2. For the same reason, the decision of the Allahabad High Court in the case of *Guru Charan Industrial Works Vs. Union of India and Others (supra),* where the Allahabad High Court held that a Writ Court can be approached for refund of tax within a period of three years from the date of knowledge of mistake of law that either in respect of monies paid to the government or the State, the State had no right to receive or that there was an exemption from payment under any provision of law and that the statutory limitation under Section 11B would not apply would not assist the Petitioner as in the case at hand we have held that the Petitioner has been unable to establish that the said mistake was a bonafide mistake of law or fact. To invoke remedy under Article 226, the Petitioner has to come with clean hands

in addition to the mistake being bonafide, which we have already held that the Petitioner has not.

38. The decision of the Apex Court in the case of *Collector of Central Excise, Chandigarh Vs. M/s Doaba Co-operative Sugar Mills Ltd. (supra)* in our view would assist the case of the Respondents. Where the duty has been levied without authority of law or without reference to any statutory authority or the specific provisions of the Act and the Rules framed thereunder have no application, the decision will be guided by the general law and the date of limitation would be the starting point when the mistake or the error comes to light, but as held in the said decision, in making claims for refund before the departmental authority, an assessee is bound within the four corners of the statute and the Rules framed thereunder must be adhered to; the authorities functioning under the Customs Act are bound by the provisions of the Customs Act and if the proceedings are taken under the Customs Act by the department, the provisions of limitation prescribed in the Customs Act will prevail.

39. Mr. Dada has also taken us to the Nine Judge Bench decision in the case of *Mafatlal Industries Limited and Another vs. Union of India*

(supra). In the said decision reference was made in paragraph 73 to the decision of the Supreme Court of the United States of America in the case of *United States Vs. Jefferson Electric Manufacturing Company*[15] where the United State's Supreme Court has considered that if the tax is illegally levied under the system then in force, the tax payer had acquired a right to have it refunded without showing whether he bore the burden of tax or had shifted it to the purchasers and as a condition to refund, the recipient of the refund would undertake or give a bond to use the refunded money in reimbursing the parties to whom the burden of such tax had been shifted by the person claiming the refund, which approach has been accepted by our Supreme Court. In other words, subject to an undertaking on unjust enrichment, an illegal levy is to be refunded.

40. However, in the facts of this case, even if there is an undertaking by the Petitioner that the tax has not been passed on to the customers the same would not be of any assistance to the Petitioner, as the requirement that the mistake is bonafide has to be brought out upfront by the Petitioner which the Petitioner has failed to do in this case.

15 *291 US 386 (1933)*

41. We are, therefore, of the considered view that in the facts and circumstances of the case, there being no bonafide mistake of law or fact established by the Petitioner, the limitation prescribed under Section 27 of the Customs Act would apply to the case of the Petitioner.

42. Section 27 of the Customs Act is quoted as under:

> *"27. Claim for refund of duty*
>
> *(1) Any person claiming refund of any duty or interest, —*
> *(i) paid by him; or*
> *(ii)borne by him,*
> *may make an application in such form or manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest.*
>
> *PROVIDED that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011, receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2):*
>
> *PROVIDED FURTHER that the limitation of one year shall not apply where any duty or interest has been paid under protest:*
>
> *PROVIDED ALSO that where the amount of refund claimed is less than rupees one hundred, the same shall not be refunded.*
> *………….*
>
> *(emphasis supplied)"*

43. Section 27 of the Customs Act, as above, clearly requires that any person claiming refund of any duty is to make an application in the form or manner as may be prescribed before the expiry of one year from the date of payment of such duty or interest. In the present case, the petitioner has filed refund application on 30.07.2019, after more than two years of payment of duty and therefore, even if the date of 11.7.2017 is considered as the payment of duty, the one year would end on 10 July 2018 which is clearly beyond the period of one year as contemplated by the Customs Act and is barred by limitation. Paragraph 108(i) of the decision of the Hon'ble Supreme Court in the case of *Mafatlal Industries Limited and Another vs. Union of India and Others (supra)* lays down that where a refund of tax or duty is claimed on the ground that it has been collected by misinterpreting or misapplying the provisions of law, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments, Section 11B under the Excise Act or under Section 27 under the Customs Act before the Authorities specified thereunder and within the period of limitation prescribed therein, and any Writ Petition in that regard has to be considered and disposed of in accordance with the statutory provisions as the power under Article 226 has to be

exercised to effectuate the rule of law and not for aggravating it, as Section 11-B or Section 27 constitute law within the meaning of Article 265 of the Constitution of India and that, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded under the authority of law. Even otherwise, the claim of refund made by the Petitioner nowhere states or submits that the tax or duty had been claimed or collected by misinterpreting or misapplying the provisions of law. There would therefore be no question of unjust enrichment as claimed by the Petitioner in the Respondent no. 3 rejecting the refund claim on the ground of limitation.

44.1 Mr. Jetly has relied upon the decision in the case *ITC LTD V/s Commissioner of Central Excise, Kolkata IV (supra)* to submit that the refund application was not maintainable. That, Petitioner ought to have filed an appeal against the self assessed bills of entry and only on setting aside of the said assessment, the refund application could have been filed. And that, the Respondent no. 3 was right in rejecting the refund claim on the ground of limitation.

44.2 The Hon'ble Supreme Court in the case of *ITC LTD V/s Commissioner of Central Excise, Kolkata IV (supra)* has observed that endorsement made on the bill of entry is an order of assessment. That u/s 17(1) of Finance Act 2011, there is a provision to self assess the duty, if any, leviable on such goods by importer or exporter as the case may be. Self assessment is an assessment as per the amended Section 2(2). Section 27 of Customs Act provides that any person claiming refund of any duty or interest paid or borne by him may make an application in prescribed form and manner for the refund before the expiry of one year from date of payment of such duty / interest. No doubt the expression which was used in Section 27(1)(i) that, "In pursuance of order of assessment has been deleted from Section 27 due to the introduction of provision of self assessment, however, self assessment is an order of assessment even though the deletion has been effected. The Hon'ble Supreme Court also went on to hold that the provision of refund is more or less in the nature of execution proceedings and it was not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.

44.3 Addressing the contention that no appeal lies against the order of self assessment, the Hon'ble Supreme Court quoting Section 128 of Customs Act, held that as the order of self assessment nonetheless is an assessment order passed under the said Act obviously it would be appealable by any person aggrieved thereby. The Hon'ble Supreme Court concluded that the provision of Section 27 cannot be invoked in the absence of amendment or modification having being made in bill of entry on the basis of which self assessment has been made. The order of self assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution proceedings for refunding the amount. It is not assessment or re-assessment. The Hon'ble Supreme Court held that the claim for refund cannot be entertained unless the order of assessment or self assessment is modified in accordance to law by taking recourse to appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self assessment and re-assess the duty for making refund. Finally it was held that in case any person is aggrieved by any order including self assessment, he has to get the order modified U/s. 128 or under other relevant provisions of the Act. This decision was

relied upon by the Hon'ble Supreme Court in the case of *Commissioner of Customs, Central Excise and Services Tax (Appeals-II), Hyderabad V/s. Standard Consultants Ltd.(supra),* in which case, the Hon'ble Supreme Court held that since order(s) of self assessment were admittedly not assailed, the claim(s) for refund were not maintainable. A Division Bench of this Court in the case of *Pfizer Ltd. & Ors. V/s Union of India & Ors.*[16] has followed, *ITC LTD vs. Commissioner of Central Excise, Kolkata – IV (supra)* held that first an appeal has to be filed and then an application for refund.

44.4 Similar view has taken by this Court in *Andrew Telecom (i) V/s Commissioner of Custom and Central Excise Goa*.[17] A Division Bench of this Court has in the case of *Commissioner of Custom (Import) V/s Indian Farmers Fertilizer Co-operative Ltd*.[18] has held that till assessment order is rectified, the question of refund would not arise.

44.5 However, the Respondent authorities have not rejected the refund application of the Petitioner on the ground that the self-assessment order should have been modified. In any case, since we

16 (1996) 98 BOMLR 193
17 2014 (34) S.T.R. 562 (BOM)
18 2009 (243) E.L.T. 687 (Bom)

have already observed that the application for refund of the excess of duty under Section 27 of the Customs Act was filed beyond the period of limitation, and having held the Petitioner has been unable to establish that the mistake was bona fide, the Petitioner would not be able to escape the limitation under Section 27, we do not deem it necessary to consider the issue of maintainability of the refund application, which has been rejected on the ground of limitation.

45. Mr.Jetly, learned Counsel for the Respondents, has also submitted that under Section 128 of the Customs Act the order of rejection is an appeallable order before the Commissioner of Appeals and the Appeal was to be filed within a period of sixty days and the Commissioner (Appeals) has power to condone the delay for a further period of only thirty days upon sufficient cause being shown. This means that the Petitioner had ninety days to file the Appeal which period considering the date of the impugned order as 8 November 2019 would expire on 16 February 2020. Even if the date of receipt of the impugned order i.e. 18 November 2019 was to be considered, even then the Appeal would be time barred.

46. In *Assistant Commissioner (CT) LTU, Kakinada and others Vs. Glaxo Smith Kline Consumer Health Care Limited (supra)*, the Hon'ble Supreme Court has categorically observed that if a writ petitioner chooses to approach the High Court after expiry of maximum limitation period in the statute, the High Court cannot disregard the statutory period for redressal of the grievance and entertain the writ petition of such a party as a matter of course. The following paragraphs of the said decision are usefully quoted as under :

> "*In the subsequent decision in Mafatlal Industries Ltd. v/s. Union of India, this Court went on to observe that an Act cannot bar abd curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the Constitutional Court would certainly take note of the legislative intent manifests in provisions on the Act and would exercise its jurisdiction consistent with the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute.*
>
> *16. Indubitably, the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. Even while the exercising that power, this Court is required*

to bear in mind the legislative intent and not to render the statutory provision otiose".

47. Further, the period of ninety days has expired much before 16 March 2020, and therefore, the benefit of the suo motu order of the Hon'ble Apex Court extending or excluding the time period between 16 March 2020 and 20 February 2022 on account of Covid-19 pandemic, as claimed by the Petitoner, would also not be available to the Petitioner.

48. Therefore, it is clear that the Petitioner has been negligent in pursuing its statutory remedies and now is seeking the indulgence of this Court in its writ jurisdiction which we are not inclined to exercise as we have found that the Petitioner has not been able to establish that the mistake was bonafide nor has the Petitioner come with clean hands.

49. The Petition also suffers from delay and laches. Even assuming that the impugned order rejecting the refund claim of the Petitioner on 8.11.2019 was received by the Petitioner on 18.11.2019, the Petitioner has filed the present Petition only on 14th September 2020. Therefore, apart from the fact that the Petition is filed more than three years after

the date of excess payment of customs duty on 11.7.2017, it is also filed after ten months of the date of the rejection order.

50. Mr. Dada also referred to a decision of the Full Bench of this Court in the case of *Commissioner of Income Tax Vs. Velingkar Brothers (supra)* where this Court after considering the provision Section 260-A of the Income Tax Act and Section 5 of the Limitation Act read with Section 29 (2) of the Limitation Act observed that Section 5 of the Limitation Act applies in the case of appeals filed under Section 260-A of the Income Tax Act more so, by virtue of Section 29(2) of the Limitation Act. That decision, in our view, would not apply to the facts of this case which is under Section 27 of the Customs Act for refund of duty and not for filing an Appeal. Moreover, as discussed earlier, the decision of the Hon'ble Supreme Court in the case of *Assistant Commissioner (CT) LTU. Kakinada and others Vs. Glaxo Smithkline Consumer Healthcare Limited (supra)* has clearly held that statutory limitation cannot be extended even under Article 142 of the Constitution of India.

51. In the facts and circumstances of this case, no interference is called for in the impugned order dated 8 November 2019 passed by the Assistant Commissioner of Customs, Refund Section, ACC, Mumbai, under Section 27 of the Customs Act, 1962.

52. The Petition is accordingly dismissed. Parties to bear their own costs.

53. We would like to place on record our appreciation for the services rendered by Mr. Rafiq Dada, learned Senior Advocate, and Mr. Zubair Dada, as Amicus Curiae.

(ABHAY AHUJA, J.) **(NITIN JAMDAR, J.)**