

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 87176 of 2018

(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Sodexo India Services Private Limited **Appellant**
1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.

Versus

Commissioner of CGST and Central Excise, **Respondent**
Mumbai West
Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

And

Service Tax Appeal No.87178 of 2018

(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Sodexo India Services Private Limited **Appellant**
1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.

Versus

Commissioner of CGST and Central Excise, **Respondent**
Mumbai West
Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

With

Service Tax Appeal No.87182 of 2018

(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Sodexo India Services Private Limited **Appellant**
1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.

Versus

Commissioner of CGST and Central Excise, **Respondent**
Mumbai West
Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

With

Service Tax Appeal No.87187 of 2018

(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Sodexo India Services Private Limited **Appellant**
1st Floor, Gemstar Commercial Complex, Ramchandra Lane,

Extension Kanchanpada, Malad (W), Mumbai – 400 064.

Versus

Commissioner of CGST and Central Excise, Respondent
Mumbai West

Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

With

Service Tax Appeal No.87199 of 2018

(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Sodexo India Services Private Limited Appellant

1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.

Versus

Commissioner of CGST and Central Excise, Respondent
Mumbai West

Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

With

Service Tax Appeal No.87923 of 2018

(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Commissioner of Central Goods and Service Tax, Appellant
Mumbai West

Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

.

Versus

Sodexo Food Solutions India Pvt Ltd Respondent

1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.

With

Service Tax Appeal No. 87925 of 2018

(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Commissioner of Central Goods and Service Tax,
Appellant

Mumbai West
Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

Versus

Sodexo Food Solutions India Pvt Ltd**.... Respondent**1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.**With****Service Tax Appeal No. 87928 of 2018**(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018
dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)**Commissioner of Central Goods and Service Tax,****....****Appellant****Mumbai West**Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

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Versus

Sodexo Facilities Management Services**.... Respondent****India Pvt Ltd**1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.**With****Service Tax Appeal No. 87929 of 2018**(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018
dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)**Commissioner of Central Goods and Service Tax,****....****Appellant****Mumbai West**Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

.

Versus

Sodexo Facilities Management Services**.... Respondent****India Pvt Ltd**1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.**With****Service Tax Appeal No. 87931 of 2018**(Arising out of Order-in-AppealNo. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018
dated 05.03.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)**Commissioner of Central Goods and Service Tax,****....****Appellant****Mumbai West**

Mahavir Jain Vidyalaya, C.D. Burfiwala Lane,
Andheri (W), Mumbai – 400 058.

Versus

Sodexo Food Solutions India Pvt Ltd

.... Respondent

1st Floor, Gemstar Commercial Complex, Ramchandra Lane,
Extension Kanchanpada, Malad (W), Mumbai – 400 064.

APPEARANCE:

Shri Arun Jain, Advocate for the Assesse-appellant

Shri Jitesh Kumar Jain, Authorized Representative for the Revenue

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86223-86232/2026

Date of Hearing: 18.08.2026

Date of Decision: 08.10.2026

PER: SANJIV SRIVASTAVA

These appeals are directed against Order-In-Appeal No. SK/GST (Audit-II)/MUM/17 to 21/Appeals-III/2018 vide the impugned order dated 05.03.2018 as follows :

"ORDER

In view of the above discussions and findings, I modify the order to allow sanction to the appellant the refund claim total of Rs. 31,38,475/- + Rs. 22,30,395/- + 13,59,456/- + Rs. 27,47,859/- + 26,19,108/- Totally amounting to Rs. 1,20,95,023/- pertaining to 'Housekeeping Service' with consequential relief to the appellant. I further modify the order to sanction the refund claims of Rs. 16,09,249/- + Rs. 1,33,59,277/- + Rs. 1,15,35,636/- + Rs. 19,83,510/- + Rs. 1,86,01,459/- Totally amounting to Rs. 4,70,89,131/-, pertaining to 'Canteen/Outdoor catering service', but order to transfer the same to Consumer Welfare Fund as per the provisions of section 11B of Central Excise Act, 1944 made applicable to service tax matter vide Section 83 of Finance Act, 1994.

These five appeals are disposed off in the above terms."

2.1 Appellant is having service tax registration No. AAACR2547QST001 for providing taxable services namely "Business Auxiliary Service" "Business Support Service", "Cleaning Services", "Dry-Cleaning Services", "Management

or Business Consultant Service”, “Event Management Service”, “Renting of Immovable Property”, “Maintenance or Repairs Service”, “Manpower Requirement/Supply Agency Services and “Outdoor Catering Service” in terms of Section 65 of Chapter V of the entrance Act 1994, to multi-national companies, educational institutions and other organizations.

2.2 Appellant had filed refund claims with the department under provisions of Section 11B of Central Excise Act, 1984 as made applicable to Service Tax by virtue of Section 83 of Chapter 5 of Finance Act, 1994 on the ground that there was no liability to pay any tax.

2.3 Appellant had filed these refund claims on the basis that they were providing services which are in the nature of catering, House-keeping and facility management services as the provision of notification No. 25/2012-ST dated 20.06.2012 states with regard to the services provided by them which in their view they paid the due Service Tax in respect of these services. Simultaneously, they represented to the CBEC Board with regard to clarification in the matter. Vide Circular No. 172/7/2013-ST dated 19.09.2013, Board clarified that these services were exempt from payment of service tax as per clause 9(a) of the said notification, as per which Auxiliary Educational Services provided to the Educational institutions were exempt from payment of service tax. As they had provided the services in nature of House-Keeping and Catering services to Educational institutions, these services are exempt from payment of Service Tax. Appellant claimed that they had issued credit notes to the service recipients for service tax collected from them at the time of provision of services.

2.4 After examination and scrutiny show cause notices were issued to the appellant for rejection of the refund claims. These refund claims and show cause notices were disposed of by Order-In-Original as detailed in the table below :

Order-In-Original No. & Date	Period of Refund claims	Amount Claimed as refund	Date of Filing the refund claim
ST-II/Div. IV/R-206/2014-15 dated 30.09.2014	February,2013	687485	21.02.2014
	March,2013	1118659	21.02.2014
	April,2013	577513	27.03.2014
	May,2013	679440	27.03.2014
	June,2013	814916	27.03.2014
	July,2013	264420	27.03.2014
	August,2013	504293	27.03.2014

	September,2013	100098	27.03.2014
	Total	4746824	
ST-II/Div. IV/R- 208/2014-15 dated 30.09.2014	July, 2012	402905	11.02.2014
	August,2012	515704	11.02.2014
	September,2012	603744	12.02.2014
	October,2012	1094184	12.02.2014
	November,2012	812506	21.02.2014
	December,2012	524495	07.02.2014
	January,2013	777561	05.02.2014
	Total	4731099	-
ST-II/Div. IV/R- 205/2014-15 dated 30.09.2014	April,2013	2627764	07.04.2014
	May,2013	3206687	07.04.2014
	June,2013	2315100	07.04.2014
	July,2013	2353719	15.04.2014
	August,2013	3871224	15.04.2014
	September,2013	1215178	15.04.2014
	Total	15589672	
ST-II/Div. IV/R- 204/2014-15 dated 30.09.2014	January,2013	3876125	15.01.2014
	February,2013	3974607	16.01.2014
	March,2013	5044360	20.01.2014
	Total	12895092	
ST-II/Div. IV/R- 207/2014-15 dated 30.09.2014	July,2012	2234041	21.01.2014
	August,2012	3018216	21.01.2014
	September,2012	4060713	22.01.2014
	October,2012	4802152	22.01.2014
	November,2012	3670893	24.01.2014
	December,2012	3434552	24.01.2014
	Total	21220567	
	Grand Total	59183254	

2.5 As the refund claims were rejected for the reasons recorded in the respective orders, Appellant filed appeals before the Commissioner (Appeals) which have been disposed of as per the impugned order.

2.6 Aggrieved by the impugned order, both Revenue and Appellant (Assesse) have filed these appeals.

2.7 As the issues involved in these appeals is identical all the appeals have been taken up for consideration together.

3.1 We have heard Shri Arun Jain, Advocate for the Appellant (Assesse) and Shri Jitesh Kumar Jain, Authorized Representative for the Revenue.

3.2 Learned counsel submits that

- following issues are involved in the present appeal
 - Whether the refund claim for the period July 2012 to December 2012 is barred by limitation as the same is filed after 1 year from the date of payment of tax?
 - The learned Commissioner (A) in his Order-in-Appeal dated 05.03.2018 has held that the time period of 1 year shall start from the date of CBIC clarification dated 19.09.2013 and therefore, refund claims are within the time period including for the period July, 2012 to December, 2012. Against this, the department is in appeal.
 - Whether the assessee has satisfied the bar of unjust enrichment castigated upon it under Section 11B of the Central Excise Act, 1944, read with Section 83 of the Finance Act?
 - In respect of housekeeping services, the learned Commissioner (A) has held that the Assessee has borne the incidence of tax and is eligible for refund. Against this, the department is in appeal.
 - Insofar as canteen/outdoor catering services are concerned, the learned Commissioner (A) has come to the conclusion that the Assessee has failed to satisfy that the incidence of service tax claimed as refund has not been passed to the students and faculty members who have ultimately borne the burden of service tax. Against this finding, Assessee is in appeal.
- time period for computing the limitation in these cases will commence from date of board clarification i.e. 19.09.2013, as appellant has made representation before the board, all the Service Tax paid by them should have been treated as to be paid under protest. Hence, the refund claims could not have been barred by the limitation, reliance is being placed on the following decisions :
 - Tamil Nadu Petro Products Ltd. [2008 (226) E.L.T. 51 (Mad.)]
 - In-House Productions Ltd. [2017 (3) G.S.T.L. 97 (Bom.)]
- appellant had issued credit note to the educational institutions and for an amount equivalent to the Service Tax initially collected, bar of unjust

enrichment would not apply in the present case. The refund should have been allowed in their favour.

- The reliance placed is also being on following decisions :
 - Hasmat Ali v/s. Amina Bibi and others [2021 SCC OnLine SC 1142]
 - Uday Mohanlal Acharya [2000 SCC OnLineBom 585]
- The decision of Hon'ble Supreme Court in the case of Addison & Co. Ltd reported in 2016 (339) E.L.T. 177 (S.C.) would not apply to the effects of the present case as the same was in respect of Central Excise duty shown as and Service Tax Rules, 1994 itself ensures the bar of unjust enrichment is not applicable once credit note is issued.
- Reliance is placed upon the Instruction No. 341/34/2010-TRU dated 31.03.2011.
- the independent Chartered Accountant to the effects that burden of tax paid has been borne by the appellant themselves.
- Appeals filed by the assessee be allowed and those filed by revenue be dismissed.

3.3 Arguing for Revenue, Authorized Representative submits that:

- the impugned order allows the refund of Rs. 1,20,95,023/- in respect of Housekeeping Service in favour of the appellant. Out of this Rs. 53,66,697/- which is barred of limitation, as per the provision of the Section 11B of the Central Excise Act,1944 read with Section 83 of the Finance Act,1 994. Revenue challenges this part of the order in their appeals.
- Impugned order though sanctioning the amount of refund of Rs. 4,70,89,131/- but finds that the same was hit by bar of unjust enrichment, hence ordered to credit the same with consumer welfare fund.
- On the issue of unjust enrichment reliance placed on the following decisions :
 - Prachar Communication Ltd. [2017 (10) TMI 664 Bombay High Court].
 - Addison & Co. Ltd. [2016 (339) E.L.T. 177 (S.C.)]
 - Grasim Industries Ltd [2011 (271) E.L.T. 164 (S.C.)]
 - Mafatlal Industries Ltd. [1997 (89) E.L.T. 247 (S.C.)]

4.1 We have considered the impugned order along with submissions made in appeal and during the course of arguments.

4.2 Impugned order records the findings as follows :

"9. I have gone through the facts of the case, the impugned orders, appeals filed by the appellants, the grounds indicated therein and those tendered during the course of personal hearing.

9.1. I observe that the appellants are primarily providing housekeeping and outdoor catering (being the major service provided) which are falling under the ambit of auxiliary educational services as defined under Notification No.25/2012-ST dated 20th June, 2012.

Sr. No. 9 of which reads:

"Services provided to or by and educational institution in respect of education exempted from Service Tax, by way of,-

(a) Auxiliary education services; or

(b) -

TRU vide Circular No. 172/7/2013 St dated 19.09.2013 has clarified interalia that the activity of housekeeping and canteen has been specified for exemption from service tax. I find that both the activities of Housekeeping and Canteen / Outdoor Catering Service are falling under the ambit of auxiliary educational services as defined under Notification No.25/2012-ST dated 20th June, 2012, At Sr. No. 9.

9.2. The next issue is whether the 'Canteen service' provided is the same as 'Outdoor Catering service'. In this regard I find that there are various judicial decisions upholding that services provided at canteens would be chargeable to Service Tax under the category of 'Outdoor Catering service' as was held in M/s. Krunal Catering Service Vs. CCE, Vadodara[2009-TIOL-672-CESTAT-AHM] & CCEX & CS, Aurangabad Vs. M/s. Greaves Lambordini Officers Welfare Club[2013-TIOL-1902-CESTAT-MUM. I concur with these judicial decisions specially because on perusal of the agreements submitted in this regard it appears that the 'Canteen Service'/ 'Outdoor Catering Service' provided to these educational institutions is exclusively for the students, faculty and staff and not open to the general public.

9.3. As regards the view that the claims for the Periods as shown in Para 6.2.a. & 6.2.b. above alleged to be entirely time barred, as they were not filed within one year from the relevant date as per the provision of section 11B of CEA, 1944 as made applicable to Service Tax vide Section 83 of the Finance Act, 1994. I find that appellant had paid Service Tax as a matter of abundant caution, in good faith and made representation to Chairman, CBEC seeking clarification on applicability of Service Tax on Facility Management Services and Catering Service provided to educational institutions with reference to Mega Exemption Notification 25/2012 dated 20-06-2012. CBEC vide Cir. No. 172/7/2013-ST dated 19-09-2013 clarified that the services of hostels, housekeeping, security services, canteen etc. would fall under the definition of "auxiliary educational services". Therefore, limitation period of 1 year should be counted from date of CBEC clarification as was held in *M/s. In House Productions Ltd. Vs. the Commissioner of Service Tax, Mumbai 2017(8)TMI 521. (Bombay HC); Hindustan Cocoa Products Vs. Union of India 1994(6) TMI - Bombay High Court*. I therefore, find all the claims to be within time and the appellant is eligible for refund of the entire amount of Housekeeping service as per para 5.1.I. to 5.1.III. and 5.2.I. to 5.2.II. above.

9.4. Having found that the appellants are primarily providing housekeeping and Canteen/Outdoor catering service which are falling under the ambit of auxiliary educational services as defined under Notification No. 25/2012-ST dated 20th June, 2012, I proceed to decide the unjust enrichment issue. I find that the facility management/housekeeping service is being provided to educational institutions and having issued credit notes to them the appellant clearly has borne the incidence of tax and is eligible for refund. As regards Canteen/Outdoor catering service, as detailed in para 6.1.a. to 6.1.c. and 6.2.a. to 6.2.b. above, is concerned on perusal of the agreements, it appears that the educational institutions are receiving the catering services for the students and faculty members, and therefore the real consumers/ receivers of the service are basically the students and faculty members for which the charges per month or so basis, are collected. As such, I

have every reason to believe that the service tax has actually been paid by the school students to the authorities concerned and then by the authorities to the appellant and believing the appellant has refunded the service tax amount to the school who have become a double beneficiary in the instant case. Further, on the request of the department, the Appellant had tried to collate the information's from the Educational Institutions in relation to the fee receipts of the students and the pricing method thereof. However, the Educational Institutions have restrained from sharing any such information on account of their internal confidentiality issues. The appellant has failed to prove beyond doubt that the incidence of service tax claimed as refund has not been passed to the students and faculty members who have ultimately borne the burden of Service Tax.

10. In view of the above discussions and findings, I pass the following order."

4.3 It is a claim of the appellant that they paid the service tax in respect of these services namely Housekeeping and Canteen/ Outdoor Catering Service provided to Educational Institutions. Owing to ambiguity in the Notification No 25/2012-ST dated 20.06.2012, (S No 9 (e) to get things clarified they have represented to the board and the same was clarified by the board vide Notification No. 172/7/2013 – ST dated 19.09.2013. Hence for computation of period of limitation, the date of issuance of circular should be treated as the relevant date to us even otherwise, when they had represented the tax was paid under protest and hence should not have been said to be hit by bar of limitation.

4.4 Though at first instance above arguments appears to be attractive and meritorious but we find that the said arguments lacks to stand upon, notification No. 25/2012 was effective from 01.07.2012. Appellant was collecting Service Tax in respect of these services from 01.07.2012 onwards and paying the same to the ex-chequer accordingly as prescribed. They had not pointed out uptill making the representation on 12.03.2013 however beyond any contest in respect of the collections of payment of tax. All the details further, they were filing them as ST-3 returns with regards to the Service Tax collected

and paid. We also find that the assessment orders which acquire finality if challenged against. The Issuance of board circular dated 19.09.2013 can clarify but not modify. It is clarified on the representation made by the appellant but not assessment/re-assessment order or an order in appellate proceedings setting aside the same. On the issue whether the Appellant could have filed the refund claim without the self assessment made by the appellant on the invoice determining the duty payable on the goods cleared by the appellant being modified by the appellate authority a larger bench of tribunal has in the case of Eurotex Industries and Exports Ltd [2007 (216) ELT 137 (T-LB)] has observed as follows:

"4. The respondents' contention that under Section 27 of the Customs Act, 1962 a claim for refund can be made by any person who had paid duty in pursuance of an order of assessment implies that a claim for refund can be made without challenging the assessment in appeal and that since Section 27 of the Customs Act and Section 11B of the Central Excise Act providing a period of six months to one year for filing a refund claim would become redundant as the appeal proceeding against the assessment order would never be over within that period and that both Section 27 and Section 11B provide that whereas a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund, the amount to such person without his having to make any claim in that behalf implies that the claim of refund can be made without challenging the assessment order have been adequately dealt by the Apex Court decisions in the case of Priya Blue Industries and Flock (India) Pvt. Ltd., and negated the relevant paragraphs of these decisions are reproduced below :

Priya Blue

"5. Under Section 27 of the Customs Act, 1962 a claim for refund can be made by any person who had (a) paid duty in pursuance of an Order of Assessment or (b) a person who had borne the duty. It has been strenuously submitted that the words "in pursuance of an Order of Assessment" necessarily imply that a claim for refund can be made without challenging the Assessment in an Appeal. It is submitted that if the assessment is not correct, a party could file a claim for refund. It

was submitted that if the assessment is not correct, a party could file a claim for refund and the correctness of the Assessment Order can be examined whilst considering the claim for refund. It was submitted that the wording of Section 27, particularly, the provisions regarding filing of a claim for refund within the period of 1 year or 6 months also showed that a claim for refund could be made even though no Appeal had been filed against the Assessment Order. It was submitted that if a claim for refund could only be made after an Appeal was filed by the party, then the provisions regarding filing of a claim within 1 year or 6 months would become redundant as the Appeal proceedings would never be over within that period. It was submitted that in the claim for refund the party could take up the contention that the Order of Assessment was not correct and could claim refund on that basis even without filing an Appeal.

6. We are unable to accept this submission. Just such a contention has been negated by this Court in Flock (India)'s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding: The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.

Flock India

10. Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and

will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

5. Our attention has also been drawn to the Circulars issued by the Board as contained in the Customs Appraising Manual Volume V and Chapter 15 of the CBEC's Customs Manual of instructions which lay down that at times, when it is found that duty has been paid in excess than what was actually leviable on the goods, which excess payment may be due to lack of information on the part of importer/exporter or non-submission of documents required for claim of value or rate of duty or due to shortage/short landing, pilferage of goods, refund of excess amount of duty paid can be claimed by the importer/exporter under Section 27 of the Customs Act and further Board's Letter vide F. No. 55/98/70-Cus-IV, dated 25-8-1970, 249/70 provides that if an assessment was made by appraiser, which is merely countersigned by the Assistant Collector, the refund can be claimed under Section 27 itself whereas if assessment is changed by the Assistant Collector, refund cannot be claimed under Section 27 without challenging the assessment itself. In view of the circulars, it was submitted that same are binding on the revenue as per Apex Court decision in the case of Collector of Central Excise, Vadodara v. Dhiren Chemical Industries - 2002 (139) E.L.T. 3 (S.C.) and Arviva Industries (I) Ltd. v. U.O.I. - 2007 (209) E.L.T. 5 (S.C.) and therefore the refund claims which are filed in pursuance of these circulars cannot be rejected. We however find

that the Board has issued a Circular No. 24/2004, dated 18-3-2004 vide F. No. 438/18/2003-Cus-IV, bringing to the notice of the field formations the Apex Court decision in the case of Flock India and other cases holding that a refund claim is not maintainable when the assessee does not challenge assessment order and directed them to follow the decision of the Supreme Court and since this circular was issued after 2003 when the Customs Manual was issued, the same will have precedence over earlier circulars and therefore it cannot be said that the Revenue has not followed its own circular which are binding on them. Besides there is a contrary decision of the Supreme Court in the case of Kalyani Packaging Industry v. Union of India - 2004 (168) E.L.T. 143 (S.C.) which held that circular issued by the Board cannot stand in preference to the decision of the constitutional Bench of the Supreme Court. We also observed, that the Apex Court decision in the case of Priya Blue and Flock India were followed by the Tribunal and upheld by the Supreme Court in the case of HCL Perot Systems Ltd. v. Commissioner of Customs, New Delhi - 2004 (165) E.L.T. A77 (S.C.), Super Cassette Industries v. Commissioner of Customs - 2004 (163) E.L.T. A116 and that the Supreme Court decision in the case of Sales Tax Officer, Benaras & Ors. v. Kanhaiya Lal Mukundlal Saraf, (1959) SCR 1350, which was followed in Shri Valabh Glass case was overruled by the Apex Court in the case of Mafatlal Industries Ltd. v. Union of India - 1997 (89) E.L.T. 217. Further in Paragraph 70 of the Mafatlal decision, Supreme Court has observed that where a duty has been collected under a particular order which has become final, the refund of duty cannot be claimed unless the order (whether it is a order of assessment, the adjudication or any other order under which the duty is paid) is set aside according to law. We are not convinced by the plea of the respondent that when an assessment is made in accordance with the claim made by the assessee, such an assessment cannot be challenged by him, as he cannot be said to be aggrieved by the order of the assessment, as it is the job of the proper officer to pass a correct assessment order irrespective of the claim made by the assessee and the grievance is from the assessment order and not from his claim especially when the Apex Court in the two decisions in the case of Priya Blue and Flock India, has categorically held that a refund is not

maintainable unless and until the assessment order in pursuance of which the duty was paid has not been challenged."

4.5 It is now a settled law by the three judges Bench of Hon'ble Supreme Court in the case of ITC Ltd. [2019 (368) ELT 216 (SC)] that even the self assessment made is an assessment order and no refund claim would be maintainable till the same is set aside in the appellate proceedings. The relevant paras of the said decision are reproduced below:

35. Section 27 of the Act prior to amendment by Finance Act, 2011 provided for refund procedure. Any person could claim a refund of duty and interest if any paid on such duty. Refund of duty and interest if any paid pursuant to the order of assessment or borne by him, may make an application for refund of such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs within one year in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital. In any other case before the expiry of six months from the date of payment of duty and interest. He has to further satisfy that he has not passed on such liability to any other person. The limitation of one year or six months shall not apply where any duty and interest has been paid under protest. It is made clear by the second proviso to Section 27 that in case of refund becomes necessary as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months shall commence from the date of such judgment, decree, order or direction.

36. Section 27 of the Customs Act as amended by Finance Act, 2011 provides that any person claiming refund of any duty or interest paid or borne by him, may make an application in such form and manner as may be prescribed for such refund to the Assistant or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest. If an application for refund has been made before Finance Bill received the assent of the President, it is deemed to be filed under the provision of Section 27(1) as existed and to be dealt with under Section 27(2). The period of limitation of one year provided by the provisions of Section 27 has to be computed in the case of goods which are exempt from payment of duty by a special

order issued under Section 25(2) from the date of issue of such an order as provided in Section 27(1B)(a). Where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any Court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction. It is provided in Section 27(1B)(c) that where any duty is paid provisionally under Section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in the case of re-assessment, from the date of such re-assessment. The second proviso to Section 27 makes it clear that limitation of 1 year shall not apply where any duty or interest has been paid under protest.

37. Under Section 27(2)(a) it is incumbent upon the applicant to satisfy that the amount of duty or interest of which refund has been claimed, had not been passed by him to any other person, the provision aims at preventing unjust enrichment.

38. No doubt about it that the expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self-assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self-assessment as observed by this Court in Escorts Ltd. v. Union of India &Ors. (supra).

39. In Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd. - 2000 (120) E.L.T. 285 (S.C.) = (2000) 6 SCC 650, the question which came up for consideration before this Court was non-challenge of an appealable order where the adjudicating authority had passed an order which is appealable under the statute, and the party aggrieved did not choose to file an appeal. This Court held that it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing the order. The provisions of the Central Excise Act, 1944 came up for consideration. The Court has observed :

"10. Coming to the question that is raised, there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing its order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view was taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that whereas a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, if an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for the refund which, if we may term it so, is in the nature of execution of a decree/order. In the case at hand, it was specifically mentioned in the order of the Assistant Collector that the assessee may file an appeal against the order before the Collector (Appeals) if so advised." (emphasis supplied)

40. In *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)* - 2004 (172) E.L.T. 145 (S.C.) = (2005) 10 SCC 433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus :

"6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India) case (2000) 6 SCC

650. Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.

7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the claim for refund had to be filed within a period of six months. It was still held, in *Flock (India)*'s case (*supra*), that in the absence of an appeal having been filed no refund claim could be made.

8. The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained." (emphasis supplied)

41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is 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.

42. It was contended that no appeal lies against the order of self assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder :

"128. Appeals to [Commissioner (Appeals)]. — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner

(Appeals)] [within sixty days] from the date of the communication to him of such decision or order :

[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]

[(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing : Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, selfassessmentis not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, 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 for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or reassessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra)."

45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India - 2008 (12) S.T.R. 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act.

4.6 Though the law has been explained referring to provisions of Custom Act, 1962, it need to be noted that law has been applied by the Hon'ble Apex Court in Case of ITC, which was a case under the Central Excise Act, 1944 as is evident from para 7 to 10 of the said order. Also Hon'ble Supreme Court has not agreed with the reasoning adopted by the Hon'ble Rajasthan High Court incase Central Office Mewar Palace, which was case of service tax. However we observe that Hon'ble Delhi High Court has in case of BT (India) Pvt. Ltd. [(2023) 13 Centax 89 (Del.)], specifically observed as follows:

57. It becomes pertinent to note that both the Customs as well as the Excise Acts follow an identical procedure of self assessment. While Section 17 of the Customs Act enables an importer or an exporter, as the case may be, to self-assess and pay the duty leviable on goods, the said provision further empowers the proper officer to verify the self-assessed return that may be submitted. In terms of Section 17(4) of the said enactment, if the proper officer on verification, examination or testing of the goods comes to the conclusion that the self assessment is incorrect, it becomes entitled to reassess the duty leviable on goods. It is in extension of the aforesaid power that sub-section (5) of Section 17 speaks of reassessment and the obligation of the proper officer to pass a speaking order in support of the exercise of reassessment.

58. Section 27 enables a person to claim refund of duty or interest which may have been either paid or borne by it. Section 27(2) of the Customs Act, in terms identical to Section 11B (2) of the Excise Act, speaks of refunds being effected upon the proper officer being satisfied that the whole or any part of the duty paid is refundable. Section 27(2) is thus a provision which is *pari materia* with Section 11B (2) of the Excise Act.

59. The Supreme Court in *ITC Limited*, notwithstanding Section 27(2) employing the expression 'satisfied' held that unless a self-assessed return is revised or doubted in exercise of powers of reassessment, best judgment assessment or where it be alleged that duty had been short levied, short paid or erroneously refunded, those powers would not be available to be exercised at the stage of considering an application for refund. Having noticed the statutory position which prevails, we turn then to the decisions which would have a bearing on the question which stands posited.

60. *Flock (India)* was one of the earliest decisions which dealt with the aspect of a claim for refund emanating from a return which had been duly assessed. In *Flock (India)*, the self-assessed returns had been duly assessed by the Assistant Collector and the issue of classification was answered against the assessee. The aforesaid order of the Assistant Collector came to be affirmed by the Collector

(Appeals). It was thereafter and while seeking to prosecute a claim for refund that the assessee sought a review of the aforesaid decisions which had been rendered by the authorities. Negating the said contention, the Supreme Court observed that once an assessment filed had been duly adjudicated in accordance with the procedure prescribed under the statute, it would be impermissible for the said decision being reviewed or revisited at the stage of consideration of a refund claim.

61. In Priya Blue Industries, the Supreme Court was faced with a situation where a Bill of Entry had been duly assessed and the duty payable in terms of that assessment deposited under protest. It was thereafter that an application for refund came to be preferred. As would be evident from the conclusions ultimately recorded in that decision, the Supreme Court categorically held that once an order of assessment came to be made, the duty was liable to be paid in accordance with that order alone. Their Lordships pertinently observed that unless such an order of assessment is reviewed or modified in appeal, the duty as determined to be payable would remain untouched and it would not be open for an assessee to seek a review of the assessment order, bearing in mind the fact that the claim for refund is not akin to proceedings in appeal. It was further held that the authority which is enjoined to consider a refund claim can neither sit in an appeal over an assessment made nor can it review an order of assessment.

62. Both these decisions and the views expressed therein came to be specifically noticed and reaffirmed by three learned Judges of the Supreme Court in ITC Limited. The decision of the Supreme Court in ITC Limited assumes added significance, insofar as the present case is concerned, in light of it having found that a self-assessment return, even in the absence of a formal order dealing with the same, would nonetheless amount to an assessment. We had in this regard and in the preceding parts of this decision noticed the definition of the expression 'assessment' as contained in Rule 2(b) of the 1994 Rules which includes a self-assessment of service tax and thus being evidence of a position similar and akin to that which obtains under the Customs and Excise Acts.

63. *Their Lordships in ITC Limited categorically held that notwithstanding a self-assessed Bill of Entry having been merely endorsed by the competent authority, the same would nonetheless amount to an 'assessment'. It was in that backdrop that it was held that once a self-assessed return had been duly accepted, the same could not be modified or varied by an authority while considering an application for refund.*

64. *It becomes pertinent to note that the appellant before the Supreme Court in that case, had sought to press the claim for refund asserting that it had due to inadvertence failed to submit a self-assessment return taking into consideration an exemption notification. It was this claim which came to be ultimately negated by the Supreme Court and which held that a claim for refund cannot be entertained unless the order of assessment, and which would include a self-assessment return, is modified in accordance with the procedure prescribed in the statute. In our considered opinion, it is these principles enunciated in Flock (India), Priya Blue Industries and ITC Limited, which compel and convince us to observe that the impugned order is clearly rendered unsustainable.*

65. *Undisputedly, the petitioner had submitted self-assessment returns proceeding on the basis that the output services rendered by it would qualify as an 'export of service' and thus it being not exigible to service tax. The aforesaid self-assessment returns remained untouched and had not been questioned by the respondents either in terms of Sections 72 or 73 of the Act. The application for refund of CENVAT credit was founded on the petitioner assessing that it was not liable to pay service tax on services so exported. The accumulation of CENVAT credit came about in light of the various input services received by the petitioner and it having availed credit of service tax paid thereon in terms of Rule 3 of the CCR Rules. It was in respect of the accumulated CENVAT credit that the application for refund came to be made.*

66. *In our considered view, unless the self-assessed return, as submitted had been questioned, re-opened or re-assessed and the assertion of the petitioner of the services rendered by it qualifying as*

an 'export of service' questioned or negated in accordance with the procedure prescribed under the Act, its claim for refund could not have been negated. As was observed by the Supreme Court in ITC Limited, a self-assessed return also amounts to an 'assessment' and unless it is varied or modified in accordance with the procedure prescribed under the relevant statute, the same cannot possibly be questioned in refund proceedings. As the Supreme Court had held in the decisions aforementioned, the authority while considering an application for grant of refund neither sits in appeal nor is it entitled to review an assessment deemed to have been made. In fact, the Supreme Court in ITC Limited had described refund proceedings to be akin to execution proceedings.

67. We thus come to the firm conclusion that in the absence of the self-assessed return having been questioned, reviewed or re-assessed, the claim for refund of CENVAT credit could not have been denied by the respondents. When confronted with the application for refund, all that the respondents could have possibly examined or evaluated was whether the provisions of Rule 5 read along with the various prescriptions contained in the notification dated 18 June 2012 had been complied with. The respondents, at this stage of the proceedings, could not have doubted, questioned or undertaken a merit review of the self-assessed return which had been submitted.

4.7 In case of R C Gupta [(2025) 35 Centax 185 (Tri.-Del)] Delhi Bench held as follows:

"9. In the present case, the appellant had paid the service tax on 60% of the value of the service so rendered and made the refund claim on 5.4.2016. The refund application was decided by the Adjudicating Authority on merits that the refund claim was filed incorrectly as the assessee themselves were liable to pay service tax on 50% of the total value of the billing amount. As the assessee was held to be himself liable to pay duty for which the refund is claimed, the refund claim was held to be unsustainable. On the same analogy, the impugned order has been passed on 3.5.2018. After the said two orders, the decision of the Apex Court in ITC Ltd. was pronounced on 18.09.2019. The law settled by the Apex Court in ITC Ltd. is law of

the land and is applicable/binding on all the forums in the country. In view thereof, the refund claim filed by the appellant cannot be entertained unless and until the assessment is challenged by way of appeal. The law has been further clarified by the Delhi High Court in BT (India) Pvt. Ltd. to be applicable to the cases of refund claims under the Service Tax Regime. Following the decision in BT (India) Pvt. Ltd., the Tribunal in the case of Jagdamba Phosphate v. Commissioner of CGST, Udaipur Final Order No.59378/2024 dated 28.10.2024 [(2024) 25 Centax 421 (Tri. - Del.)] held that since the appellant had not assailed the self-assessments and as per assessments, the appellant is not entitled to any refund, the refund claim was rejected."

4.8 In view of the above decisions we do not find any merits in the submissions made by the appellant on the ground of limitation. The representation made by the appellant to the Board and clarification issued by the Board is not akin to appellate proceedings as provided by Section 85 of the Finance Act, 1994 against the self assessment made by the appellant at time of provision of the services and hence no refund claim would be maintainable till the time such self assessment is modified. Further Board is not even the prescribed appellate authority to whom the appeal against the self assessed returns could have been filed. Hence the submission made by the appellant on the basis of the representation made by them to the Board and subsequent clarifications issued by the Board, do not have legs to stand upon. In the case of Krish Fabrics India Pvt. Ltd. [FINAL ORDER NO.76380-76384/2025 dated 23.05.2025 in Customs Appeal No.75899 of 2022] Kolkata Bench has observed as follows:

"19. While it is not in dispute that an importer can claim benefit of an exemption notification, if eligible, at any point in time; however for the purpose it is necessary that he has an assessment order to that effect, even if it be by way of a reassessment. So even if for argument sake, it is considered that changes sought were amendment or rectification of clerical errors, that alone would not be sufficient to achieve the desired result. There ought to be an appropriate assessment/re-assessment order to such an effect and it is settled law that for re-assessment, the original assessment order would need to be set aside, to pave way to be replaced by the

revised assessment/reassessment order and it is thus a crucial link in the process for which at this juncture the only remedy lies in following the Section 128 route.

20. The law provides for an appeal mechanism which cannot be substituted, by seeking recourse to the provisions concerning amendment or correction of the relevant documents. It is settled law that even if payment is made under mistake of law, as long as the order was final, no refund benefit in law could accrue, till the same is unsettled and assessed afresh. Mere incorporation of new notification number or a tariff head would not mean and sanctify a reassessment of the document. It warrants a specific and categorical order to that effect. This can only be achieved upon first extinguishing the earlier order and revising and replacing it with a new one. To achieve this end, the Proper Officer would need a direction from an appropriate superior authority. Such a direction as contemplated in law can only emanate out of directions in appeal, hence the courts including the hon'ble apex court have always stressed upon and held the imperative need in following the Section 128 route, as the appropriate course of action."

4.9 The decision of Hon'ble Madras High Court (Tamil Nadu Petro Products Ltd.) and Hon'ble Bombay High Court, (In House Productions Ltd.) will not help the case of the appellant assessee as these decisions have been rendered much prior to decision of Hon'ble Supreme Court in case of ITC and have only stated vis a vis the applicability of limitation when the appellant had paid duty under mistaken belief of law. It is not the case in hand and we find that in terms of the decision of the Hon'ble Apex Court refund claims were not even maintainable.

4.10 Further in case of M.G.M. International Exports Ltd. [2022 (61) G.S.T.L. 565 (Mad.)] Hon'ble Madras High Court observed as follows

11. The Hon'ble Supreme Court in UOI v. Mafatlal India Ltd., 1997 (89) E.L.T. 247, while dealing with refund of tax, classified refunds into two categories. The first one on account of unconstitutional levy and second one on account of illegal levy.

12. Former was on account of the provision under which the collection was made is declared as unconstitutional subsequently and

the latter on account tax collected by the authorities under the Act by misconstruction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts, i.e., an erroneous finding of fact. In the latter class of cases, the claim for refund it has been held to arise under the provisions of the Act and governed by the situations contemplated by, and provided for by, the Act and the Rules.

13. Explaining the second category of refund, the Court also held that where a duty of tax has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained.

14. It was held that it was ununderstandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another Court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a Court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. It observed that if this theory is applied universally, it will lead to unimaginable chaos.

15. Therefore, the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the

manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ in Tilokchand Motichand extracted in Para 37). The decisions of the Court saying to the contrary was held to have been decided wrongly and were accordingly overruled herewith. [AIR 1959 SC 135 and 1968 (3) SCR 662 overruled; 1969 (2) SCR 824 followed]. [paras 70, 99]

16. It has also held that the very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. It also observed that a corresponding obligation is cast upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the constitutional provisions, viz., Article 265 of the Constitution of India.

17. At the same time, it held that it does not follow from this that refund follows automatically. Article 265 of Constitution of India cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 of the Constitution, an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It observed that it would be a parody of economic justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden that would be economic justice. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This Section contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same and there is no automatic or unconditional right to refund. [paras 20, 69]

18. Pursuant to the directions given in *Mafatlal Industries v. Union of India*, 1997 (89) E.L.T. 247 (S.C.), the Hon'ble Supreme Court has laid down the following guidelines in *Assistant Collr. of Cus. v. Anam Electrical Manufacturing Co.*, 1997 (90) E.L.T. 260 (S.C.) :-

(1) Where a refund application was filed by the manufacturer/purchaser beyond the period prescribed by the Central Excise Act/Customs Act in that behalf, such petition must be held to be untenable in law. Even if in any appeal, suit or writ petition, direction has been given that the refund application shall be considered with reference to the period of limitation prescribed in the Central Excise Act/Customs Act - or that the period of limitation shall be taken as three years - such a direction of the Appellant Court/Civil Court/High Court shall be deemed to be unsustainable in law and such direction shall be set aside. The period prescribed by the Central Excise Act/Customs Act for filing a refund application in the case of "illegal levy" cannot be extended by any Authority or Court.

(2) Where, however, a refund application was filed within the period prescribed by the Central Excise Act/Customs Act but has been dismissed wholly or partly on any ground and the said order is questioned by way of a writ petition or a suit or any appeal arising therefrom the manufacturer/purchaser shall be entitled to withdraw the writ petition, suit or an appeal arising therefrom, as the case may be, and file an appeal before the appropriate appellate authority within sixty days from today. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the Revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the Revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby. If such an appeal is filed, it shall be entertained without raising an objection on the ground of limitation and shall be dealt with in accordance with law. This direction shall apply even in cases where the High Court or Civil Court is approached after exhausting the remedy of appeal to Collector (Appeals). He can file an Appeal to C.E.G.A.T. within sixty days from today, after withdrawing the writ petition or the suit, as the case may be.

(3) Where, however, a writ petition or suit claiming refund was filed directly in the High Court/Civil Court (i.e., without filing a refund application), the petitioner/plaintiff shall be entitled to withdraw such writ petition/suit or any appeal arising therefrom and prefer a refund claim under Section 11B within sixty days from today provided the writ petition or suit was filed within the period prescribed by the Central Excise Act/Customs Act for filing the refund application. It is clarified herewith that even in a case where such writ petition has been allowed and an appeal filed by the Revenue is pending, the writ petitioner shall be entitled to withdraw the writ petition, in which event, the Revenue appeal shall be disposed of permitting the writ petitioner to withdraw the writ petition to pursue the remedy proposed hereby.

(4) The above rules, however, do not apply in the case of a claim for refund of duty levied and recovered under an unconstitutional provision. In such a case, the period of limitation shall be prescribed in Mafatlal Industries. The duty to allege and prove that the duty has not been passed on to another person, of course, remains even in such a case.

(5) Where a person challenges the constitutionality of a provision in the Central Excise Act/Customs Act in a High Court or the Supreme Court but fails in his challenge to constitutionality, he cannot take advantage of the decision in the case of another person striking down the said provision, as explained in the judgment. This rule is evolved in the particular context of refund claims under these two enactments and has to be observed.

(6) Where a refund application or an appeal is preferred under and in accordance with the directions (1), (2), (3) and (4) above, the same shall be entertained only if the applicant for refund/appellant files affidavit stating that he has not passed on the burden of the duty, which is claimed by way of refund, to another person. In case the applicant for refund is a company or a society, the affidavit shall be sworn by the Managing Director or the Principal Officer of the Company or the Society, as the case may be. Such an affidavit shall

be treated as an averment/assertion which an applicant for refund has to make in terms of the judgment in Mafatlal.

7(a) Where the refund claim is rejected by this Court, the assessee who has already obtained any amount by way of refund shall be liable to pay back the same to the Department and the Department shall be entitled to recover the same in accordance with law

(7)(b) If the refund claim is rejected by an authority under the Act and where the assessee has already obtained the refund he shall be liable to pay back the said amount to the Department according to law and the Department shall be entitled to recover back the said amount, subject to orders, if any, by an Appellate Authority.

19. There is no dispute that the amount was collected and paid to the Department by IMC Ltd. contrary to the law as has been clarified by the Central Board of Excise and Customs by its clarification bearing reference Order No. 2/1/2002-S.T., dated 24-4-2002 when it has been clarified that storage and warehousing services for goods including liquids and gases was proposed to be made liable to service tax in Finance Bill, 2002. Therefore, as and when the Circular dated 24-4-2002 containing Section 65(87) was passed as a Finance Act, service tax become payable under "storage and warehousing".

20. Admittedly, collection of service tax by IMC Ltd. during the material period in dispute was contrary to law as was clarified by the Central Board of Excise and Customs vide its Circular dated 24-4-2002. Thus, the collection of the amount was contrary to Article 265 of Constitution of India and therefore, the amount collected ought to have been refunded back, if a refund claim was filed in time from the date of payment under Section 11B of the Central Excise Act, 1944.

21. Thus, collection of tax by IMC Ltd. was not only contrary to the provisions of the Finance Act, 1994 but also the appropriation of such amount by the service tax department contrary to Article 265 of the Constitution of India. However, payment of tax by IMC Ltd. and appropriation and collection by service tax department at best was on account of misconstruction of the provisions of the Finance Act, 1994 as it stood and therefore, any refund of such tax paid on borne by any person would be governed by the provisions of the Central

Excise Act, 1944 as made applicable to refund under Finance Act, 1994 by virtue of Section 83 of the Finance Act, 1994.

22. Therefore, refund of tax if any borne by the petitioner had to be made only within a period of limitation prescribed under Section 11B of the Central Excise Act, 1944 notwithstanding the fact that the petitioner became aware of the wrong payment of tax only after the Central Board of Excise and Customs issued clarification bearing reference Order No. 2/1/2002-S.T., dated 24-4-2002. Thus, the period prescribed under Section 11B of the Central Excise Act, 1944 had expired long before the above were clarification was issued.

23. The Hon'ble Supreme Court in Commissioner v. Allied Photographics India (P.) Ltd., 2004 (166) E.L.T. 3 (S.C.) considered the case of distributor who had borne the incidence of tax and posed the following question :-

"The point which still remains to be decided is whether the respondent herein was entitled to refund without complying with Section 11B of the Act on the ground that it had stepped into the shoes of NIIL (manufacturer) which had paid the duty under protest?"

24. The Hon'ble Supreme Court in para 15 has answered the issue as follows :-

15. Mr. Ganesh, Learned Senior Counsel appearing on behalf of the respondent vehemently urged that the issue arising in the present matter is squarely covered by the decision of Division Bench of this Court in the case of National Winder v. Commissioner of Central Excise, Allahabad [2003 (154) E.L.T. 350] in which it has been held that if duty is paid by a manufacturer under protest then limitation of six months will not apply to a claim of refund by a purchaser. For the reasons given hereinabove, we hold that the said judgment is per incuriam. At this stage, it is important to note that the Division Bench judgment [Hon'ble S.N. Variava and B.P. Singh, JJ.] in the case of National Winder (supra) was delivered on 11-3-2003. However, on 13-11-2003, the Division Bench [Hon'ble S.N. Variava and H.K. Sema, JJ.], has referred the matter as stated above to the Larger Bench in the light of conflict which the Division Bench noticed

between the earlier judgments of this Court on one hand and Paragraph 104 of the judgment of the Constitution Bench of nine-Judges in the case of Mafatlal Industries Ltd. (supra). Hence, by this judgment, we have clarified the position in law.

25. Though the Learned Counsel for the petitioner has cited few decisions of the Andhra Pradesh High Court, Punjab and Haryana High Court and that of the Karnataka High Court, I am afraid that these decisions have either not considered the decision of the Supreme Court in Mafatlal Industries Ltd. v. Union of India, 1997 (89) E.L.T. 247 in its proper perspective or have ignored the same altogether. The decision of the Hon'ble Supreme Court in Commissioner v. Allied Photographics India (P) Ltd., 2004 (166) E.L.T. 3 (S.C.) sealed the fate of the refund claim and put the last nail in the coffin and has thereby destroyed all the hopes of the petitioner.

4.11 On the issue whether the bar of unjust enrichment will not apply to refund claims filed by the manufacturer, if he issues the credit notes subsequent to clearance of the goods from the place of clearance, refunding the excess duty recovered by him at the time of clearance of the goods. Hon'ble Supreme Court has in the case of Grasim Industries Ltd. [2011 (271) E.L.T. 164 (S.C)] rejected the reliance placed on the credit notes issued after two years from payment of duty for holding that burden of duty has not been passed on. Hon'ble Apex Court observed:

"15. *So far as the issuance of the credit note is concerned, the same was issued only on 7-8-1991 although the duty was paid on 19-7-1989 and, therefore, the credit note was issued after two years of the payment of the duty and the clearance of the goods. In this connection. Section 12 of the Central Excise Act becomes relevant which indicates that the party who is liable to pay excise duty on any goods, has to file the sales invoice and other documents relating to assessment at the time of clearance of the goods itself. Therefore, when at the time of clearance no such document was filed and what is sought to be relied upon is a document issued after two years, the same raises a doubt and cannot be accepted as a reliable document."*

4.12 A three judges bench of Hon'ble Supreme Court has in the case of Addison & Co Ltd. [2016 (339) ELT 177 (SC)], observed as follows:

14. We have considered the submissions made by the Counsel carefully and examined the material on record. The questions that arise for consideration in this case are whether the Assesse is entitled for a refund and whether there would be unjust enrichment if the said refund is allowed. It was held by the Special Bench of CEGAT, New Delhi by its judgment dated 17-3-1994 in Collector of Central Excise, Madras v. Addison & Co. Ltd. [1994 (73) E.L.T. 331 (Tribunal)] that the turnover discount is not an admissible abatement on the ground that the quantum of discount was not known prior to the removal of the goods. In an appeal filed by the respondent-Assesse, this Court by its judgment dated 11-3-1997 in Addison & Co. Ltd. v. Collector of Central Excise, Madras (supra) held that the turnover discount is an admissible deduction. This Court approved the normal practice under which discounts are given and held that the discount is known to the dealer at the time of purchase. The Additional Solicitor General submitted that any credit note that was raised post clearance will not be taken into account for the purpose of a refund by the Department. We do not agree with the said submission as it was held by this Court in Union of India v. Bombay Tyre International (supra) that trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. It is the submission of the Assesse that the turnover discount is known to the dealer even at the time of clearance which has also been upheld by this Court. It is clear from the above that the Assesse is entitled for filing a claim for refund on the basis of credit notes raised by him towards turnover discount.

15. The following provisions of Central Excise Act, 1944 are relevant for appreciating the point of unjust enrichment :-

SECTION 11B. Claim for refund of duty. –

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [in such form and manner] as may be prescribed and the

application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act :] *[Provided further that] the limitation of [one year] shall not apply where any duty has been paid under protest.*

** * * **

(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty of excise as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

- (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;*
- (b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Commissioner of Central Excise];*
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;*

- (d) *the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;*
- (e) *the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;*
- (f) *the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :*

"Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty has not been passed on by the persons concerned to any other person.

3. Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

4. Every notification under proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

5. For the removal of doubts, it is hereby declared that any notification issued under clause f of the first proviso to sub-section (2), including any such notification approved or modified under subsection (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.]

[Explanation. - For the purposes of this section, -

- (A) *"refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials*

used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) *in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -*

(i) *if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, Or*

(ii) *if the goods are exported by land, the date on which such goods pass the frontier, Or*

(iii) *if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;*

(b) *in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;*

(c) *in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;*

(d) *in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;*

(e) *in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]*

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;]

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]

in any other case, the date of payment of duty.]

SECTION 12A. Price of goods to indicate the amount of duty paid thereon. –

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise 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.

SECTION 12B. Presumption that the incidence of duty has been passed on to the buyer. –

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

SECTION 12C. Consumer Welfare Fund. –

- (1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.*
- (2) There shall be credited to the Fund, in such manner as may be prescribed, -*
 - (a) the amount of duty of excise referred to in sub-section (2) of section 11B or sub-section (2) of section 11C or sub-section (2) of section 11D;*
 - (b) the amount of duty of customs referred to in sub-section (2) of section 27 or sub-section (2) of section 28A, or sub-section (2) of section 28B of the Customs Act, 1962 (52 of 1962);*

- (c) *any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.*

SECTION 12D. Utilisation of the Fund. –

- (1) *Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.*
- (2) *The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India”.*

16. In the instant case, the Assessee has admitted that the incidence of duty was originally passed on to the buyer. There is no material brought on record to show that the buyer to whom the incidence of duty was passed on by the Assessee did not pass it on to any other person. There is a statutory presumption under Section 12B of the Act that the duty has been passed on to the ultimate consumer. It is clear from the facts of the instant case that the duty which was originally paid by the Assessee was passed on. The refund claimed by the Assessee is for an amount which is part of the excise duty paid earlier and passed on. The Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched.

It will be useful to refer to the relevant para of Mafatlal Industries v. Union of India (supra) in this connection.

“108. (iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so

passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched”

17. Section 11B(2) of the Act contemplates that the amount of refund determined by the Authorities shall be credited to the fund. The Proviso to Section 11B(2) permits the refund to be paid to the applicant instead of being credited to the fund if such amount is relatable to the manufacturer, the buyer or any other such class of applicants as notified by the Central Government.

18. Mr. Venkatraman interpreted the said provision to mean that the only persons who were entitled for claim of refund are the manufacturer, his buyer and any other class of persons as notified by the Central Government. There is no dispute about the fact that no notification has been issued by the Central Government as

contemplated in Clause (f) to proviso to Section 11B(2) of the Act. He contested that the claim for refund can be made only by the manufacturer or his buyer and any enquiry pertaining to unjust enrichment should be restricted only to the manufacturer and his buyer. The ultimate buyer/consumer will not figure in the scheme of Sections 11B, 12A, 12B and 12C of the Act. This submission was accepted by the High Court in the impugned judgment. We do not approve the findings of the High Court in this regard.

19. The sine qua non for a claim for refund as contemplated in Section 11B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person. Section 11B(2) provides that, in case it is found that a part of duty of excise paid is refundable, the amount shall be credited to the fund. Section 2(ee) defines Fund to mean the Consumer Welfare Fund established under Section 12C. There is a proviso to Section 11B(2) which postulates that the amount of excise duty which is refundable may be paid to the applicant instead of being credited to the fund, if such amount is relatable to the duty of excise paid by the manufacturer and he had not passed on the incidence of such duty to any other person. Clause (e) to proviso of Section 11B(2) also enables the buyer to receive the refund if he had borne the duty of excise, provided he did not pass on the incidence of such duty to any other person. There is a third category of a class of applicants who may be specified by the Central Government by a notification in the official gazette who are also entitled for refund of the duty of excise. A plain reading of Clauses (d), (e) and (f) of the proviso to Section 11B(2) shows that refund to be made to an applicant should be relatable only to the duty of excise paid by the three categories of persons mentioned therein i.e. the manufacturer, the buyer and a class of applicants notified by the Central Government. Clause (e) refers to the buyer which is not restricted to the first buyer from the manufacturer. The buyer mentioned in the above Clause can be a buyer downstream as well. While dealing with the absence of a provision for refund to the

consumer in the rules this Court in Mafatlal Industries v. Union of India (supra) held as follows :-

"98. A major attack is mounted by the learned counsel for petitioners-appellants on Section 11B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organization to get the grant. There is no provision in the Act, Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Shri Nariman. It is a colourable device - declaimed Shri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Shri Parasaran to this criticism runs thus : It ill becomes the manufacturers/Assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organization had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience

warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method - says Shri Parasaran".

20. There was a further submission which was considered in the said judgment about the convenience/difficulty for the ultimate consumer to make applications for refund. In that connection it was held as follows :-

"99. We agree with Shri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12C which creates the Consumer Welfare Fund and Section 12D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provide for "grants" being made in favour of consumer organisations for being spent on welfare of consumers. But, this is perhaps for the reason that clause (e) of the proviso to sub-section (2) of Section 11B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in clause (e) of Explanation B appended to Section 11B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. A practical difficulty is pointed out in this behalf by the learned counsel for appellants-petitioners: It is pointed out that the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund - it is submitted - he has to go to the place where the duty has been paid by the manufacturer and apply there. It is also pointed out that purchasers may be spread all over India and it is not convenient or practicable for all of them

to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claims will be filed only by purchasers of high-priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground - assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg [(1981) 4 SCC 675 : 1982 SCC (Tax) 30 : AIR 1981 SC 2138] and other decisions cited in paras 87 and 88.)"

21. That a consumer can make an application for refund is clear from paras 98 and 99 of the judgment of this Court in Mafatlal Industries (supra). We are bound by the said findings of a Larger Bench of this Court. The word 'buyer' in Clause (e) to proviso to Section 11B(2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which remains to be considered is the requirement of verification to be done for the purpose of finding out who ultimately bore the burden of excise duty. It might be difficult to identify who had actually borne the burden but such verification would definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched. If it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilized for the benefit of the consumers as provided in Section 12D.

22. The High Court proceeded on an erroneous assumption of fact as well. It was held by the High Court that there is no unjust enrichment as the burden has not been passed on. The High Court's interpretation of Section 11B is also not correct."

4.13 In case of Allied Photographics [2004 (166) E.L.T. 3 (S.C)] Hon'ble Supreme Court has observed as follows:

"9. According to Statement of Objects and Reasons for enacting the Amendment Act, the Public Accounts Committee recommended introduction of suitable legislation to amend the said Act to deny refunds in cases of unjust enrichment. Under the amended Section 11B(3) of the said Act, notwithstanding anything to the contrary in any judgment, decree, order or direction of the appellate Tribunal or any Court, no refund was to be made except in accordance with Section 11B(2) of the said Act. Further, there was substitution of sub-clause (e) to explanation B to Section 11B(1) by which the original sub-clause (e) was deleted and substituted by new sub-clause (e) under which in cases where duty has been passed on by the manufacturer to the buyer, the relevant date for computing the period of limitation would commence from the date of purchase of goods by the buyer. At this stage, it is important to note that although sub-clause (e) as it stood prior to 20-9-1991 dealt with the period of limitation in cases of refund of duty paid under provisional assessment, the substantive provision for provisional assessment of duty was Rule 9B. Therefore, even with the deletion of old sub-clause (e), Rule 9B continued during the relevant period. The deletion of sub-clause (e) and continuation of Rule 9B shows that the Section 11B (as amended) applied to claiming of refunds where the burden was on the applicant to apply within time and prove that the incidence of duty has not been passed on whereas Rule 9B covered cases of ordering of refund/making of refund, where on satisfaction of the conditions, the concerned officer was duty bound to make the order of refund and in which case question of limitation did not arise and, therefore, there was no requirement on the part of the assessee to apply under Section 11B. Lastly, Rule 9B referred to payment of duty on provisional basis by the assessee on his own account and, therefore, in cases where the manufacturer has been allowed to invoke this rule and refund accrues on adjustment under Rule 9B(5) that refund is on the account of the manufacturer and not on the account of the buyer. If one reads Section 11B on one hand and Rule 9B on the other hand, both indicate payment by the assessee on his own account and refund becomes due on that account alone.

10. In the light of what is stated above, we now quote hereinbelow Para 104 of the judgment of this Court in the case of Mafatlal Industries Ltd. (supra) :-

"104. Rule 9B 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". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. 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 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) reagitating the issues already decided under Rule 9B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."

11. At the outset it may be pointed out that in Para 104 there is nothing to suggest that payment of duty under protest does not attract bar of unjust enrichment. Para 104 only states that if refund arises upon finalisation of provisional assessment, Section 11B will not apply.

12. In the present case, reliance was placed by the respondent M/s. APIL on the above para in support of its contention that payment of duty under protest and payment of duty under provisional assessment are both "on account" payments under the Act. We do not find any merit in this argument. As discussed, there is a basic difference between duty paid under protest and duty paid under Rule 9B. The duty paid under protest falls under Section 11B whereas duty paid under provisional assessment falls under Rule 9B. That Section 11B deals with claim for refund whereas Rule 9B deals with making of refund, in which case the assessee has not to comply with Section 11B. Therefore, Section 11B and Rule 9B operate in different spheres and, consequently, in Para 104 of the said judgment, it has been held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. In the said para, it has been clarified that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issues, then such claim would attract Section 11B. This is because when the assessee makes an independent refund claim after final orders under Rule 9B(5), such application represents a claim for refund and, it would not come in the category of making of refund and therefore, the bar of unjust enrichment would apply. Hence, there is no merit in the contention of the respondent M/s. APIL that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under the said Act. This argument was obviously advanced because unless the two payments are equated as contended, the respondent M/s. APIL was required to comply with Section 11B. In this matter, duty has been paid under protest. It is the case of the respondent M/s. APIL that since such payment was similar to payment under Rule 96, the respondent M/s. APIL was not required to comply with Section 11B. In the light of the discussion hereinabove, we hold that the respondent was bound to comply with Section 11B. Lastly, in any event, the application dated 11-2-1997 fell in the category of refund claim being made after finalisation of assessment of NIIL and, therefore, Section 11B had to be complied with in terms of Para 104

of the above judgment in the case of Mafatlal Industries Ltd. (supra). For above stated reasons, since there was failure to comply with Section 11B, the respondent was not entitled to refund.

13. The point which still remains to be decided is - whether the respondent herein was entitled to refund without complying with Section 11B of the Act on the ground that it had stepped into the shoes of NIIL (manufacturer) which had paid the duty under protest. It was argued on behalf of the respondent that NIIL had paid the excise duty under protest pending final assessment, which was ultimately decided in favour of NIIL and since NIIL had sold the product to the respondent herein, the respondent was entitled to the benefit of the second proviso to Section 11B(1) which inter alia stated that limitation of six months shall not apply where duty had been paid under protest. We do not find any merit in this argument. In the case of Bombay Tyre International Ltd. (supra), it has been held by this Court that Section 3 of the said Act is a charging section whereas Section 4 is a computation section which covers assessment and collection of excise duty. That the basis of assessment under Section 4 was the real value of excisable goods which included manufacturing cost and manufacturing profit but excluded selling cost and selling profit. 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. Dave, Asstt. Collector of Central Excise reported in [1978 (2) E.L.T. (J444) (S.C.) = 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 11B dealt with claim for refund of duty. It did not deal with making of refund. Therefore, Section 11B(3) stated that no refund shall be made except in terms of Section 11B(2). Section 11B(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 11B 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 11B of the Act.

14. As stated above, Para 104 of the judgment in the case Mafatlal Industries Ltd. (supra) states that if refund arises upon finalisation of provisional assessment, Section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra). In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17-1-1991. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied Para 104 of the judgment of the Constitution Bench in the case of Mafatlal Industries Ltd. (supra), which with respect, had no application. As stated above, Para 104 of the judgment in the case of Mafatlal Industries Ltd. (supra) dealt with refund consequent upon finalisation of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon

finalisation of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of Mafatlal Industries Ltd. (supra). We may also point out that the judgment in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra) is based on the concession made by the Counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned Counsel for the respondent herein placed reliance on the judgment of this Court in the case of TVS Suzuki Ltd. (supra). In that case, application for refund was filed. This was on completion of final assessment. On 9-7-1996, the Department issued a show cause notice as to why the refund claim should not be rejected for non-compliance of Section 11B. By order dated 17-7-1996, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner (Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of Para 104 of the judgment of this Court in Mafatlal Industries Ltd. (supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B(5). The judgment of this Court in the case of TVS Suzuki Ltd. (supra), therefore, supports the view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment.

15. Mr. Ganesh, learned Senior Counsel appearing on behalf of the respondent vehemently urged that the issue arising in the present matter is squarely covered by the decision of Division Bench of this Court in the case of National Winder v. Commissioner of Central Excise, Allahabad [2003 (154) E.L.T. 350] in which it has been held that if duty is paid by a manufacturer under protest then limitation of six months will not apply to a claim of refund by a purchaser. For the reasons given hereinabove, we hold that the said judgment is per incuriam. At this stage, it is important to note that the Division Bench judgment [Hon'ble S.N. Variava and B.P. Singh, JJ.] in the case of National Winder (supra) was delivered on 11-3-2003. However, on

13-11-2003, the Division Bench [Hon'ble S.N. Variava and H.K. Sema, JJ.], has referred the matter as stated above to the Larger Bench in the light of conflict which the Division Bench noticed between the earlier judgments of this Court on one hand and Paragraph 104 of the judgment of the Constitution Bench of nine-Judges in the case of Mafatlal Industries Ltd. (supra). Hence, by this judgment, we have clarified the position in law.

16. Having come to the conclusion that the respondent was bound to comply with Section 11B of the Act and having come to the conclusion that the refund application dated 11-2-1997 was time-barred in terms of Section 11B of the Act, we are not required to go into the merits of the claim for refund by the respondent who has alleged that it has not passed on the burden of duty to its dealers. Mr. Ganesh, learned Senior Counsel however submitted that this Court should not interfere, under Article 136 of the Constitution, in view of the concurrent finding of fact given by the authorities below that the respondent has not passed on the incidence of duty to its dealers. We do not find any merit in this argument. In May, 1974, the Department took the view that price declared by NIIL in its price list cannot be accepted as assessable value of excisable goods and price at which their sole distributor M/s. AGIL sold the goods represented the correct price. Accordingly, on 8-5-1974 show cause notice was issued to NIIL as to why the prices submitted by NIIL should not be rejected and why excise duty should not be collected from NIIL on the prices at which their distributor M/s. AGIL sold the goods in the market. By order dated 31-12-1974, the Department held that the transactions between NIIL and M/s. AGIL (predecessor of the respondent herein) were not at arms length and accordingly it was ordered that the prices charged by the distributor M/s. AGIL should be taken as a wholesale cash price under Section 4 of the said Act, as it stood at the relevant time. However, later on, in view of the judgment of this Court in the case of Bombay Tyre International Ltd. (supra) the Department approved the price list of NIIL vide order dated 31-10-1984 and accepted the ex-factory price of NIIL. On the basis of the said order, NIIL claimed refund of Rs. 1,25,34,988.97 on which the Department issued show cause notice on 23-2-1987 calling

upon NIIL to show cause why the said amount should not be credited to the Consumer Welfare Account. NIIL objected. However, their objection was rejected. Thereafter, the litigation took place as stated above. Ultimately, vide order dated 31-10-1997, the Assistant Commissioner, Central Excise granted refund, which order was confirmed in appeal by the Commissioner (Appeals) and by CEGAT. Hence, the Department has come by way of the present civil appeal.

17. On the above facts, the short point which arises for determination is - whether incidence of duty was passed on by NIIL to its distributor M/s. AGIL and whether M/s. AGIL in turn passed on the burden to its dealers. On the first point, NIIL conceded in the earlier proceedings before the High Court that it had passed on the duty burden to its distributor M/s. AGIL. Therefore, the only question which we are required to decide is - whether M/s. AGIL in turn had passed on the duty burden to its dealers as alleged. In the present case, it was argued on behalf of the Department before the authorities below that 20% of the total price paid by M/s. AGIL represented the duty recovered by NIIL as a part of the sale price. It is important to note that M/s. AGIL was the sole distributor of NIIL. Therefore, it is highly improbable for a distributor to incur cost of purchase which included 20% element of duty in addition to the purchase price without passing on the burden to its dealers. From the record, it appears that during the disputed period 1974 to 1984, M/s. AGIL were in trading which further supports the above improbability. In the present case, there is no material placed on record by M/s. AGIL as to how it had accounted for the cost of purchase in its books and the accounting treatment it gave to the said item at the time of payment of the purchase price. No record as to costing of that item has been produced. This material was relevant as in the present case NIIL conceded that it had passed on the burden of duty to its distributor M/s. AGIL (buyer) and it was the buyer who claimed refund. It has been urged on behalf of the respondent and which argument has been accepted by the authorities below that 20% of the total price paid by M/s. AGIL to NIIL represented total excess excise duty levied and not the excess duty collected by NIIL in the form of sale price from its distributor M/s. NIIL. It was argued that

excess duty collected by NIIL represented only 1.62% of the total price. It was argued that resale price charged by M/s. AGIL to its dealers had no relevance to excess excise duty paid by M/s. AGIL to NIIL at the time of purchase as the sale price charged by M/s. AGIL to its dealers was based on the prevailing market price. We do not find any merit in this argument. In the present case, the refund claim is made by a buyer and not by the manufacturer. The buyer says that he has not passed on the burden to its dealers. The buyer has bought the goods from the manufacturer paying the purchase price which included cost of purchase plus taxes and duties on the date of purchase. In such cases, cost of purchase to the buyer is a relevant factor. None of the authorities below have looked into this aspect. Even the Appellate Tribunal has not gone into this relevant factor. It has merely quoted the passages from the order of the lower authority, whose order was impugned before it. Costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own account were relevant circumstances which the authorities below failed to examine. It was submitted that cost of purchase was not a relevant factor. It was submitted on behalf of the respondent that the resale price charged by the buyer was not a relevant factor. It was submitted that since the sale price of the goods before and after the assessment remained the same the burden of excess duty was absorbed by the respondent. It was submitted that in any event the sale price of the goods increased much less than the amount of duty (differential) involved in this case and, therefore, incidence of duty was not passed on to the consumers. In this connection, reliance was placed on several judgments of the Tribunal. We have gone through these judgments. They are not applicable to the facts of this case. In the present case, we are concerned with the distributor buying the products from the manufacturer and reselling them to its dealers. Hence, the cost of purchase is a relevant factor. The facts of the cases before the Tribunal deal with sale by manufacturer to the consumer. They deal with assessee's invoice bearing a composite price. They are the cases which dealt with the claim of refund by the

manufacturer. They did not deal with claim of refund by the buyer. Hence, they have no bearing on the facts of the present case.

18. Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Hence, even on merits, the respondent has failed to make out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact.

4.14 By relying on the Rule 6 of the Service Tax Rules, 1994 (as amended), Counsel for Appellant submitted that the decision of the Hon'ble Supreme Court in case of Addison & Co supra, shall not apply to cases of refunds of Service Tax paid (Chapter V of Finance Act, 1994). However we find the same argument has been answered by Hon'ble Bombay High Court in the case of Prachar Communication Ltd [2017 (7) GSTL 6 (Bom)] and following was observed:

"6. This appeal was admitted on the substantial questions of law incorporated in paragraph 4 of the Memorandum of Appeal.

7. The said substantial questions of law are as follows :

- (A) Whether the respondents are entitled to refund of the excess Service Tax paid by them in terms of Rule 6 of the Service Tax Rules?*
- (B) Whether post clearance adjustment like issue of credit notes would help the assessee to get over the bar of unjust enrichment under Section 11B of the Central Excise Act, 1944?*
- (C) Whether Rule 6 of Service Tax Rules, 1944 will have precedence over Section 11B of the Central Excise Act, 1944 which is made applicable to provisions of Finance Act, 1994?"*

8. The learned counsel for the appellant relied upon the decision of the Apex Court in the case of Commissioner of Central Excise, Madras v. Addison & Company Limited - 2016 (339) E.L.T. 177 (S.C.). He submitted that the respondent has not discharged the

burden of proving that the incidence of such duty has not been passed by him to any other person. He invited our attention to the findings recorded by the Appellate Tribunal and submitted that there is no finding recorded by the Appellate Tribunal that the respondent has discharged the burden on him. He would, therefore, submit that the impugned Judgment and Order which is patently illegal deserves to be set aside. None appears for the respondent.

9. We have carefully considered the submissions. Firstly, it will be necessary to advert to the decision of the Apex Court in the case of Commissioner of Central Excise, Madras v. Addison & Co. Limited (supra). Paragraph 19 of the said decision reads thus :

"19. The sine qua non for a claim for refund as contemplated in Section 11B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person. Section 11B(2) provides that in case it is found that a part of duty of excise paid is refundable, the amount shall be credited to the fund. Section 2(ee) defines Fund to mean the Consumer Welfare Fund established under Section 12C. There is a proviso to Section 11B(2) which postulates that the amount of excise duty which is refundable may be paid to the applicant instead of being credited to the fund, if such amount is relatable to the duty of excise paid by the manufacturer and he had not passed on the incidence of such duty to any other person. Clause (e) to proviso of Section 11B(2) also enables the buyer to receive the refund if he had borne the duty of Excise, provided he did not pass on the incidence of such duty to any other person. There is a third category of a class of applicants who may be specified by the Central Government by a notification in the official gazette who are also entitled for refund of the duty of excise. A plain reading of Clauses (d), (e) and (f) of the proviso to Section 11B(2) shows that refund to be made to an applicant should be relatable only to the duty of excise paid by the three categories of persons mentioned therein i.e. the manufacturer, the buyer and a class of applicants notified by

the Central Government. Clause (e) refers to the buyer which is not restricted to the first buyer from the manufacturer. The buyer mentioned in the above Clause can be a buyer downstream as well. While dealing with absence of a provision for refund to the consumer in the rules this Court in Mafatlal Industries v. Union of India (supra) held as follows :

"98. A major attack is mounted by the learned counsel for petitioners-appellants on Section 11B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplates only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted the Rules are so framed as to make it highly difficult for any consumer organization to get the grant. There is no provision in the Act, Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Shri Nariman. It is a colourable device-declaimed Shri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Shri Parasaran to this criticism runs thus : It ill-becomes the manufacturers/assesseees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to

sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method - says Shri Parasaran." (underlines supplied)

10. It is in the light of the law laid down by the Apex Court that the merits of the appeal will have to be examined. The case made out by the respondent in the refund application was that it rendered services to M/s. Emami Limited by getting their advertisements published on the media. The contention was that the Service Tax was erroneously paid by the respondent on the gross amount of the bills before the discount was allowed of 15% of the gross bill amount. The contention was that incidence of Service Tax payable on 15% amount has not been passed on to any other person by the respondent.

11. We have already quoted the findings recorded by the Deputy Commissioner as well as the Commissioner (Appeals). The findings recorded are that the refund claim was based only on two credit notes and ledger account of M/s. Emami Limited. The Deputy Commissioner held that he was convinced that there is no unjust enrichment in this case. The finding recorded by the Commissioner of Central Excise is already quoted above. The Commissioner (Appeals) held that the first respondent has not amended or rectified the bills or the issued revised bills. Moreover, no material was placed on record to show that M/s. Emami Limited did not pass on the incidence of Service Tax to the buyers or customers of its products.

This finding recorded by the Commissioner of Central Excise is not disturbed by the Appellate Tribunal. Perhaps, the Appellate Tribunal oversimplified the matter by observing in paragraph 4 that there was no dispute that the realization for service was less than bill amount entitling the respondent to pay duty on the net amount received after discount. The only other finding recorded by the Appellate Tribunal is that the respondent has admitted that Service Tax is paid to its customers. This finding is based on the credit notes issued by the respondent to M/s.Emami Limited. There is no finding recorded by the Appellate Tribunal that M/s.Emami Limited did not pass on incidence of Service Tax on the 15% amount to its customers or buyers of the products. The burden was on the respondent to establish that M/s.Emami has not passed on the incidence of Service Tax to any other person including its customers or purchasers of the products. Thus, even going by the finding of fact recorded by the Appellate Tribunal, in paragraph 5 and the finding of fact recorded by the Deputy Commissioner in paragraph 14, the respondent did not establish that the incidence of Service Tax has not been passed by M/s. Emami Limited to any other person.

4.15 Similar view has been expressed by a coordinate bench in the case of Vilsons Roofing Product Pvt. Ltd. [FINAL ORDER NO. 85589-85613/2023 dated 25.04.2023].

4.16 Appellant counsel has in his written submissions referred to the following decisions:

- Hasmat Ali v/s. Amina Bibi and others [2021 SCC OnLine SC 1142]
- Uday Mohanlal Acharya [2000 SCC OnLineBom 585]

The decision in case of Hasmat Ali is matter of interpretation of provision Civil Procedure Code vis a vis the powers of High Court while deciding an appeal. We do not find any application of the said decision to case in hand. Similarly decision of Hon'ble Bombay High Court in case of Uday Mohanlal Acharya is in case of criminal proceedings and do not have any relevance to the matter in hand.

4.17 In a result, we do

- not find any merits in the appeals filed by appellant-assesses; and
- find merits in the appeals filed by the Revenue

5.1 The appeals filed by the appellant assessee (Service Tax Appeal No 87176, 87178, 87182, 87187 & 87199/ 2018) are dismissed.

5.2 Appeal filed by the revenue (Service Tax Appeal No 87923, 87925, 87928, 87929 & 87931/ 2018) are allowed.

(Order pronounced in open court on 08.10.2026)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Tvu/Suraj