CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. I

Service Tax Appeal No. 40198 of 2016

(Arising out of Order-in-Appeal No. 229/2015 (CXA-I) dated 28.10.2015 passed by Commissioner of C. Ex. (Appeals-I), Chennai)

M/s. TVS Motor Company Ltd., **.... Appellant**
P.B. No.4, 'Harita',
Hosur – 635 109.

VERSUS

Commissioner of GST and Central Excise **...Respondent**
Chennai Outer Commissionerate
Newry Towers, No.2054, I Block,
II Avenue, 12th Main Road,
Anna Nagar, Chennai-600 040.

APPEARANCE :

Shri. Raghav Rajeev, Advocate for the Appellant
Ms. Rajani Menon, Authorised Representative for the Respondent

CORAM :

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

FINAL ORDER No.40109/2026

DATE OF HEARING:22.12.2025
DATE OF DECISION:20.01.2026

Per Mr. Ajayan T.V.

TVS Motor Company Ltd, the appellant herein, has assailed the impugned Order-in-Appeal No. 229/2015 (CXA-I) dated 28.10.2015 (impugned order) whereby the appellate authority has rejected the appeal preferred by the appellant challenging the Order in Original No.11/2013(ST) dated 29.07.2013 (OIO) passed by the Adjudicating Authority confirming a service tax demand of Rs.41,97,987/- along with applicable interest thereon.

2. The relevant facts, as emanating from the appeal records, are that the appellant is a manufacturer of motor cycles mopeds etc and is also registered as a service provider for providing various services, such as Consulting Engineer, Market Research Agency, Management Consultant, Architect and Online Information & Database Access and Retrieval. During 2002-03 and 2003-04, from November 2002 to November 2003, the appellant remitted service tax for technical consultancy services

provided to the appellant by foreign service providers in India as well as for the service provided to the appellant by such foreign service providers outside India. The amount of tax remitted for the services provided outside India during the said period amounts to Rs.41,19,987/-. The appellant adjusted the said amount towards their service tax liability for the period November 2003 to September 2004 in terms of Rule 6(3)of the Service Tax Rules, 1994(STR, 1994).

3. The Department was of the opinion that such suo motu adjustment was not permitted in the appellant's context and therefore issued a show cause notice dated 28-05-2004 stating that such suo motu adjustment is not permitted in the Rule 6(3) in the present case and that the appellant ought to have filed a refund claim under Section 11B. The SCN together with its addendum issued, alleged that this wrong adjustment of Rs.41,19,897/- tantamount to non-payment of service tax and required the Appellant to show cause as to why the amount so adjusted should not be disallowed. After due process of law, the Adjudicating Authority confirmed the demand along with interest holding that in terms of Rule 6(3) of the STR, 1994 was not permissible and the appellant ought to have filed a refund claim under Section 11B of the Central Excise Act as applicable to service tax matters for claiming the amount. It was held that such wrong adjustment amounted to nonpayment of service tax. Aggrieved, the appellant filed an appeal before the Commissioner of Central excise (Appeals-II). The Appellate Authority, inter-alia, held that the contention of the appellant that, the service tax paid towards the service provided by foreign service providers, for which no service tax was payable, could be adjusted towards service tax liability for the subsequent period in terms of Rule 6(3) of the STR, 1994, is not sustainable. The Appeal was therefore rejected and hence this Appeal.

4. Shri Raghav Rajeev, Ld. Counsel appearing for the Appellant contended that the Appellant having paid the service tax under mistaken notion of law, is eligible for adjustment of the service tax so paid in terms of Rule 6(3) of the STR, 1994. It is submitted that the impugned order concedes that there is no liability of service tax on the Appellant and the demand is confirmed solely on the ground that the Appellant cannot suo motu adjust the tax which is not payable. The Ld. Counsel argued that when there is no dispute that the tax itself is not payable, the adjustment of

the same in the subsequent months is in order and the impugned order merits to be set aside. Reliance was placed on the decision in ***CCE, Mysore v Powercell Battery India Ltd, 2010 (19) STR 400 (Tri-Bang)*** in this regard. As regards the non-satisfaction of the stipulations in provisions of Rule 6(3), Ld. Counsel contended that these stipulations are applicable only to a service provider who is actually providing the service whereas the appellant was in fact the service receiver, but had made the payment of service tax as a deemed service provider as provided in the statute. Therefore, Ld. Counsel contends, evidently the appellant cannot refund the value of service tax received and the service tax thereon to itself so as to satisfy the said stipulation and hence the said stipulations would not apply in the appellant's context. It is argued that the adjustment made by the appellant, being in accordance with the spirit of the said provision, is therefore correct.

5. Ms. Rajni Menon, the Ld. Authorised Representative appearing for the Department reiterated the finding of the Appellate Authority in the impugned order. Ld. A.R. contended that the Apex Court decision in Mafatlal Industries case has laid down the law and it is no more res-integra that the procedure prescribed in Section 11B is the only manner in which refund ought to be made of any amount that was paid to the credit of the Central Government characterizing it as the service tax payable, even if such payment was made by oversight.

6. When the Ld. Counsel was queried on the applicability of Section 11B, he submitted that while he had no quarrel with the proposition laid down therein per se, however, the same was inapplicable in this case as the provision of Rule 6(3) as given in the STR, 1994 itself provided a mechanism of adjustment that was available to the appellant, which obviated the necessity to prefer a refund claim under Section 11B.

7. Heard both sides, perused the appeal records and the case laws cited as well as relied upon.

8. The issue to be determined is whether the demand confirmed for non-payment of service tax, consequent to the appellant adjusting in terms of Rule 6(3) of Service Tax Rules, 1994, the service tax paid by the

appellant by oversight under a mistaken notion of law, against the appellant's subsequent service tax liability; instead of filing a claim for refund under Section 11B of the Central Excise Act, 1944 as made applicable to Finance Act by virtue of Section 83 of the Finance Act, 1994; is tenable.

9. The undisputed facts are that the Appellant is a registered service provider for providing various services and is also a registered manufacturer manufacturing excisable goods. The appellant has availed the services of a service provider located abroad who has provided technical consultancy services to the appellant. The said service provider provided the technical consultancy services to the appellant both, in India as well as outside India. The appellant has paid service tax in the stated compliance of the provisions of the Finance Act, 1994 applicable to service tax matters. However, the appellant realized that it had by oversight, paid service tax on the services provided by the said service provider outside India under a mistaken notion of law, in spite of the non-applicability of the provisions of Finance Act, 1994 to the said services provided outside India by such service provider located abroad. In so far as the service provided by such service provider located abroad to the appellant, which services were provided in India, the appellant continued to harbour the bonafide belief that the levy of service tax was tenable. The said levy of service tax in respect of such services received in India when provided by a service provider located abroad, was found to be tenable only after the insertion of Section 66A with effect from 18-04-2006 into the Finance Act, 1994. The service tax payments made in so far as the services received in India provided by the said service provider located abroad is not a subject matter of the present dispute.

10. The bone of contention is the service tax paid to the Government Exchequer, in respect of the services provided to the Appellant outside India by the Service Provider located abroad, that is stated to be a payment made by oversight under a mistaken notion of the law and which the appellant has suo motu adjusted in terms of Rule 6(3) of the Service Tax Rules, 2004 against subsequent service tax liability that has arisen. As per the view of the revenue, the appellant could not have made such suo motu adjustment under the said Rule and instead should have made a claim for refund under Section 11B. The tenability of such suo

motu adjustment, which according to the Revenue has resulted in short payment of the appellant's subsequent service tax liability, is in question, and it is the consequent short payment of service tax, which has been demanded and stood confirmed by the adjudicating authority. The order of the adjudicating authority stands affirmed consequent to the impugned order of the appellate authority, by which the appellant's appeal was rejected.

11. To appreciate the controversy, it is necessary to reproduce Rule 6(3) of the Service Tax Rules, 2004, which at the relevant time, read as under:

> Rule 6 of the STR, 1994: Payment of Service Tax
>
> (1) The service tax…
>
> (2) ….
>
> (3) Where an assessee has paid to the credit of the Central Government service tax in respect of a taxable service, which is not so provided by him either wholly or partially for any reason, the assessee may adjust the excess service tax so paid by him (calculated on a pro rata basis) against his service tax liability for the subsequent period, if the assessee has refunded the value of taxable service and the service tax thereon to the person from whom it was received.
>
> (4) …..

12. From a plain reading of the said Rule 6(3), it can be seen that it applies to:

    a) An assessee who has paid to the credit of the central government,
    b) Service tax in respect of a taxable service,
    c) Which taxable service was not provided by the assessee either wholly or partially for any reason.

    The situation envisaged is therefore that, where for any reason the service provider has received the value of the taxable service along with the applicable service tax beforehand and had paid such service tax to the credit of the central government, and thereafter is unable to provide the said taxable service either wholly or partially for any reason. In other words, Rule 6(3) is applicable to a situation where the service provider receives payment for the taxable services in advance and post crediting of the service tax thereon to the central government, is unable to provide such taxable service either wholly or partially for any reason.

13. The provision then states what an assessee, i.e. the service provider, is allowed to do in such circumstances. It states that the assessee may adjust the excess service tax so paid by him, calculated on a pro rata

basis, against his service tax liability for the subsequent period. Thus, the service tax paid in respect of a taxable service that was not provided and which is therefore paid in excess, is allowed to be adjusted against any service tax payable in future on the taxable service provided by the assessee to its clients/customers. However, it is also evident that Rule 6 (3) requires the assessee to at first refund the value of taxable service that has not been provided either wholly or partially for any reason as well as the service tax thereon to the customer/client. It is only after such a refund is made, that the assessee is allowed to adjust such service tax paid in excess against the service tax liability of the assessee for the subsequent period. In other words, such an adjustment is allowed only if it is preceded by the aforesaid mandated refund that has to be made by the assessee.

14. Therefore, it is clear that Rule 6(3) brought within its ambit only cases where for any reason the service provider has received the value of the taxable service along with the applicable service tax beforehand and had paid the same to the central government, i.e. in respect of advances received for the services to be provided. Subsequently when the taxable service was not provided wholly or partially for any reason, then such service tax that was paid in excess was being allowed to be adjusted against subsequent liability to service tax, provided it is duly preceded by refund of the value of the taxable service as well as the pro-rata service tax leviable thereon as it pertains to the taxable service that was not provided.

15. Furthermore, from an analysis of Rule 6(3), two pertinent aspects come to the fore:

    Firstly, what is material, is that there must be a taxable service, therefore, only a transaction that is covered by a charging provision is taxable; and in respect of such a taxable service which was not provided by the assessee either wholly or partially for any reason, the assessee should have paid service tax to the credit of the central government. Admittedly, the Appellant’s contention is that in respect of services provided to the appellant outside India by the foreign service provider situated abroad, the appellant has by oversight paid service tax as a deemed service provider. It is the Appellant’s case that these services so

rendered are not covered by the charging provision having been rendered outside the territorial waters of India, but under a mistaken notion of law, by oversight the appellant had paid service tax on the value of such services. Therefore, having set up its case on the said premise, the appellant cannot then be seen to contend that what the appellant has paid to the credit of the central government as a deemed service provider, is service tax in respect of a taxable service.

Secondly, Rule 6(3) also requires the assessee to, at first refund the value of taxable service that has not been provided either wholly or partially for any reason as well as the service tax thereon to its customer/client and only then proceed to adjust such service tax that has been paid in excess to the government against its service tax liability for the subsequent period. In other words, the said Rule mandates that the assessee who has paid such service tax is not unjustly enriched and is therefore not being permitted to retain the said value of service and the service tax thereon which it has received from its client. On this aspect, the Appellant contends that this stipulation is applicable only to a service provider who is actually providing the service whereas the appellant was in fact the service receiver, but had made the payment of service tax as a deemed service provider as provided in the statute. Therefore, the argument goes, evidently the appellant cannot refund the value of service tax received and the service tax thereon to itself so as to satisfy the said stipulation and thus the said stipulations would not apply in the appellant's context.

16. The very fact that when the appellant attempts to bring itself within the ambit of Rule 6(3), it is then faced with the impossibility of being able to satisfy the statutory prescription of the mandated pre-condition of refund of value of service and the service tax thereon, as provided in the latter part of the said Rule; should have been ample indication enough that the said provisions would not apply in the context of the appellant's instant case. Rule 6(3) cannot be selectively bisected and applied as the appellant desires to do. In view of the analysis of Rule 6(3) stated above, this Tribunal is of the firm opinion that the said Rule 6(3) would have no application with respect to the payment of service tax by oversight made by the appellant as a deemed service provider. The aforesaid view of this Tribunal is also bolstered by the Division Bench decision of the Tribunal

in ***BBC World (I) Pvt Ltd v. CST, New Delhi, 2009 (14) STR 152 (Tri-Del)***.

17. It is the contention of the Revenue that the appellant could not have taken recourse to Rule 6(3) and it ought to have preferred a refund claim under Section 11B since it was a payment made as service tax by oversight, though such provision of service by the service provider did not attract levy of service tax. When it comes to the issues pertaining to the claim of refund and application of section 11B, which has been made applicable to service tax matters also by virtue of Section 83 of the Finance Act, 1994, this Tribunal needs to look no further than advert to the *locus classicus*, namely, ***the Judgement of the 9 Judge Constitution Bench in the case of Mafatlal Industries Ltd v. Union of India, 1996 INSC 1514: (1997) 5 SCC 536: 1997 (89) E.L.T. 247 (S.C.)*** which was rendered as early as on 19-12-1996 and was the law of the land during the relevant period***.***

18. In the said case, in the Judgement delivered per majority, by B.P. Jeevan Reddy, J., on behalf of himself and Hon'ble J.S. Verma, S.C.Agrawal, B.P. Jeevan Reddy, A.S. Anand and B.N. Kripal JJ; Section 11B and its implications have been thrashed out exhaustively. S.C. Sen, J. has authored the lone dissenting opinion. The celebrated Judgement also comprises of two other separate, albeit, more or less concurring views, authored by Ahmadi, C.J. and Paripoornan, J. (speaking for Justice Hansaria and himself), that captures the opinion of these three Honourable Judges. These two judgements while substantially concurring with the views of Jeevan Reddy, J., however, differ in few details on the issue of the remedy of refund from that of the views expressed in the Judgement of Jeevan Reddy, J on behalf of the other four Honourable Judges and himself. Presumably inadvertently, there have been decisions rendered by various judicial fora thereafter, premised on the concurring judgements, without noticing the majority Judgment. However, being the view taken by only three Judges, they are normally accorded less significance and it is the opinion of Jeevan Reddy, J. which is the unanimous verdict of five Judges, out of the nine Judges, that becomes the effective and binding judgment in this case. The portions of the said majority judgement, as are relevant to the instant case, are reproduced as under:

"17. *We must, however, pause here and explain the various situations in which claims for refund may arise. They may arise in more than one situation. One is where a provision of the Act under which tax is levied is struck down as unconstitutional for transgressing the constitutional limitations. This class of cases, we may call, for the sake of convenience, as cases of "unconstitutional levy". In this class of cases, the claim for refund arises outside the provisions of the Act, for this is not a situation contemplated by the Act.*

18. Second situation is where the tax is collected by the authorities under the Act by mis-construction 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. This class of cases may be called, for the sake of convenience, as illegal levy. In this class of cases, the claim for refund arises under the provisions of the Act. In other words, these are situations contemplated by, and provided for by, the Act and the Rules.

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22. *There is as yet a third and an equally important category. It is this : a manufacturer (let us call him "X") pays duty either without protest or after registering his protest. It may also be a case where he disputes the levy and fights it out up to first Appellate or second Appellate/Revisional level and gives up the fight, being unsuccessful therein. It may also be a case where he approaches the High Court too, remains unsuccessful and gives up the fight. He pays the duty demanded or it is recovered from him, as the case may be. In other words, so far as `X' in concerned, the levy of duty becomes final and his claim that the duty is not leviable is finally rejected. But it so happens that sometime later - may be one year, five years, ten years, twenty years or even fifty years - the Supreme Court holds, in the case of some other manufacturer that the levy of that kind is not exigible in law. (We must reiterate - we are not speaking of a case where a provision of the Act whereunder the duty is struck down as unconstitutional. We are speaking of a case involving interpretation of*

the provisions of the Act, Rules and Notification.) The question is whether `X' can claim refund of the duty paid by him on the ground that he has discovered the mistake of law when the Supreme Court has declared the law in the case of another manufacturer and whether he can say that he will be entitled to file a suit or a writ petition for refund of the duty paid by him within three years of such discovery of mistake? Instances of this nature can be multiplied. It may not be a decision of the Supreme Court that lead `X' to discover his mistake; it may be a decision of the High Court. It may also be a case where `X' fights up to first appellate or second appellate stage, gives up the fight, pays the tax and then pleads that he has discovered the mistake of law when the High Court has declared the law."

19. Furthermore, B.P. Jeevan Reddy, J., per majority, after stating that the discussions in the Judgement yields the following propositions, have laid them down in para 99, as under:

(i) ***Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for***

the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties, imposed thereunder . Section 11B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. *It is necessary to emphasize in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.*

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition*. This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this*

is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. ***A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.***

(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.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment of levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) ***While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State****.*

(viii) The decision of this Court in Sales Tax Officer, Benaras v. Kanhaiyalal Mukundlal Saraf [1959 S.C.R. 1350] must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiyalal have also been wrongly decided to the above extent. This declaration - or the law laid down in propositions (i) to (vii) above - shall not however entitle the State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any Authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an Authority, Tribunal or Court or otherwise.

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

(x) ***By virtue of sub-section (3) to Section 11B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said***

Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners [1992 (61) E.L.T. 321 (SC) = 1992 (4) S.C.C. 389] and Union of India v. I.T.C. [1993 (67) E.L.T. 3 (SC) = 1993 Suppl. (4) S.C.C. 326] have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act [September 19, 1991], they cannot be re-opened and/or governed by Section 11B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the Appellate Authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the

*burden to another person**. It, therefore, cannot be said that Section 11B is a device to retain the illegally collected taxes by the State.** This is equally true of Section 27 of the Customs Act, 1962**."*** ***(emphasis supplied)***

20. In fact, while laying down the aforesaid propositions, the Honourable Apex Court has also stated that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive and in case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment. Therefore, even if one were to look at the main body of the Judgement, it is seen that the application of Section 11B to the exclusion of Section 72 of the Contract Act has been expressly stated in paragraphs 67 and 68 of the aforesaid decision. Relevant portions from the discussions on whether Kanhaiyalal was correctly decided and if not in what respects, are reproduced as under:

"PART - II

WAS KANHAIYALAL CORRECTLY DECIDED AND IF NOT, IN WHAT RESPECTS ?

67. The first question that has to be answered herein is whether Kanhaiyalal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act; *(2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or reopening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable; and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.*

68. Re. : (I) : Hereinbefore, we have referred to the provisions relating to refund obtaining from time to time under the Central Excises and Salt Act. Whether it is Rule 11 (as it stood from time to time) or Section 11B (as it obtained before 1991 or subsequent thereto), they invariably purported to be exhaustive on the question

of refund. Rule 11, as in force prior to August 6, 1977, stated that "no duties and charges which have been paid or have been adjusted....shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officers within three months from the date of such payment or adjustment, as the case may be". Rule 11, as in force between August 6, 1977 and November 17, 1980 contained sub-rule (4) which expressly declared: "(4) Save as otherwise provided by or under this rule, no claim of refund of any duty shall be entertained". Section 11B, as in force prior to April, 1991 contained sub-section (4) in identical words. It said : "(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Sub-section (5) was more specific and emphatic. It said : "Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim." It started with a non-obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of Section 11B, as it now stands, is to the same effect - indeed, more comprehensive and all-encompassing. It says, "(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or in any law for the time being in force, no refund shall be made except as provided in sub-section". The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in Para 14, and has to be respected so long as it stands. The validity of these provisions has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended Section 11B is questioned, no specific reasons have been assigned why a provision of the nature of sub-section (3) of Section 11B (amended) is

unconstitutional. Applying the propositions enunciated by a seven-Judge Bench of this Court in Kamala Mills, it must be held that Section 11B [both before and after amendment] is valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation of delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of Section 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond challenge. To repeat - and it is necessary to do so - so long as Section 11B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11A and 11B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. Sections 11 and 11B are complimentary to each other.To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz., where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available - except to the limited extent pointed out therein. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The Jurisdiction of a civil court is expressly barred - vide sub-section (5)

of Section 11B, prior to its amendment in 1991, and sub-section (3) of Section 11B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made under Section 11B/Rule 11. Since 1981, an appeal is provided to this Court also from the orders of the Tribunal. While Tribunal is not a departmental organ, this court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Article 265.In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provision, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction of this court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment. (emphasis supplied)

69. There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences*. Rule 11/Section 11B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11B. 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. A corresponding obligation 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. But, it does not follow from this that refund follows automatically. Article 265 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 - 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 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. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assessee on the declaration of invalidity of the provision by the court. 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 too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 72 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 - an aspect which we shall deal with a little later.*

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 - there is no automatic or unconditional right to refund*.*

70. *Re : (II) : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the ease may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding.* ***Where a duty 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. *But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court.* ***It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law : The incongruity of the situation needs no emphasis.*** *And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/Assessees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts.* ***All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excise Act and the Rules made thereunder including Section 11B/Rule 11 too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a mis-interpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11A and 11B. As held by a seven - Judge Bench in Kamala Mills, following the principles enunciated in Firm & Illuri Subbaiya Chetty, the words "any assessment made***

under this Act" are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words "an assessment made" cannot mean an assessment properly and correctly made. *It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction.* ***Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act.*** *Once this is so, it is un-understandable 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.* ***We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article. 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. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable as*

demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. ***We are, therefore, of the clear and considered opinion that 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 this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith. (emphasis supplied)***

71. *Re. : (III) : For the purpose of this discussion, we take the situation arising from the declaration of invalidity of a provision of the Act under which duty has been paid or collected, as the basis, inasmuch as that is the only situation surviving in view of our holding on (I) and (II). In such cases, the claim for refund is maintainable by virtue of the declaration contained in Article 265 as also under Section 72 of the Contract Act as explained hereinbefore, subject to one exception: where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it. In such cases, the plaintiff may also invoke Section 17(1)(c) of the Limitation Act for the purpose of determining the period of limitation for filing a suit. It may also be permissible to adopt a similar rule of limitation in the case of writ petitions seeking refund in such cases. But whether the right to refund or restitution, as it is called, is treated*

as a constitutional right flowing from Article 265 or a statutory right arising from Section 72 of the Contract Act, it is neither automatic nor unconditional. The position arising under Article 265 is dealt with later in Paras 75 to 77. Here we shall deal with the position under Section 72. Section 72 is a rule of equity. This is not disputed by Sri F.S. Nariman or any of the other counsel appearing for the appellants-petitioners. Once it is a rule of equity, it is un-understandable how can it be said that equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is, in our respectful opinion, a contradiction in terms. Indeed, in Kanhaiyalal, the Court accepts that the right to recover the taxes - or the obligation of the State to refund such taxes - under Section 72 of the Contract Act is subject to "questions of estoppel, waiver, limitation or the like", but at the same time, the decision holds that equitable considerations cannot be imported because of the clear and unambiguous language of Section 72. With great respect, we think that a certain amount of inconsistency is involved in the aforesaid two propositions. "Estoppel, waiver....or the like", though rules of evidence, are yet based upon rules of equity and good conscience. So is Section 72. We are, therefore, of the opinion that equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72. Now, one of the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. ***In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be recompensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly net borne the duty notwithstanding the fact that it is he who has paid the duty. Where such a claim is made, it would be wholly permissible for the court to call upon the petitioner/plaintiff to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in I.T C. In this connection, it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within the exclusive knowledge of the manufacturer. He has the relevant evidence - best evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming the refund and also because the fact of passing on the burden of duty is***

within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is an equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rule of equity but also because both the Central Excise duties and the Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. *That these duties are indirect taxes, meant to be passed on, is statutorily recognised by Section 64A of the Sale of Goods Act, 1930 [which was introduced by Indian Sale of Goods (Amendment) Act, 1940 and substituted later by Act 33 of 1963].*

21. Thus, the Constitutional Bench of the Honourable Supreme Court has, in no uncertain terms, held that the burden of proof to establish that the manufacturer / assessee has not passed on the burden of duty to a third party is a matter within the exclusive knowledge of the manufacturer / assessee as he has the best knowledge in his position. Since, the manufacturer is claiming the refund and also because the act of passing on the burden of duty is within his possession and exclusive knowledge, it is entirely for him to establish by letting the evidence that he has not passed on the duty to third party. In fact, the Central Excise Act itself under Section 12B mandates a statutory presumption that the incidence of duty has been passed on to the buyer. The provisions of Section 12 B is as extracted below: -

> "**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."

22. The provisions of Section 12B; 12C-pertaining to Consumer Welfare Fund; and Section 12D-pertaining to Utilization of the Fund, had come up for the consideration of the Apex Court in the case of ***CCE, Madras Vs. Addisson and Co.,2016 (339) ELT 177 (SC),*** wherein the Apex Court, relying on the Constitutional Bench's decision in the case of Mafatlal Industries cited *supra,* has yet again reiterated that the *sine qua non* for a claim for refund 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.

23. At this juncture, it is apposite to notice that Section 12B has also been made applicable to the Finance Act 1994 in so far as Service Tax matters are concerned by virtue of Section 83 of the Act ibid and therefore the mandatory presumption that the incidence of tax has been passed on to the service recipients is also applicable in the instant case of the Appellant.

24. Furthermore, it is also pertinent to notice that even when the Department was all along contending that the Appellant ought to have adhered to the provisions of Section 11B, the appellant has not even once made any averment as to whether or not the appellant has satisfied the precondition that it has not passed on the incidence of tax to any other person. It can be seen that Section 11B (1) stipulates as under:

> "**SECTION 11B. Claim for refund of duty and interest, if any, paid on such duty**. — (1) ***Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on 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 and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:"***

25. That apart, it is also seen that the Hon'ble Apex Court in ***Union of India v Solar Pesticide Ltd,2000 (116) ELT 401 (SC),*** had while considering whether the duty paid on raw material when added to price of finished goods can be considered to be a situation where incidence of duty has been passed, had observed as under:

> "**17.** The use of the words "incidence of such duty….." is significant. The words "incidence of such duty" mean the burden of duty. Section 27(1) of the Act talks of the incidence of duty being passed on and not the duty as such

being passed on to another person. **To put it differently the expression "incidence of such duty" in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly**. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of the duty on the raw material would stand passed on to the purchaser of the finished product. It would follow from the above that when the whole or part of the duty which is incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27(1) of the Act. **(emphasis supplied)**

26. It would also be apposite to notice that the Honourable Apex Court in its decision in ***Commissioner of Central Excise, Chennai-III v. Grasim Industries, 2015 (318) ELT 594 (SC)***, has held as under:

7. Two things which emerge from the reading of the aforesaid judgment and need to be emphasized are as under :

(i) in attracting the principle of unjust enrichment it is not only the actual burden which is passed on to the another person that would be taken into consideration even if the incident of such duty had not been passed on by him to any other person;

(ii) the principle of unjust enrichment shall be applicable in the case of captive consumption as well. According to the Court the principle of unjust enrichment would be applicable in both the circumstances.

The Apex Court then went on to hold as under:

2. *However, what follows from the reading of the said judgment is that if a particular material is used for manufacture of a final product, that has to be treated as the cost of the product. Insofar as cost of production is concerned, it may include capital goods which are a part of fixed cost as well as raw material which are a part of variable cost. Both are the components which come into costing of a particular product. Therefore it cannot be said that the principle laid down by the Court in Solar Pesticides would not extend to capital goods which are used in the manufacture of a product and have gone into the costing of the goods.* ***In order to come out of the applicability of the doctrine of unjust enrichment, it therefore becomes necessary for the assessee to demonstrate that in the costing of the particular product, the cost of capital goods was not taken into consideration****. We, thus, are of the opinion that the view taken by the Tribunal is not correct in law.* ***(emphasis supplied)***.

27. It is emphasised that the aforesaid decisions of the Apex Court in Solar Pesticides case and Grasim Industries case which lay down the law, have been noticed to appreciate the factum of the necessity to rebut the presumption of unjust enrichment that an assessee has to necessarily make in the circumstances elucidated therein, in order to be entitled to claim refund of an amount paid to the credit of the Central Government as held in the Mafatlal case supra.

28. As noticed supra, undisputedly, the Appellant is a manufacturer of motor cycles mopeds etc and is also registered as a service provider for providing various services, such as Consulting Engineer, Market Research Agency, Management Consultant, Architect and Online Information & Database Access and Retrieval. In this connection, it is also pertinent to notice that as per the provisions of Rule 3(1) of the Service Tax Credit Rules 2002, as amended by Notification No.5/2003-ST dated 14-05-2003, applicable for the relevant period, the appellant as a service provider was entitled to avail input credit on the input services received and further such unutilized credit was also allowed to be transitioned and utilized in the subsequent Cenvat Credit Rules, 2004 too.

29. When the aforecited decision of the Apex Court in Solar Pesticides case has held that where the duty paid on raw material is added to the price of the finished goods which are sold, in which case the burden or the incidence of the duty on the raw material would stand passed on to the purchaser of the finished product, and when the Hon'ble Supreme Court in the Grasim Industries case has held that in order to come out of the applicability of the doctrine of unjust enrichment, it therefore becomes necessary for the assessee to demonstrate that in the costing of the particular product, the cost of capital goods was not taken into consideration; in essence the Apex Court has laid down the ratio that the inclusion of the duty paid on the raw materials in the costing of the finished goods or including the costing of the capital goods in the costing of the particular product would itself amount to passing on the incidence of duty and attract the bar of unjust enrichment. Therefore, on a parity of reasoning, it follows that if the appellant has included the incidence of service tax which the appellant has suffered, either in the cost of the goods that it manufactures or taken the said amount of service tax it has

suffered into consideration in the costing of the services it renders to its service recipients, then that would amount to the appellant passing on the incidence of service tax to the buyer of the appellant's goods, or to the service recipients to whom the appellant renders services, and consequently the appellant would not have overcome the bar of unjust enrichment. It is of pertinence that there is nary a whisper by the Appellant that it has not taken credit of the said service tax paid amount of Rs.41,97,987/- and utilised the same. Otherwise, even an averment that, although it had taken credit of the said amount, it had not utilised the same and had only after reversal of the same proceeded to make the said adjustment against the future liability; is also conspicuously absent. The Appellant while making such suo motu adjustment against its subsequent service tax liability, is also completely silent on whether or not the appellant had already factored in the said amount of service tax of Rs.41,97,987/- into the cost of its services/products and had passed on the incidence of duty on to its customers. This Tribunal is of the considered view that, absent clarity on the above aspects, it cannot be considered that the appellant has successfully rebutted the presumption of unjust enrichment attracted by virtue of Section 12B of the Central Excise Act as made applicable to service tax matters by Section 83 of the Finance Act, 1994 and the rebuttal of which presumption is a *sine qua non* even to claim any right to get back the said amount.

30. In Sum, when the Apex Court, sitting in a combination of nine, has categorically held that in the case of mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the Central Excise or Customs Enactments, such a claim has necessarily to be preferred under, and in accordance with, the provisions of the respective enactment before the authorities specified thereunder, and within the period of limitation prescribed therein; this Tribunal is of the considered view that even in a case of payment of service tax, made by an assessee, without proper examination of whether or not the service received in respect of which the assessee had made such service tax payment, was indeed exigible to service tax, as is the instant case of the appellant, it would still have to be dealt with under the refund provisions as provided for in the Finance Act 1994, namely Section 11B as made applicable vide Section 83 of the Finance Act, 1994. In light of the categorical finding of the Honourable Supreme Court in the aforesaid judgement in Mafatlal

Industries case that all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment, this Tribunal, as a creature of statute is well aware of its jurisdiction. Thus, this Tribunal has no hesitation to hold that the appellant's contentions to the contrary as to the inapplicability of Section 11B in the instant case, is wholly untenable and cannot be countenanced.

31. This Tribunal finds that the reliance placed by the appellant on the decision in ***CCE, Mysore v Powercell Battery India Ltd, 2010 (19) STR 400 (Tri-Bang)*** is misplaced. The application of Section 11B, as is being contended by the Revenue in the instant case, did not arise for consideration before the Tribunal. The decision of the Apex Court in Mafatlal Industries was also not brought to the notice of the Tribunal and as such the facts therein being different, the said decision is not applicable to the facts of the instant case. It has come to the notice of this Tribunal that often the aforesaid binding decision of the majority as laid down in paragraph 99 of the decision of the Honourable Supreme Court in ***Mafatlal Industries Ltd v. Union of India, 1996 INSC 1514 : (1997) 5 SCC 536: 1997 (89) E.L.T. 247 (S.C.)***, have not been brought to the notice of the Honourable Courts and the Tribunal, resulting in decisions being rendered without having the benefit of the Constitution Bench Judgement of the Mafatlal Industries case itself in its entirety, and especially paragraphs 67 through 71, as well as the aforesaid principles as crystallised in the afore reproduced paragraph 99 in particular, of the Binding Judgement of an ennead Judge constellation of the Supreme Court.

32. This Tribunal is unable to subscribe to the view canvassed by the Ld. Counsel that if the spirit of the said Rule 6(3) was considered, the adjustment done by the appellant ought to be accepted. This Tribunal is of the considered view that the said premise is unacceptable for more than one reason. First, that would tantamount to reading into the said Rule 6(3) an adjustment that was not envisaged for payment of service tax as a deemed service provider made by oversight, such as in the instant case made by the Appellant. It is settled position in law that there is no room for intendment in taxation and that a taxing statute has to be

given the strict interpretation that it lends itself to. The Hon'ble Supreme Court in in the case of ***Union of India and Ors. vs. Ind- Swift Laboratories Limited , (2011) 4 SCC 635 :2011 (265) ELT 3 (SC)*** has summarized the legal position thus:-

> "19. A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In support of the same we may refer to the decision of this Court in *Commissioner of Sales Tax, UP v. Modi Sugar Mills* reported in (1961) 2 SCR 189 wherein this Court at para 10 has observed as follows:
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> > *"10.* ***.....In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."****(****Emphasis supplied****)***

This Tribunal is therefore unable to indulge in such impermissible interpretative expansiveness.

33. Second, the interpretation canvassed, if accepted, would amount to ignoring the law of the land as laid down in the aforecited Judgement of the Nine Judge Bench of the Hon'ble Apex Court in Mafatlal Industries case as reproduced above, including the emphasis that the Judgement lays on the aspect of unjust enrichment. When the Apex Court Judgement in Mafatlal Industries case has been delivered on 19-12-1996 and has elaborated on the application of Section 11B, the reluctance, nay the complete absence, of any averment on the part of the appellant that it has not passed on the incidence of duty and its efforts to squeeze in, into the ambit of Rule 6(3), which Rule also has, in the circumstances for which it is envisaged as elaborated above, a built in requirement of satisfying the bar of unjust enrichment; leads this Tribunal to the unavoidable presumption that the Appellant is unable to satisfy that it has not passed on the incidence of service tax. As observed supra, when the aforecited decisions of the Apex Court in Solar Pesticides case and Grasim Industries case, duly following the ratio laid down in the Mafatlal

Industries case, have explained how the principles of unjust enrichment are attracted even in the case of use of the raw materials or capital goods; it follows that if the appellant has also similarly passed on the incidence of service tax which the appellant has suffered, to the buyer of the appellant's goods, or to the service recipients to whom the appellant renders services, then it would not have overcome the bar of unjust enrichment. It is crystal clear that the requirement to prove that the appellant was not unjustly enriched as laid down by the Hon'ble Apex Court in the Mafatlal Industries case, is inviolable.

34. It is also apposite to notice from the Hon'ble Apex Court's aforecited Nine Judge Bench decision in Mafatlal Industries case that in Para 99 (i), (ii), (iii) & (vii), the Apex Court has in no uncertain term emphasized that refund claims in situations where the levy is said to be unconstitutional, cannot be governed by the provisions of the Central Excise and Salt Act and the Customs Act, and being not contemplated by the said act, is outside their purview. As a corollary, this Tribunal, as a creature of statute, can evidently therefore not accord sanction to such a refund under the provisions of the Act. It is also important to note that the Hon'ble Supreme Court has emphatically stated that a claim for such reason can only be by way of a Civil suit or by invoking the Writ jurisdiction, both of which are proceedings, that do not arise before this Tribunal. It is also pertinent to note that the Honourable Supreme Court in para 99 (x) has also inter-alia held that so far as the jurisdiction of the High Courts under Article 226 of the Constitution or of the Apex Court under Article 32 is concerned, it remains unaffected by the provisions of the Act. The Apex Court went on to hold that even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. The Apex Court has also held that even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

35. It would also be apposite to pause for a moment, and reflect on what is it that the appellant has actually done by such an adjustment? It would appear that since the appellant was of the view that it has paid such amounts by mistake as service tax into the credit of the Central Government, it has unilaterally taken upon itself to adjust the payments against future liabilities. In effect, by doing so, the appellant has arrogated to itself the authority to determine that the levy was nonexistent. This tribunal is of the firm opinion that in the light of the analysis made above, such a recourse to *suo motu* adjustment was impermissible for the following reasons. First, the payment so made by the appellant to the credit of the Central Government by oversight under a mistaken notion of the law, is thereafter considered Government Revenue until a competent authority determines otherwise. Second, the correct and proper procedure has been prescribed in the statute and it involves applying for a refund through the prescribed statutory mechanism under Section 11B as made applicable to the Finance Act, 1994 by Section 83 of the Finance Act, 1994, during which proceedings the competent authority would then make such determination. Third, the payment so made by the appellant also attracts the statutory presumption under Section 12B as made applicable to the Finance Act, 1994 by Section 83 of the Finance Act ibid, namely that the incidence of service tax has been passed on to the buyer/service recipient, Fourth, the right to a refund is also contingent on proving that the burden of tax was not passed on to the end customer/anyone else, but has been in fact borne by the claimant, as has been emphatically laid down in the Mafatlal Industries case reproduced extensively above; which burden in the instant case, the appellant has failed to prove and Last, any condonation of such adjustment on equitable or discretionary considerations would tantamount to according this Tribunal's imprimatur to an action opposed to the statutory provisions. This effectively translates to bestowing an undeserved legitimacy to such circumventions as those which precisely the law seeks to prevent. Misplaced sympathy is a largesse that this Tribunal can ill afford. Hence, the *suo motu* adjustment undertaken by the appellant having resulted in short payment of the appellant's subsequent service tax liability, has therefore been correctly demanded by the original authority, and the appeal preferred by the appellant against the same, has also been rightly turned down vide the impugned order.

36. In light of the discussions above, this Tribunal is of the considered view that the Order in Appeal passed by the Appellate Authority warrants no interference.

The Appeal being devoid of merits, is hence dismissed.

(Order pronounced in open court on 20.01.2026)

(AJAYAN T.V.)
(Member Judicial)

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