CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70340 of 2018

(Arising out of Order-in-Appeal No.90/CE/Alld/2018 dated 16/02/2018 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Allahabad)

M/s HIL Ltd., **.....Appellant**
(A-49 & A-50 Satharia, District-Jaunpur, U.P.)

VERSUS

Commissioner of Central Excise &

Service Tax, Allahabad **....Respondent**

(38-M.G. Marg, Civil Lines, Allahabad)

APPEARANCE:

Shri S.P. Ojha, Consultant for the Appellant
Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER No.70060/2023

DATE OF HEARING : 02 August, 2023
DATE OF DECISION : 02 August, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.90/CE/Alld/2018 dated 16.02.2018 of the Commissioner CGST and Central Excise (Appeals), Allahabad. By the impugned order Commissioner (Appeal) has dismissed the appeals filed by the appellant, upholding the order of Deputy Commissioner, Central Excise and Service Tax Division -II, Allahabad.

2.1 Appellant have filed six refund claims as detailed below with the jurisdictional authorities:

Final Assessment Order No & date	Period	Refund claimed 'Rs	Relevant Date	Date of receipt
28/2015 dtd 06.11.2015	01/2015-03/2015	20,44,141/-	05.01.2016	27.01.2017
29/2015 dtd 20.11.2015	04/2015-06/2015	8,75,181/-	19.11.2016	27.01.2017
29/2015 dtd 17.12.2015	07/2015-09/2015	9,45,310/-	16.12.2016	27.01.2017
02/2016 dtd 26.04.2016	10/2015-12/2015	20,69,149/-	25.04.2017	27.01.2017

06/2016 dtd 01.06.2016	01/2016-03/2016	27,26,372/-	31.05.2017	27.01.2017
10.2016 dtd 29.11.2016	04/2016-06/2016	33,48,460/-	28.11.2017	18.01.2017

2.2 After issuing show cause notices to the appellant in respect of each of the refund claim, the refund claims filed by the appellant were rejected by the Deputy Commissioner vide his order in original No 04/Refund/Div II/2017. Deputy Commissioner has recorded as following in the order for rejection of refund claims:

"9. Moreover the party has also not replied to the preposition of te Show Cause Notice that any such amount of refund should be credited to to the Consumer Welfare Fund in accordance with the provisions of Section 11 B (2) read with Section 12 C of the Act, ibid as the party is deemed to have passed on the full incidence of such duty to the buyer of such goods unless the contrary is proved by them as provided vide Section 12B of Central Excise Act, 1944 which they failed to do. Hence all the refund claims referred supra are also liable to be rejected as the amount claimed for refund by the party has been collected by them from the customers on account of central excise duty and paid to exchequer, and therefore is not refundable to them.

10. Further I find that all the show cause notices as detailed below were subject issues of the assessment orders in the present case.

SL No	*SCN Number & Date*	*Amount involved (Rs)*	*Period covered under Demand*
1	*06/Commr/Alld/13 dt 12.03.2013*	*1,55,09,285/-*	*April 2008 to Sept 2012*
2	*43/Commr/Alld/13 dt 15.10.2013*	*91,17,580/-*	*Oct. 2012 to July 2013*
3	*36/Commr/Alld/14 dt 27.08.2014*	*1,34,71,164/-*	*August 2013 to July 2014*
4	*35/Commr/Alld/15 dt 01.09.2015*	*1,37,64,285/-*	*August 2014 to June 2015*
5	*37/Commr/Alld/16 dt 14.07.2016*	*71,36,320/-*	*July 2015 to March 2016*

Further all the aforesaid demands have been confirmed by the Joint Commissioner vide his O-I-O (MP-93/2016)(83/16)(84/16)983/16) 156 to 160 of 2016 dated 30.12.2016. in the said order competent authority has observed that "....."

11 It is evident from the records that in all the final Assessment orders against which the instant refund claims were filed it was specifically stated that the outcome of the demand and subsequent demands as stated in para 10 supra would determine the liability of the party to teh payment of Central excise duty. Evidently the said demands have been confirmed by the competent authority against the party as such their refund claims are inadmissible.

12. Thus in view of the forgone the refund applications of the party are erroneous, illegal and without jurisdiction and are liable to be rejected. Accordingly, I pass the following order:

ORDER

I hereby reject the refund claims dated 23.01.2017 and 16.01.2017 totally amounting to Rs 1,20,08,613.00."

3.1 We have heard Shri S P Ojha Consultant for the Appellant and Shri Sandeep Pandey, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submitted that-

3.3 Arguing of the revenue learned authorized representative reiterates the findings recorded in the impugned order.

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

4.2 Impugned order record as follows for rejection of the refund claims filed by the appellant.

"4.1 I have gone through the facts of case, the averments made at the time of the personal hearing and all other materials/ documents on record. It is observed that:

(i) The appellant had filed the refund claims after finalization of their provisional assessments. In the final assessment orders, it was held that the appellant had paid excess duty, on account of discount allowed through credit notes. Further, all the final assessment orders were subject to the outcome of Show Cause Notices issued on the issue of non-inclusion of freight in the assessable value for the purposes of payment of duty; and

(ii) The Adjudicating Authority vide the impugned Order, found that the first three claims were filed on 27.10.2017 after one year of the date of finalization of the provisional assessment and

rejected the refund claims on the ground of unjust enrichment as well. he also held that the refund claims were also inadmissible, as the Show Cause Notices issued on the issue of the non inclusion of freight in the assessable value, have been confirmed by the concerned Adjudicating Authority.

4.2 First of all, I take up the issue of rejection of the first three refund claims of the appellant on the ground of time limitation. I find that clause (eb) of the Explanation under Section 11B of the Act, inserted w.e.f 01.08.1998, vide the Finance (No 2) Act, 1998 provides that relevant date in case where duty of excise is paid provisionally under the Act or the rules made there under, is the date of adjustment of duty after final assessment thereof.

4.2.1 Further, the Hon'ble Supreme Court in the case of CCE Mumbai II vs Allied Photographics India Ltd. [2004 (166) ELT 3 (SC)] has interalia held at para 12, that Section 11B of the Act is required to be complied with for the refund claim made after finalization of provisional assessments. Since in this case, the appellant had filed the refund claims after finalization of their provisional assessments, they were required to comply with the provisions of Section 11 B of the Act.

4.2.2 Thus I find that the Adjudicating Authority has rightly held that the first three refund claims filed on 27.01.2017, for which the relevant dates in terms of clause (eb) of the Explanation under Section 11B of the Act, were 05.11.2016, 19.11.2016 & 16.12.2016 were barred by limitation.

4.3 Now I take up the issue of unjust enrichment. It is observed that the Adjudicating Authority has rejected the refund claims, on the ground that the appellant had failed to show that they had not passed on the incidence of duty to any other person. In this regard, he has also relied upon the decision of Hon'ble CESTAT in case of SAF Yeast Company Pvt Ltd. Vs CCE Lucknow [2017 (345) ELT 651 (T-Alld)], wherein it ahs been held as under:

Refund - Unjust enrichment - discount by credit notes - Credit notes issued after arriving at assessable value and payment of duty - At time of assessment of goods duty already passed on to the purchaser - Duty involved in such value which is reduced by *way of issue of credit notes hit by provisions of unjust enrichment. - Refund Claim for excess duty paid correctly rejected as hit by unjust enrichment - section 11 B of the Central Excise Act, 1944 {2011 (271) ELT 164 (SC)]*

4.3.1 It is further observed that the appellant have submitted that the refund claims were not hit by the bar of unjust enrichment, as they had received only reduced prices to the extent of discounts allowed by credit notes and when the credit notes are given, every element of price including duty gets proportionately reduced.

4.3.2 I find that Section 11B (2) of the Act provides, as under:

......

4.3.3 Further, I find that the Hon'ble Supreme Court in the case of CCE, madras vs Addison & Co ltd. [2016 (339) ELT 177 (SC)] interalia, held, as under:

....

4.3.4 The aforesaid decision of the Hon'ble Supreme Court was also affirmed by the Hon'ble Supreme Court vide order dated 27.04.2017 reported as Addison and Co Ltd. vs Commissioner {2017 (353) ELT A 64 (SC)].

4.4 In this case, it is observed that the appellant have failed to show that incidence of duty had not been passed on to consumers. Since the dealers/ stockists/ consignment agents are not the ultimate consumers and the duty component initially passed onto the them, was further passed on by them, to ultimate consumers, I therefore, find that refund of such duty on the plea taht such duty returned back by issuing credit notes subsequent to clearance of goods, is hit by bar of unjust enrichment, in light of aforesaid decision of Hon'ble Supreme Court and as such, the six refund claims filed by the appellant, are hit by the bar of unjust enrichment.

4.5 Even otherwise, I find that when all the final assessments were subject to the outcome of Show Cause Notices issued on the issue of inclusion of freight element in the assessable and the demand raised in these Show Cause Notices have been *confirmed by the concerned Adjudicating Authority, the refund claims filed by the appellant are not maintainable."*

4.3 From the perusal of the impugned order, it is quite evident that is marred by various contradictions. On one hand the order determines the relevant date for filing the refund claim under Section 11B on the basis of the date of finalization of assessment, on the other hand it says that the finalization of assessment was subjected to the outcome of the five show cause notices issued to the appellant on the issue of inclusion of freight in the assessable value. Admittedly these show cause notices were adjudicated by the concerned Joint Commissioner on 30.12.2016. Here we take a break and refer to the provisions of Section 11 B of the Central Excise Act, 1944:

11B. Claim for refund of 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 12 A) 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 whch 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:

Provided that

Provided further that the limitation ....

(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 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) ...

(b) ...

(c) ...

(d) ...

(e) the duty of excise and interest, if any, paid on such duty borne by the interest, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person.

(f) ......

....

Explanation: For the purpose of this section,-

(A) ....

(B) "relevant date" means,-

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(ea) ....

(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.

(ec) ....

(f) ...

In terms of (eb) to the explanation under Section 11B, the relevant date is not the date of finalization of assessment but the date of adjustment of duty after finalization of assessment. If the order of Joint Commissioner, dated 30.12.2016 is taken to be the date of adjustment of the duties, paid in excess against the demand confirmed then the relevant date for computing the limitation for filing the refund claim will be the date of this order and not the date of finalization of assessment. That being so the refund claims could have been filed by the appellant upto 29.12.2017 without being hit by limitation as provided for by Section 11B. We find that all the refund claims have been filed prior to this date and will not be barred by the limitation.

4.4 Commissioner (Appeal) has referred to para 12 of the decision of Hon'ble Supreme Court in case of Allied Photographics India Ltd. [2004 (166) ELT 3 (SC)]. We reproduce the said para 12 Hon'ble Apex Court order along with other paras leading to conclusion highlighted in this paragraph.

''6. The points at issue in this civil appeal are whether refund of duty paid under provisional assessment is similar to duty paid under protest as both are "On Account" payments adjustable on finalization of assessment or vacating of protest? Secondly, in the course of such adjustment or vacation of protest, if any amount is found payable by the Department to the manufacturer, is it open to the purchaser to contend that he (the purchaser) has stepped into the shoes of the manufacturer seeking refund of "on account payment" and, therefore, he was not bound to comply with section 11B of the said Act. In this civil appeal, we have to deal with the law governing refund during the disputed period from 1974 to 1984. To resolve the dispute herein, we quote herein below section 11B of the said Act as also rule 9B of the Central Excise Rules, 1944 as it stood prior to Central Excise & Customs (Amendment) Act, 40 of 1991:-

"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 Collector of Central Excise before the expiry of six months from the relevant date:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

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 despatch 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 which 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 a 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;

(f) in any other case, the date of payment of duty.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provision 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.

Rule 9B: Provisional assessment of duty- (1) Notwithstanding anything contained in these rules:

(a) where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or

(b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or

(c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, but the proper officer deems it necessary to make further enquiry (including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the goods after their removal) for assessing the duty,

the proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and as finally assessed.

(2) .....

(3) The Collector may permit the assessee to enter into a general bond in the proper Form with such surety or sufficient security in such amount or under such conditions as the Collector approves for assessment of any goods provisionally from time to time:

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Collector may, in his discretion, demand a fresh bond and may, if the security furnished for a bond is not adequate, demand additional security.

(4) 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 not so assessed.

(5) 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."

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

However, even in such cases, the person claiming refund had to pay the duty under protest in terms of prescribed rules. A bare reading of section 11B(1), therefore, shows that it refers to claim for refund as against making of refund by the proper officer under rule 9B.

8. On 20.9.1991, the above section 11B underwent a drastic change vide Central Excises and Customs Laws (Amendment) Act, 40 of 1991 (hereinafter referred to as "the Amendment Act"). By the Amendment Act, the concept of unjust enrichment as undeserved profit was introduced. We reproduce herein below amended section 11B:

"Section 11B: Claim for refund of duty.

.....

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.*

In the light of what is stated above, we now quote herein below para 104 of the judgment of this Court in the case of Mafatlal Industries Ltd. (supra):

"104. Rule 9-B provides for provisional assessment in situations specified in clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B(5) reagitating the issues already decided under Rule 9-B assuming that such a refund claim lies and is allowed, it would obviously be governed

by Section 11-B. It follows logically that position would be the same in the converse situation."

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 finalization 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 9B, 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 finalization 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.*

From the perusal of the above it is quite evident that the issue for consideration before the Hon'ble Apex Court was not qua the determination of the relevant date as per explanation to Section 11B, but was in respect of "duty paid under protest, and whether the observation made by the Apex Court in the para 104 of the decision in case of Mafatlal Industries can be made applicable to the duty paid under protest. Thus in our view the reliance placed by the Commissioner (Appeal) on this decision for upholding the rejection of three refund claims on the ground of limitation is totally misplaced.

4.5 Rule 7 of the Central Excise Rules, 2002 is a self contained rule. It provides for the situations in which the assessment can be ordered to be made provisional and the manner of finalization of assessment. It also provides for recovery and refund of the duty short paid or paid excess the relevant provisions of the said rule are reproduced below:

"7. Provisional Assessment

(1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate and value as may be specified by him.

(2) ....

(3) The Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, shall pass order for final assessment, as soon as may be, after relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule (1);

(4) The assessee shall be liable to pay interest on any amount payable to Central Government, consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under section 11AA of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

(5) Where the assessee is entitled to refund consequent to an order of final assessment under sub-rule (3), then subject to sub-rule (6), there shall be paid an interest on such refund as provided under section 11BB of the Act.

(6) Any amount of refund determined under sub-rule (3) shall be credited to the Fund:

Provided that the amount of refund, instead of being credited to the fund, be paid to the applicant, if such amount is relatable to -

(a) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person, or

(b) *the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person."*

4.5 Explaining the above provisions in respect of the refund arising on the account of finalization of assessment in Central Excise Manual issued by CBEC, in Chapter 3 Part IV, at para 2.8 following has been stated:

"2.8 Where any refund becomes due to the assessee, order shall be passed for such refund, but disbursement shall be subject to further verification about incidence of such duty. The assessee will be required to submit proof to the Assistant/deputy Commissioner of Central Excise that the duty incidence was borne by him (assessee). If the assessee fails to produce such proof/evidence, the Assistant/deputy Commissioner of Central

Excise will pass an order for depositing the amount in Consumer Welfare Fund in the prescribed manner. Otherwise, the refund shall be give along with interest at the rate specified by the Central Government by Notification issued under Section 11BB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of refund."

4.6 From the above it is quite evident that the refund arising on the account of finalization of provisional assessment ahs to be paid either to the claimant/ applicant or credited to fund, without the requirement of any further application under Section 11B i.e. the refunds on finalization of the provisional assessment cannot be subjected to limitation as provided for by the Section 11B. In our view rejection of refund claims on the ground of limitation is contrary to the provision of Rule 7 of Central Excise Rules, 2002 and also contrary to para 2.8 of Central Excise Manual, referred above.

4.7 From the perusal of the Section 11 B (1) along with explanation at (eb) it is quite evident that relevant date in the cases of the finalization of assessment, is not the date of finalization of provisional assessment but is *the date of adjustment of duty after the final assessment thereof*. In the case of refunds arising as result of finalization of assessment will be the date when either that amount is paid to the appellant or credited to the fund. In the present case neither has been done till date, nay, on the date when the application for the refunds have been filed under Section 11 B. That being so the refund claim cannot have been held as time barred for the reason that the relevant date for counting the period of limitation has not even started.

4.8 Thus in our view the rejection of three refund claims on the ground of time bar cannot be upheld. The refunds have also been rejected on the ground of unjust enrichment. From plain wording of the Section 11B and also Rule 7 of the Central Excise Rules, 2002, it is evident that unjust enrichment cannot be ground for unjust enrichment but the refund has to allowed, but ordered to be credited to Consumer Welfare Fund, (the Fund created under Section 12 C of the Central Excise Act, 1944). In any case the amounts not due to the governemnt cannot have been retained by the Government as per Article 265 of the Constitution (*No tax shall be levied or collected except by authority of law*). To the extent of rejection and not crediting these amounts to Consumer Welfare Fund the orders of lower authorities is totally erroneous.

4.9 Commissioner (Appeal) and learned authorized representative has referred to the decision of the Hon'ble Apex Court in the case of Addison and Co [2016 (339) ELT 177(SC)], to argue that the refund claims will be hit by the unjust enrichment. The decision of Addison and Company only states that the subsequent issue of the credit notes in the favour of the customers, cannot be an evidence for not passing on the burden of duty at the time of clearance of the goods by the manufacturer. It is not even the case of the appellant that they issued the credit notes to the buyers in respect of the excess duty paid by them for which the refund claim has been filed. They have stated that the fact about not passing on the burden of the excess duty claimed as refund has been certified by the Chartered Accountant. In the case of Addison Company, Hon'ble Supreme Court has observed as follows:

" 4. Civil Appeal No. 7906 of 2002 will be taken as the lead matter as SLP (C) Nos. 18426, 23722, 18425, 18423 of 2015 and 12282, 16141 and 16142 of 2016 and Civil Appeal No. 14689 of 2015 were disposed of by the Andhra Pradesh High Court by following the Madras High Court's impugned judgment in Civil Appeal No. 7906 of 2002. Civil Appeal No. 8488 of 2009 and SLP No. 25055 of 2009 will be dealt with separately as the facts and the point involved are slightly different. **Civil Appeal No. 7906 of 2002**

5. The respondent in the above appeal is a manufacturer of cutting tools. The respondent-Assessee filed a refund claim for Rs. 40,22,133/- on 19.07.1988 and a supplementary refund claim for Rs. 5,44,688/- on 15.06.1989 towards excise duty paid on various taxes and discounts such as turnover tax, surcharge, additional sales discounts, transitory insurance, excise discounts, additional discounts and turnover discounts. The said claim was later on revised to Rs. 40,37,938/- on 17.08.1988. The claim of *the Assessee was that the said amount was deductable from the excise duty. The Department was of the opinion that the refund towards turnover discount and additional discount was to be rejected as the Assessee was not eligible for deduction from the wholesale price for determination of value under Section 4 of the Central Excises & Salt Act, 1944. On 23.08.1989 a notice was issued to the respondent to show cause as to why the refund claim involving turnover discount and additional discount should not be rejected. After hearing the Assessee, the Assistant Collector by an order dated 06.12.1989 rejected the refund claim amounting to Rs.26,37,462/- and Rs.17,17,808/- in respect of turnover discount and additional discount respectively on the ground that the quantum of discount become known only at the year end. The Collector of Central Excise Appeals set aside the said order dated 06.12.1989 of the Assistant Collector by his order in appeal dated 21.02.1990 and held that the Assessee was entitled to refund.*

7. The Assistant Collector passed an Order-in-Original dated 27.10.1992 holding that the Assessee is entitled for the refund claimed by him. The Collector of Central Excise by Order-in-Appeal dated 20.10.1993 rejected the appeal filed by the Revenue and upheld the order dated 27.10.1992 of the Assistant Collector of Central Excise, Madras Vth Division. The Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT), South Zone Bench of Madras allowed the appeal filed by the Revenue against the order dated 20.10.1993 of the Collector of Central Excise. The Tribunal held that the Assessee would be entitled to grant of refund only if he had not passed on the duty burden to his buyers. It was also held that the buyer in turn, would be entitled to claim refund only if he has not passed on the incidence of duty to any other person. It was further held by the Tribunal that the event which gives rise to cause of action for refund is payment of duty made in respect of goods cleared from the factory and once the duty burden has been passed on to the buyer at the time of clearance, issuance of credit note at a later point of time would not entitle the Assessee to claim any refund. The Tribunal also held that burden of duty is normally passed by the manufacturer and the dealer to the ultimate consumer.

8. The Assessee filed an application for reference of questions arising out of the final order dated 07.12.1996. The Tribunal referred the following questions for consideration of the High Court by its order dated 28.08.1998, taking note of the fact of the existence of divergent views on the point.

"1. Whether by passing on the duty element on the discount to its dealers the applicant had satisfied the requirements of proviso 'd' to sub Section 11-B (2) of the Central Excise Act, 1944 and was therefore, entitled to be paid the amount claimed as refund?

2. Whether the Tribunal after finding that the burden of duty was passed on by the applicant to its various dealers by issue of credit notes was right in concluding that the ingredients of Section 11-B were not satisfied."

9. The High Court of Madras answered the reference in favour of the Assessee by its judgment dated 23.11.2000. The High Court held that the refund towards deduction of turnover discount cannot be denied on the ground that there was no evidence to show who is the ultimate consumer of the product and as to whether the ultimate consumer had borne the burden of the duty. According to the High Court, Section 11-B of the Act cannot be construed as having reference to the ultimate Consumer and it would be sufficient for the claimant to show that he did not pass on the burden of duty to any other person. It was further held by the High Court that the claim for refund made by the manufacturer is not dependent on the identification of the ultimate consumer. The word 'buyer' used in Section 12-B of the Act does not refer to ultimate consumer and has reference only to the person who buys the goods from the person who has paid duty i.e. the manufacturer. The High Court concluded that the Tribunal committed an error in holding that the Assessee was not entitled for refund despite the Assessee proving that the duty was not passed on to its buyers. Challenging the legality and validity of the said judgment of the High Court, the Commissioner of Central Excise, Madras has filed Civil Appeal No. 7906 of 2002.

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 Assessee 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 17.03.1994 in Collector of Central Excise, Madras Vs. Addison & Co. Ltd. that the turnover discount is not an admissible abatement on the ground that the quantum of discount was not known prior to the removable of the goods. In an appeal filed by the respondent-Assessee, this Court by its judgment dated 11.03.1997 in Addison & Co. Ltd. Vs. 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 Vs 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 Assessee 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 Assessee is entitled for filing a claim for refund on the basis of credit notes raised by him towards turnover discount.

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 12-B 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.

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 11-B is also not correct.

23. In view of the above findings, the judgment of the High Court is liable to be set aside. The Assessee is not entitled to refund as it would result in unjust enrichment. The Appeal is allowed and the judgment of the High Court is set aside."

Special Leave Petition (C) Nos. 18426, 23722, 18423, 18425 of 2015 and 12282, 16141 and 16142 of 2016.

Leave granted.

25. The Assessee i.e. Andhra Pradesh Paper Mills Ltd. manufactures Paper and Paper boards. There is no dispute that excise duty is paid by the Assessee and the same is passed on to its buyers. Applications were filed by the Assessee for refund of amounts towards trade discounts that were given to its buyers. The refund claim is on the basis of credit notes raised by the Assessee subsequent to the sale/removal of goods. The credit notes that were raised by the Assessee were towards trade discounts which included the component of excise duty. The refund claims of the Assessees were rejected by the Assistant Commissioner of Central Excise, Rajahmundry Division. The Commissioner Customs, Central Excise (Appeals) Hyderabad confirmed the said orders in the appeals filed by the Assessee. The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Division, Bangalore dismissed the appeals filed by the Assessee.

26. The Assessee approached the High Court of Andhra Pradesh by filing Central Excise Appeals. By a judgment dated 19.02.2014, the High Court of Andhra Pradesh allowed the Central Excise Appeal Nos. 9, 10 and 51 of 2004 and 21 of 2005. The appeals were allowed, as being squarely covered by the judgment of the Madras High Court in Addison and Company

Ltd., Madras Vs. Collector of Central Excise, Madras reported in (1997) 5 SCC 763.

27. The Revenue has filed Special Leave Petitions against the said judgment dated 19.02.2014. Special Leave Petition (C) Nos. 12282, 16141 and 16142 of 2016 were filed by the Revenue against the judgment dated 01.07.2015 of the Division Bench of the Andhra Pradesh High Court which followed its earlier judgment dated 19.02.2014. The issues involved in the above Civil Appeals are similar to that of Civil Appeal No. 7906 of 2002.

28. The Appeals filed by the Revenue are allowed, in terms of the judgment in Civil Appeal No. 7906 of 2002.

Civil Appeal No. 14689 of 2015

29. The above Civil Appeal is filed by the Commissioner of Central Excise and Customs challenging the judgment of the Andhra Pradesh High Court in Central Excise Appeal No. 21 of 2004. The Respondent-Assessee manufactures Pesticide formulations which are used as pesticides in agricultural farms. The Pesticides are sold at the factory gate and also through depots. The Assessee submitted an application for refund towards allowable discounts after the removal of goods from the factory. Credit notes were issued by the Assessee in favour of the buyers towards trade discounts which also contained a component of the excise duty. There is no dispute regarding the fact of payment of the excise duty originally by the manufacturer being passed on to his buyers. The refund claim of the Assessee was rejected by the Deputy Commissioner vide Order-in-Original No. 58 of 2002 dated 30.12.2002. The above said order was reversed by the Commissioner of Customs and Central Excise by his order dated 12.03.2003.

30. The Revenue filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Division, Bangalore which was allowed. The Assessee preferred an appeal to the High Court aggrieved by the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Division, Bangalore. The High Court following its own judgment in Andhra Pradesh Paper Mills Vs. Commissioner of Central Excise allowed the appeal. The point in this appeal is identical to the issue in Civil

Appeal No. 7906 of 2002. The Appeal filed by the Revenue is allowed in terms of the judgment in Civil Appeal No. 7906 of 2002.

Special Leave Petition (C) No. 25055 of 2009

Leave granted.

31. The Assessee is engaged in the processing of man-made fibre. Prior to 11.06.2001 the CENVAT credit admissible on the declared inputs used in the manufacture of process of man-made fibre was 45 per cent. The net duty payable on the fibre was 55 per cent of the effective duty. On 11.06.2001, a notification was issued increasing CENVAT credit from 45 per cent to 50 per cent which resulted in the net duty payable being 50 per cent. The Assessee continued to pay the effective duty at 55 per cent for a short period between 11.06.2001 to 13.06.2001. The effective duty of excise is 16 per cent and the duty payable from the personal ledger account prior to the notification dated 11.06.2001 was 8.8 per cent and after 11.06.2001 the duty payable is 8 per cent. The Assessee made an application for refund of Rs. 61,146/- paid in excess on 31.07.2001. The said application for refund was rejected by an Order-in-Original dated 12.08.2002 by the Assistant Commissioner, Bhilwara on the ground that the Assessee was a job worker engaged in the processing of grey fabric and that the said fabric was returned to the owners of the fabric who sold the processed fabric in the market. It was also held that the incidence of the duty was passed on to the ultimate customers/consumers before the debit notes were raised by the owners of the fabric. As the duty paid at 8.8 per cent was passed on by the owner of the fabric to the ultimate consumer the processor was not entitled for a refund.

32. The Assessee approached the Commissioner Appeals, II Customs & Central Excise, Jaipur by filing an appeal which was rejected by an order dated 27.02.2003. The Central Excise and Service Tax Appellate Tribunal by its order dated 11.05.2005 allowed the appeal filed by the Assessee on the ground that the incidence of duty was not passed on by the

Assessee to the customers. The customers protested to the charging of the net duty payable at 8.8 per cent instead of 8 per cent in spite of the notification issued on 11.06.2001. This protest was made without any delay so the question of passing the incidence of duty by the owners of the fabric to their customers does not arise.

33. In Central Excise Appeal No. 34 of 2005 filed by the Union of India through Commissioner of Central Excise, Jaipur, the High Court of Judicature for Rajasthan at Jodhpur confirmed the order of the Central Excise and Service Tax Appellate Tribunal. Challenging the said judgment of the High Court dated 26.11.2008, the Union of India has filed the above Appeal. The contention raised by the Revenue before the High Court regarding the presumption under Section 12-B of the Act was rejected by the High Court by holding that once the Assessee shows that he has not passed on the duty to his buyer, then the burden shifts to the Revenue. The submission that there is a presumption of the duty being passed on to the ultimate consumer was not accepted by the High Court. The High Court held that the claim for refund should be accepted once the Assessee shows that he has raised a credit note regarding the excess duty. The High Court had further held that passing on the burden of excise duty to the ultimate buyer cannot be left in the realm of presumption.

34. In Civil Appeal No. 7906 of 2002, we have already held that in the claim for refund of excess duty paid can be allowed only in case where the burden of duty has not been passed on to any other person, which includes the ultimate consumer as well. The findings in the Order-in-Original and the Order-in-Appeal are that the excise duty paid originally at the rate of 8.8 per cent was passed on from the Assessee-processor to the owner of the fabric and later to the customers. The point in this Appeal is also identical to that of Civil Appeal No. 7906 of 2002. The above appeal of the Revenue is allowed.

Civil Appeal No. 8488 of 2009

35. The respondent-Assessee is a 100 per cent Export Oriented Unit (EOU) manufacturing cotton yarn. The respondent filed an application for refund of an amount of Rs. 2,00,827/- on 14.08.2002 on the ground that it had paid excess excise duty at the rate of 18.11 per cent instead of 9.20 per cent. The Assessee initially passed on the duty incidence to its customers. Later the Assessee returned the excess duty amount to its buyers which was evidenced by a certificate issued by the Chartered Accountant on 02.08.2002. The refund claim was rejected by the Deputy Commissioner of Central Excise, Kolhapur Division vide an order dated 24.09.2002 on the ground that the Assessee did not submit either the credit notes or the Chartered Accountant's certificate at the time of filing the refund application. Not satisfied with the genuineness of the documents the Deputy Commissioner rejected the refund claim. The Commissioner (Appeals) Central Excise, Pune allowed the appeal filed by the Assessee by taking note of the certificate issued by the Chartered Accountant and the credit notes dated 29.07.2002. The Appellate Authority accepted the Assessee's contentions and held that there was no reason to doubt the genuineness of the documents produced. The Appellate Authority allowed the appeal of the Assessee and the said order was confirmed by the Central Excise and Service Tax Appellate Tribunal vide judgment and order dated 06.10.2005. The said order of Central Excise and Service Tax Appellate Tribunal was further confirmed by the High Court of Judicature at Bombay in Central Excise Appeal No. 100 of 2008 filed by the Revenue. The Revenue has filed the above Civil Appeal challenging the validity of the judgment of the High Court in Central Excise Appeal No. 100 of 2008.

36. Except for a factual dispute about the genuineness of the certificate issued by the Chartered Accountant and the credit notes raised by the Assessee regarding the return of the excess duty paid by the Assessee, there is no dispute in this case of the duty being passed on to any other person by the buyer. As it is clear that

the Assessee has borne the burden of duty, it cannot be said that it is not entitled for the refund of the excess duty paid. *In view of the facts of this case being different from Civil Appeal No. 7906 of 2002, the appeal preferred by the Revenue is dismissed.*

4.10 In the identically worded orders for finalization of assessment following has been recorded by the Deputy Commissioner:

"2. The party vide their letter C. No MHD/CEX/PA-IV/2014-15 dated 26.12.2014 made a request for extension of permission for clearance of their goods i.e. Asbestos Cement Products provisionally under Rule 7 of the Central excise Rules, 2002 for the period from 01.01.2015 to 31.03.2015 for the reasons mentioned in earlier letters i.e. on the following grounds:-

(i) Due to various commercial exigencies the goods in question are sold at different prices from the place of removal which can only be determined at the point of sale and not prior to actual sale. Such price fluctuates frequently which cannot be avoided due to various reasons which is beyond their control.

(ii) The actual value of clearance, both from factory and as well as depots situated at different places could not be determined due to the reason that their prices are F.O.R destination, and since amount of discount is not known at the time of clearance from their factory and as discounts are variable in nature like target achievement discount, project discounts etc., Therefore, provisional assessment is warranted.

3. The provisions of Section 4 of Central Excise Act, 1944 (herein after referred to as the 'Act') and Rule 7 of Central Excise Rules, 02 stipulates that (1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in *writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him. Further, the value of such provisionally assessed goods is to be determined in terms of the provisions of Rule 5 & 7 of Central Excise valuation (Determination of Price of Excisable Goods) Rules, 2000. The request of the party for provisional assessment was found to be genuine and has been accepted. According, Provisional Assessment Order was issued vide this office C No. VI/Prov. Ass/HIL/58/2014 dated 20.02.2015. For the period 01.01.2015 to 31.03.2015, subject to furnishing of bond for an amount of Rs 18,00,000/- (Rs. Eighteen Lakh) and bank guarantee of Rs 4,50,000/-. The party vide letter C No EX/Bond/HIL/820/12-13 dated 28.07.2012 has submitted duly executed B2 Bond (executed on 28.07.2012) for Rs 18,00,000/- (Rs Eighteen Lakh) along with bank Guarantee for Rs 4,50,000/- only which was renewed by the party up to 24.07.2015, as intimated vide their letter C No EX/Bond/HIL/820/Jul-Sep/14-15 dated 25.02.2015 to safeguard the differential duty in respect of clearances during the period of Provisional Assessment from 01.01.2015 to 31.03.2015. The party's request for the acceptance of above mentioned bond and bank guarantee was accepted.*

6. In this regard, I observe that the assessment of the period under reference i.e. 01.01.2015 to 31.03.2015 is to be finalized as per provisions of Rule 2 (b) and Rule 7 of Central Excise valuation (Determination of Price of Excisable Goods) Rules, 2000 which inter alia states that Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole *consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment.*

7. The instant case has been taken up in light of the above provisions of law. During the course of examination of the documents submitted by the party it is observed that the goods are cleared/ sold from (1) Factory gate and (2) Depot. The party has provided discounts i.e. in the case of factory gate sale from factory to customer and in case or depot sales, from depot to customer. the same is permissible under Section 4 of the Act read with Central Excise Valuation Rules, 2000. Te same is permissible deduction & hence is allowable.

8. The valuation pattern of the party, in the case of factory gate sale is ex works price excluding freight and excise duty and in the case of Depot sale (sale from Depot), it is an inclusive price in which Excise duty, other permissible deductions and other expenses i.e. freight from factory to depot & other expenses and included and freight from Depot to customer are not included. In the case of factory gate sale, assessable value has been derived by deducting trade discount (permissible deduction) and whereas in the case of removal of goods for depot sale, the assessable i.e. the normal transaction value (excluding excise duty) has been derived as value on which highest quantity of goods were sold from depot at or about the same time i.e. at the time of removal from the factory to depot and where such goods were not sold at or about the same time, at the time nearest to removal of goods under assessment and accordingly, final assessable value has been derived after deducting the trade discount. This pattern of assessment is as per Rule 2 (b) and Rule 7 of Central Excise valuation Rules, 2000 as mentioned above. It would be pertinent to mention have that on scrutiny of the documents as submitted by the party it was found that no element of freight was mentioned consequently party was *asked to clarify the same vide letter C No VI/Prov. Ass/HIL/58/2014/1325-1326 dated 01.07.2015. In this context party replied vide its letter dated 14.07.2015 that "In the above context, this is to inform you that the prices of our various products have been equalized so that the transaction value remains the same whether sale is affected at the factory gate of the depots. Amount of freight has been completely subsumed in the transaction value so that it does not affect the sale value. Under these circumstance rule 5 of the Central Excise Valuation". The fact stated therein were different from the facts stated in the provisional assessment requested letter dated 26.12.2014. Thus again a letter dated 18.09.2015 was sent to the party to elaborate the issue. Again the party replied wherein it stated Äs stated in our previous letter dated 14.07.2015 the element of freight is now no factor influencing transaction price of our various products. Therefore our prayer for allowing provisional assessment is only on account of trade discounts to be allowed on fulfilment of conditions for eligibility."*

9. Apparently the party has submitted it calculation chart for final assessment excluding the element of freight for amounting at the assessable value for payment of Central Excise duty. The calculation chart, as also certified by the Chartered Accountant, pertain only to discount to dealers/ purchasers. Thus the normal transaction value and the duty excess (+)/ short (-) paid month wise separately for factory gate sale and depot sale (duty provisionally paid from factory to depot on stock transfer) allowing deduction of dealer discount only. The freight element ...."

Thereafter the duty calculation charts as provided by the appellant are reproduced in the order. We reproduce these charts as taken from each of finalization order.

Adjudication No 28/Final Assesment/2015 dated 06.11.2015

Jan-15	FACTORY GATE SALE	13,683.02	1419,78,423.88	1419,78,423.88	50,37,095.94	1369,41,328.00			
	FACTORY TO DEPOT	6,830.13	719,19,243.04	739,40,305.96	34,09,250.78	705,31,055.00			
	TOTAL	20,513.15	2138,97,666.92	2159,18,729.84	84,46,346.72	2074,72,383.00	256,43,587.00	264,37,753.00	-7,94,166.00
Feb-15	FACTORY GATE SALE	10,617.92	1088,81,057.00	1088,81,057.00	55,26,142.76	1033,54,914.00			
	FACTORY TO DEPOT	10,444.47	1088,88,701.53	1133,80,476.18	32,98,493.59	1100,81,983.00			
	TOTAL	21,062.39	2177,69,758.53	2222,61,533.18	88,24,636.35	2134,36,897.00	263,80,800.00	269,16,343.00	-5,35,543.00
Mar-15	FACTORY GATE SALE	14,796.42	1518,20,930.90	1518,20,930.90	72,70,139.55	1445,50,791.00			
	FACTORY TO DEPOT	8,854.53	931,14,462.37	931,14,462.37	24,22,585.78	946,69,178.00			
	TOTAL	23,650.95	2449,35,393.27	2449,35,393.27	96,92,725.33	2392,19,969.00	299,02,496.00	306,16,928.00	-7,14,432.00
	Grand Total						819,26,883.00	839,71,024.00	-20,44,141.00

Adjudication No 29/Final Assesment/2015 dated 20.11.2015

Apr-15	FACTORY GATE SALE	17,845.47	1891,20,637.25	1891,20,637.25	41,40,113.78	1849,80,523.00			
	FACTORY TO DEPOT	7,147.28	756,83,963.46	807,63,469.43	22,65,896.89	784,97,573.00			
	TOTAL	24,992.75	2648,04,600.71	2698,84,106.68	64,06,010.67	2634,78,096.00	329,34,762.00	331,00,579.00	-1,65,817.00
May-15	FACTORY GATE SALE	19,906.92	2150,15,434.36	2150,15,434.36	14,39,588.44	2135,75,846.00			
	FACTORY TO DEPOT	6,382.38	676,05,731.57	709,43,806.60	43,30,616.00	666,13,191.00			
	TOTAL	26,289.30	2826,21,165.93	2859,59,240.96	57,70,204.44	2801,89,037.00	350,23,630.00	353,27,650.00	-3,04,020.00
Jun-15	FACTORY GATE SALE	18,724.30	2004,19,280.14	2004,19,280.14	48,74,904.89	1955,44,375.00			
	FACTORY TO DEPOT	6,064.56	646,92,615.18	702,72,058.75	39,47,247.98	663,24,811.00			
	TOTAL	24,788.86	2651,11,895.32	2706,91,338.89	88,22,152.87	2618,69,186.00	327,33,648.00	331,38,992.00	-4,05,344.00
	Grand Total						1006,92,040.00	1015,67,221.00	-8,75,181.00

Adjudication No 29/Final Assesment/2015 dated 17.12.2015

Jul-15	FACTORY GATE SALE	6,276.41	673,25,346.71	673,25,346.71	40,38,060.44	632,87,286.27			
	FACTORY TO DEPOT	6,079.84	671,56,123.02	704,90,464.33	14,37,034.67	690,53,429.66			
	TOTAL	12,356.25	1344,81,469.73	1378,15,811.04	54,75,095.11	1323,40,715.93	165,42,589.00	168,10,186.00	-2,67,597.00
Aug-15	FACTORY GATE SALE	4,231.49	442,93,436.18	442,93,436.18	25,50,691.56	417,42,744.62			
	FACTORY TO DEPOT	2,890.53	306,76,730.69	327,34,824.02	16,07,923.56	311,26,900.46			
	TOTAL	7,122.02	749,70,166.87	770,28,260.20	41,58,615.12	728,69,645.08	91,08,706.00	93,71,272.00	-2,62,566.00
Sep-15	FACTORY GATE SALE	5,733.08	578,39,046.81	578,39,046.81	24,67,033.78	553,72,013.03			
	FACTORY TO DEPOT	3,121.47	327,70,882.63	336,60,734.82	17,43,985.78	319,16,749.04			
	TOTAL	8,854.55	906,09,929.44	914,99,781.63	42,11,019.56	872,88,762.07	109,11,095.00	113,26,243.00	-4,15,148.00
	Grand Total						365,62,390.00	375,07,701.00	-9,45,311.00

Adjudication No 02/Final Assesment/2015 dated 26.04.2016									
Oct-15	FACTORY GATE SALE	5,673.78	589,05,091.51	589,05,091.51	20,86,871.11	568,18,220.40			
	FACTORY TO DEPOT	2,750.46	286,65,154.53	296,38,963.63	15,82,296.89	280,56,666.74			
	TOTAL	8,424.24	875,70,246.04	885,44,055.14	36,69,168.00	848,74,887.14	106,09,361.00	109,46,283.00	-3,36,922.00
Nov-15	FACTORY GATE SALE	6,078.57	611,72,084.10	611,72,084.10	10,42,490.67	601,29,593.43			
	FACTORY TO DEPOT	4,690.40	507,46,487.51	518,46,718.70	9,01,479.11	509,45,239.59			
	TOTAL	10,768.97	1119,18,571.61	1130,18,802.80	19,43,969.78	1110,74,833.02	138,84,354.00	139,89,823.00	-1,05,469.00
Dec-15	FACTORY GATE SALE	9,184.11	945,20,006.94	945,20,006.94	79,21,613.33	865,98,393.61			
	FACTORY TO DEPOT	7,079.38	773,43,501.18	779,53,532.17	57,02,456.00	722,51,076.17			
	TOTAL	16,263.49	1718,63,508.12	1724,73,539.11	136,24,069.33	1588,49,469.78	198,56,184.00	214,82,942.00	-16,26,758.00
	Grand Total						443,49,899.00	464,19,048.00	-20,69,149.00

Adjudication No 06/Final Assesment/2015 dated 01.06.2016									
Jan-16	FACTORY GATE SALE	9,520.91	937,55,369.38	937,55,369.38	59,61,206.22	877,94,163.16			
	FACTORY TO DEPOT	10,802.26	1148,06,992.67	1149,19,013.36	36,73,454.22	1112,45,559.14			
	TOTAL	20,323.17	2085,62,362.05	2086,74,382.74	96,34,660.44	1990,39,722.30	248,79,965.00	260,70,299.00	-11,90,334.00
Feb-16	FACTORY GATE SALE	7,871.94	779,11,430.65	779,11,430.65	33,74,173.33	745,37,257.32			
	FACTORY TO DEPOT	9,041.94	964,47,507.74	980,46,999.83	26,42,213.33	954,04,786.50			
	TOTAL	16,913.88	1743,58,938.39	1759,58,430.48	60,16,386.66	1699,42,043.82	212,42,755.00	217,94,870.00	-5,52,115.00
Mar-16	FACTORY GATE SALE	5,474.04	558,17,303.80	558,17,303.80	51,61,832.89	506,55,470.91			
	FACTORY TO DEPOT	9,806.44	1065,93,593.06	1092,33,793.91	53,49,730.67	1038,84,063.24			
	TOTAL	15,280.48	1624,10,896.86	1650,51,097.71	105,11,563.56	1545,39,534.15	193,17,442.00	203,01,365.00	-9,83,923.00
	Grand Total						654,40,162.00	681,66,534.00	-27,26,372.00

Adjudication No 06/Final Assesment/2015 dated 01.06.2016									
Apr-16	FACTORY GATE SALE	8,726.88	928,75,365.00	928,75,365.00	67,33,084.00	861,42,281.00			
	FACTORY TO DEPOT	7,972.13	858,28,848.00	915,57,449.00	66,87,748.00	848,69,701.00			
	TOTAL	16,699.01	1787,04,213.00	1844,32,814.00	134,20,832.00	1710,11,982.00	213,76,498.00	223,38,030.00	-9,61,532.00
Mar-16	FACTORY GATE SALE	16,726.56	1734,78,528.00	1734,78,528.00	96,76,027.00	1638,02,501.00			
	FACTORY TO DEPOT	9,122.97	985,05,869.00	1047,41,881.00	49,79,334.00	997,62,547.00			
	TOTAL	25,849.53	2719,84,397.00	2782,20,409.00	146,55,361.00	2635,65,048.00	329,45,631.00	339,98,055.00	-10,52,424.00
Jun-16	FACTORY GATE SALE	19,942.71	2024,19,055.00	2024,19,055.00	95,68,855.00	1928,50,200.00			
	FACTORY TO DEPOT	10,506.02	1113,58,650.00	1164,05,995.00	61,54,468.00	1102,51,527.00			
	TOTAL	30,448.73	3137,77,705.00	3188,25,050.00	157,23,323.00	3031,01,727.00	378,87,716.00	392,22,220.00	-13,34,504.00
	Grand Total						922,09,845.00	955,58,305.00	-33,48,460.00

4.11 From the perusal of the order specifically the charts attached it is evident that the duty has been determined on the value which may be higher or lower than the value at which the goods were cleared. The excess payment of duty has been determined on the monthly aggregate basis. The order determines the assessable value in the manner as provided by Rule 2 (b) and Rule 7 of Central Excise Valuation Rules, 2000. Rule 7 of the said Rules read as follows:

"RULE 2. In these rules, unless the context otherwise requires, -

(b) "normal transaction value" means the transaction value at which the greatest aggregate quantity of goods are sold;

(c) "value" means the value referred to in section 4 of the Act;

RULE 7.*Where the excisable goods are not sold by the assessee at the time and place of removal but are transferred to a depot, premises of a consignment agent or any other place or premises (hereinafter referred to as "such other place") from where the excisable goods are to be sold after their clearance from the place of removal and where the assessee and the buyer of the said goods are not related and the price is the sole consideration for the sale, the value shall be the normal transaction value of such goods sold from such other place at or about the same time and, where such goods are not sold at or about the same time, at the time nearest to the time of removal of goods under assessment."*

4.12 From the above Rules it is quite evident that the duty in this case is paid by the appellant on the normal transaction value and not the actual transaction value. The actual transaction value at which the goods were sold by the appellant may be different from the normal transaction value determined on the basis of maximum aggregate quantity of sale value. Further it was for the reason that correct assessable value could not have been determined at the time of clearance of the goods from the factory gate, the assessment were ordered to be provisional. The actual assessable value is as per the finalization order and duty determined accordingly.

4.13 Appellants have produced a certificate dated December 15, 2021 from the Chartered Accountant, G Ganesh to establish that they have not passed on the burden of the duty to their customers. The text of the said certificate is reproduced below:

Certificate No HIL/2021 2022/025 December 15,2021

TO WHOMSOEVER IT MAY CONCERN

This is to certify that I have examined the records maintained by m/s HIL limited Sathariya (Hereinafter referred as M/s HIL) and invoices raised by them by their depots and consignment agents during the period from January-2015 to July 2016 and find that they have sold corrugated sheets and moulded sheets consisting of asbestos and cement manufactured by them at their factory gate, as well as from their various depots and through consignment agents. They resorted to provisional assessment under express permission from Assistant Commissioner/ Deputy Commissioner. From the sale we found that:

(i) they have sold the excisable goods to buyers at factory gate and issued central excise invoices showing therein the price of goods, Excise duty payable thereon and shown element of freight charged separately. The Commissioner of Central Excise issued show cause notice No 35/Commissioner/ Alld/2015 dated 01.09.2015on the ground that freight element shown separately form part of transaction value in respect of invoices issued during the period from August 2014 to June 2015 and the goods sold from the factory gate. Four more show cause notices dated 12.03.2013, 15.10.2013 27.08.2014 and 14.07.2016 were also issued on the same issue for the period 4/2008 to 9/2012, October, 2012 to July 2013, 8/2013 to 7/2014 and July, 2015 to march 2016.

(ii) In view of the aforesaid show cause notice all the "assessment orders" passed by the Assistant Commissioner/ Deputy Commissioner were subject to the outcome of show cause notice No 35/Commissioner/ Alld/2015 dated 01.09.2015 and other four SCNs issued.

(iii) The Joint Commissioner vide his order dated 30.12.2016 adjudicated five SCNs and confirmed the demand of duty amounting to Rs 72,36,320/-, Rs 1,55,09,285, Rs 91,17,580/-, Rs 1,34,71,164/- and Rs 1,37,64,285/- Total Rs 5,89,98,634.00 (Five Crore Eighty Nine Lakhs Ninety Eight Thousand Six

Hundred and Thirty Four). On appeal having been filed by M/s HIL against the order dated 30.12.2016, the Commissioner (Appeal) vide his order dated 22.03.2018 allowed the appeal filed by HIL and reversed the order passed by the Joint Commissioner. In view of the facts stated above, it is certified that there is no short payment of duty on the goods sold at factory gate during the period from January 2015 to July 2016.

(iv) This is to certify that M/s HIL have transferred the goods to their various depots and consignment agents under the cover of invoices variant duty payable by them have been shown separately. Duty of Excise paid by them on transfer of goods have been borne by them.

In respect of the sale of goods from depots and consignment agents to its customer's invoice have been issued showing therein composite price inclusive of element of excise duty. They have realized only the discounted price from their buyers and realized the same element of duty as has been determined by the Assistant Commissioner/ Deputy Commissioner on finalization of assessment, therefore there is no unjust enrichment on this account.

4.14 Impugned order and the order in original have erred in their order by stating that the appellant is claiming the refund on the basis of credit notes issued by them. These credit notes were taken into account by the revenue while finalizing the value, as is evident from the charts reproduced above. The appellants claim for not having passed on the burden of duty is duly supported by the Chartered Accountant Certificate. We have reproduced the relevant paras from the decision of Hon'ble Apex Court in the case of Addison & Co, and from the said decision it is evident that in Civil Appeal No. 8488 of 2009, wherein the claim of refund was duly supported by the Certificate of Chartered Accountant the appeal was decided in favour of claimant. Thus we are of the view that in view of the Certificate of Chartered Accountant it is abundantly evident that appellant have rebutted the presumption of having passed on the burden of duty claimed as refund to the consumer. Hence the rejection of the refund claims on this ground also is not justified.

4.15 Thus we do not find any merits in the impugned order and set aside the same.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp