

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

**Excise Appeal No.60736 Of 2019**

[Arising out of OIA No.CHD-EXCUS-001-APP-306-18-19 dated 28.03.2019 passed by the Commissioner (Appeals), CGST, Chandigarh]

**M/s ACC Ltd.**

**: Appellant**

Gagan Cement Works Unit,  
IPO Barmana, Bilaspur,  
Himachal Pradesh-174013

*VERSUS*

**The Commissioner of CGST,  
Shimla**

**: Respondent**

Commercial Parking Complex, Ground &  
First Floor, Chhota Shimla,  
Shimla, Himachal Pradesh-171002

**With**

**Excise Appeal No.60830 Of 2019**

[Arising out of OIA No.CHD-EXCUS-001-APP-09-2019-20 dated 24.04.2019 passed by the Commissioner (Appeals), CGST, Chandigarh]

**M/s Ambuja Cement Ltd.**

**: Appellant**

Village Suli P.O. Darlaghat Tehsil,  
Arki Solan, Himachal Pradesh-171102

*VERSUS*

**The Commissioner of CGST,  
Shimla**

**: Respondent**

Commercial Parking Complex, Ground &  
First Floor, Chhota Shimla,  
Shimla, Himachal Pradesh-171002

**APPEARANCE:**

Shri J.C. Patel, Shri Ankit Awal, Advocate for the Appellant

Shri Saurabh Goel (Special Counsel), Shri Siddharth Jaiswal and  
Shri Aneesh Dewan, Authorised Representatives for the Respondent

**CORAM:**

**HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**

**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER Nos. 60395-60396/2024**

DATE OF HEARING: 22.03.2024  
DATE OF DECISION: 01.07.2024

**PER: P. ANJANI KUMAR**

These appeals are filed by M/s ACC Ltd. (Appeal No. E/60736/2019) and M/s Ambuja Cement Ltd. (E/60830/2019) against the impugned orders dated 28.03.2019 and 24.04.2019/ 10.05.2019 respectively. As the issue involved in both the cases is identical, the appellants were heard together and taken up for consideration together.

2. Briefly stated the facts of the cases are that the appellants are engaged in the manufacture of clinker which is captively used in the manufacture of cement; the appellants claimed exemption, from payment of excise duty on cement, in terms of Notification No.50/2003-CE dated 10.06.2003; the appellants also claimed exemption, on clinker captively consumed in the manufacture of cement, under the Notification No.67/95-CE dated 16.03.1995 (M/s ACC Ltd. from February 2005 and M/s Ambuja Cement Ltd. from May 2005); the claims of the appellants was denied by the Department by passing an order-in-original in this regard; on appeals filed by the appellants, Commissioner (Appeals), directed the appellants to pay the full amount, as pre-deposit, under Section 35F, as may be computed by the jurisdictional Assistant Commissioner, Shimla; Commissioner (appeals) rejected the appeals, vide Order dated 30.06.2005 in respect of ACC Ltd. and vide Order dated 28.09.2005; accordingly, the appellants paid the full amount as pre-deposit and filed appeals before CESTAT, which also rejected their applications for stay; CESTAT dismissed the appeals filed by the appellants (vide Order dated 15.12.2005 in respect of M/s ACC Ltd. and Order

dated 07.03.2006 in respect of M/s Ambuja Cement Ltd.). Aggrieved by the orders of the Tribunal, M/s ACC Ltd filed Civil Appeal No.2793 of 2006 and M/s Ambuja Cement Ltd. filed Civil Appeal No.2912 of 2006 before the Hon'ble Supreme Court of India; Hon'ble Apex Court admitted the appeal and issued notice for interim relief; though the Hon'ble Supreme Court did not grant any interim stay to the appellants (Petitioners therein); therefore, the appellants continued to pay the duty on clinker, captively used, during the pendency of the appeal. Hon'ble Apex Court finally decided the issue in favour of the appellants vide Order dated 21.08.2015.

2.1. Accordingly, M/s ACC Ltd filed the refund claim dated 04.11.2015 for the period May 2005 to February 2013 and M/s Ambuja Cement Ltd filed the refund claim for the period February 2005 to February 2013 on 02.11.2015. Adjudicating Authority rejected the refund claims vide OIO dated 16.09.2016 and 07.09.2016 respectively on the ground that the refund claims are hit by unjust enrichment as provided under Section 11B of the Central Excise Act, 1944 read with Section 12B ibid, as the appellants have debited the duty paid to Profit and Loss Account. Aggrieved by the orders of the Adjudicating Authority, both the appellants have filed appeals before the learned Commissioner (Appeals) who vide impugned orders, upheld the orders of the Adjudicating Authority. Hence, these appeals.

3. Shri J.C. Patel, assisted by Shri Ankit Awal, learned Counsels for the appellant submit that Section 11B is not applicable to the facts of the case; refund of pre-deposit made under Section 35F is not hit by bar of unjust enrichment; when the exemption under Notification

No.67/95-CE was denied to the appellant, the appellant preferred appeals before Commissioner(Appeals), CESTAT and the Hon'ble Apex Court; as no stay was granted by any authority, the appellant has deposited an amount equivalent to the duty payable, under protest, on the clinker captively consumed; the appellants were required to pay the amount for continuing the hearing/ appeal before Commissioner(Appeals), CESTAT; appellants were also required to deposit the same during the pendency of the appeal before Hon'ble Supreme Court in terms of Section 35L of Central Excise Act, 1944. He submits that it was held in C.C. (Preventive) Vs Ghaziabad Ship Breakers Ltd. 2010 (259) ELT 522 (Guj.) that amount deposited during the pendency of an appeal before the Hon'ble Supreme Court would squarely fall within the ambit of the Section 129E of the Customs Act, 1962, which is *parimateria* with the provisions under Central Excise. He also submits that Courts and Tribunals have been continuously holding that amount deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under Protest and principles of unjust enrichment are not applicable. He relies on the following cases:

- Daily Thanthi v. Commissioner of Customs (Appeals), Chennai - 2021 (376) ELT 615 (Mad.);
- National Organic Chemical Industries Ltd. v. C.C. (Import), Mumbai - 2021 (378) ELT 314 (Tri.-Mumbai);
- Hawkins Cookers Ltd. v. CCE, Chandigarh - I-2017 (6) G.S.T.L. 308 (Tri-Chan.)
- CCE, Coimbatore vs. Pricol Ltd. - 2015 (320) ELT 703 (Mad.);
- CCE, Lucknow vs. Eveready Industries India Ltd. - 2017 (357) ELT 11 (All.);
- M/s Allied Chemical & Pharmaceuticals Pvt. Ltd. v. CCE&ST, Jaipur - I – Final Order Nos. 50146-50163/2019;
- CCE v Eveready Industries India Ltd - 2017 (357) ELT 11 (All)-
- Dewsoft Overseas P. Ltd v CST - Final Order

No.50781/2019 dt. 17-6-2019

4. Learned Counsel for the appellant submits also that Section 11B of the Central Excise Act 1944 can never be made applicable to pre-deposit made under Section 35F of the said Act as it is not a payment of duty but only a pre-deposit for availing the right of appeal and the said amount is to be refunded when the appeal is allowed. He submits that amounts deposited pending appeals before Commissioner (Appeals), Tribunal and Hon'ble Supreme Court under Section 35F of the Central Excise Act, 1944 are pre-deposit as condition for hearing of appeal and not as payment of duty and accordingly, refund of the same on the appellant finally succeeding is not subject the provisions of Section 11B and the doctrine of unjust enrichment; CBEC vide Circular No.275/37/2K-CX A dated 02.01.2002 clarified that pre-deposit made during the pendency of appeal is other than duty and such deposits should be returned in the event the appellants succeeds in appeal; the said clarification was reiterated in Circular No.802/35/2004-CE dated 08.12.2004; Hon'ble Apex Court has approved both the circulars in their decision CC Vs Finacord Chemicals Pvt. Ltd. – 2015 (319) ELT 616 (SC); vide the same order, Hon'ble Supreme Court has affirmed their earlier dated 07.08.1996 in the case of M/s Suvidhe Ltd. Suvidhe Ltd.-(1997 (94) ELT A159 (SC) [1996 (82) ELT 177 (Bom.)].He submits that the deposit under Section 35F is not a payment of duty but only a pre-deposit for availing the right of appeal and such amount is bound to be refunded when the appeal is allowed with consequential relief.

5. Learned Counsel submits further, without prejudice to the above submissions, that merely charging of the duty paid to the Profit and

Loss Account is not a relevant factor for determining unjust enrichment; it is settled law that debit of the amounts to expenses, without corresponding increase in the price, means that the appellant has observed and borne the said amount and it cannot lead to the conclusion that the appellant has passed on the incidence thereof. He relies on the following:

- CCE v Flow Tech Power-2006 (202) ELT 404 (Mad)
- Elantas Beck India Ltd v CCE – 2016 (339) ELT 325
- Birla Corporation Ltd v CCE – 2008 (231) ELT 482
- Bharat Kumar Indrasen Trading P. Ltd v CC-2018 (2) TMI 1574:
- Shyam Coach Engineers v CCE - 2024 (1) TMI 245.

6. Learned Counsel submits further that even if it is assumed that the amounts deposited by the appellant takes the colour of "Duty", still the appellants satisfied the test of unjust enrichment; it is evident from the C.A. certificate dated 12.05.2017, the sale price of cement are market-driven in various States and the appellants do not have ability to control the sale price or the margin by passing on the duty to the customers; the pre-deposit pertains to only one plant whereas cement is manufactured by the appellants in various plants in various states and sold at uniform rate during the relevant period; there is neither a possibility nor evidence thereof to assume that the amount deposited by the appellant was included in the sale price. He submits that Hon'ble Bombay High Court in the case of Sandvik Asia Ltd. – 2015 (323) ELT 431 (Bom.) that it is immaterial and irrelevant as to what the assessee terms the pre-deposit amount in his books of accounts and even if it is shown on the expenses side, the presumption that the burden has been passed on to the consumer cannot be raised. He also relies on the following cases:

- Elantas Beck India Ltd. vs. CCE & S.T., LTU - 2016 (339) ELT 325 (Tri. – Mumbai)
- M/s Allied Chemical & Pharmaceuticals Pvt. Ltd. (supra);
- CCE, Coimbatore vs. Flow Tech Power - 2006 (202) ELT 404 (Mad.)

7. Learned Counsel submits, in addition, that the appellant, although debited the amount deposited, during pendency of appeal, to Profit and Loss Account, has not charged the same to the customers; therefore, the assumption of unjust enrichment in the impugned order is baseless; the C.A certificate was categorical to the extent that he has verified that the prices are market-driven and cost has no role to play. Learned Counsel submits that the Commissioner (Appeals) has completely disregarded a Chartered Accountant certificate which was issued after analysis of the Cost and Price trends concluding that series of variations were noticed during different timing/ season/ years during the period 2010-2015 which show that "sales price of cement" is "market-driven" in various States and the appellant has no ability to control a sale price or its margin by passing it to customers; Commissioner (Appeals) has not considered the CA certificates at all; the onus was on the Department to rebut the said certificate with cogent evidence; the CA certificate not being rebutted by the First Appellate Authority, it follows that the appellant has duly established that the incidence of the duty was not passed on to the consumers; rebuttal of the CA certificate not being done, the finding on unjust enrichment is not sustainable as held in Tirumala Bearings Pvt. Ltd. – 2016 (335) ELT 145 and Rambagh Palace Hotel- 2022 (60) GSTL 48.

8. Learned Counsel submits also that the duty amount was deposited under Protest as pre-deposit and therefore, the appellant is entitled to

refund under Section 35FF; even though, Section 35FF was introduced w.e.f. 10.05.2008, the appellant is entitled to interest, @ 12%, even for the period before 10.05.2008 as held by the Hon'ble Apex Court in the case of CCE Vs ITC Ltd. – 2005 (179) ELT 15 (SC). The above decision of the Hon'ble Supreme Court was followed by the following cases:

- Bharat Petroleum Corporation Ltd. – 2018-TIOL-1217-CESTAT-Bang.
- Madura Coats P. Ltd v CCE-2012 (285) ELT 188 (Cal)
- Sony Pictures Networks India P. Ltd v UOI: 2017 (353) ELT 179 (Ker)
- Shree wood Products P. Ltd v CCE-2016 (340) ELT 79 (P & H)

9. Shri Sourabh Goyal, Senior Standing counsel CBIC, special counsel for the Revenue, takes the bench through the provisions of Section 35F of Central Excise Act, 1944 and submits that the appellants have not made deposit in terms of Section 35F but have paid the duty on manufacture of clinker as per the order dated 24.06.2005, after dismissal of their appeal by the Hon'ble Tribunal; the amount was paid in terms of Section 35N *ibid*; amount paid under Section 35 N is not a pre-deposit but is payment of duty; the appellant has availed the Cenvat credit on the inputs used in manufacture of Clinker (Cenvat Credit can be claimed only on the duty incidence on final products) and on the other hand has claimed that the amount was being deposited under protest; the stand taken by the appellant is self-contradictory; either there can be a case where amount is paid under protest and refund is claimed or Cenvat credit has been availed and duty of incidence has been passed on to the consumers; no refund is admissible.



9.1. Learned Special Counsel reads over the provisions of Section 35 FF and further submits that the appellants have claimed interest on refund from 2005 to 2013; interest is payable under Section 35 FF of the Central Excise Act, 1944 (inserted by finance act, 2008 w.e.f. 10.05.2008), on delayed refund of an amount, deposited by the appellants, under proviso to Section 35 F, consequent upon the order of the appellate authority; in the instant case as the entire amount was not deposited under Section 35F, interest under the provisions of Section 35FF is not applicable; the amount paid by the appellants was in the form of duty paid on the manufacture and captive consumption of clinker and thus the same was not pre-deposit.

10. Learned Special counsel further submits that the appellants availed Cenvat credit on the inputs used in the manufacturing of clinker; the refund was filed for the duty paid on the captively consumed clinker during the period 2005 to 2013; once the appellants have availed the Cenvat credit of the duty paid on the inputs used in the manufacturing of clinker, the appellants are not entitled to any refund; more importantly the appellant has not produced any material to prove that the incidence of duty has not been passed on while as a matter of right the appellants were adjusting the Cenvat credit of the duty paid on the inputs used in the manufacturing of clinker; the appellant ought not to have claimed Cenvat credit once the amount was being deposited allegedly under protest; having claimed the Cenvat credit the appellant had no right to claim refund without proving that incidence has not been passed on.

10.1. Learned Special Counsel submits also that the judgments relied

upon by the appellants, on the issue that the refund is in the nature of the pre-deposit and thus there is no need to prove that incidence of duty has not been passed on to the consumers, are not applicable to the facts of the present appeal; in the present case, the appellants on one availed the Cenvat credit on the inputs used in manufacture of Clinker (Cenvat credit can be claimed only when duty is paid) and on the other claimed that the amount was being deposited under protest; the stand taken by the appellants is self-contradictory. He submits that further, the appellants in their balance sheets have shown the clinker captively consumed under the heading "manufacturing expenses & other expenses" which includes the amount claimed as refund in their profit & loss account for the relevant periods i.e. the appellants have accounted the amount of duty paid as an expenditure in their profit & loss account for year 2005 to 2013 and not as the amounts as receivable in the financial statements.

11. Learned Special Counsel submits in addition that as per Section 12B read with Section 11B of the Central Excise Act, 1944, the burden of proof is on the appellant to prove that the incidence has not been passed on to the consumers; as per Section 12B, the presumption is that if the excise duty is paid it shall be deemed that the incidence of duty has been passed on to the consumer, unless it is proved that the burden of duty has not been passed on to the ultimate consumers; the appellant failed to prove that the incidence of duty has not been passed on to the consumers.

12. Learned Special Counsel further submits that it is relevant to note here that the Order in Original rejecting the claim for refund was

passed on 16.09.2016, whereas the appellant had procured CA certificate on 12.05.2017 i.e. after the date of order in original; it clearly shows that CA certificate was procured to fill up the lacuna. He submits that the CA certificate dated 12.05.2017 certifies only that all the monthly & annual financial statements are correct for the period 2010 to 2015 and that a series of variations noticed during different timing/season/year's shows that sales price of cement is market driven and appellant company has no ability to control the sale price or its margin by passing it to customers; the CA certificate does not state that the burden of duty paid has not passed on to the consumers and is only for period 2010 to 2015, whereas the refund claimed is for period 2005 to 2013; there is no cogent material produced on record to prove that incidence of duty has not been passed on to the consumers.

13.Learned Counsel for the appellants submits, in rebuttal,that the contention of the Special Counsel that amounts deposited during the pendency of the appeal before Hon'ble Supreme Court is not pursuant to order under first proviso of Section 35F and therefore, not a pre-deposit under Section 35F is *ex facie* erroneous; appeal to Hon'ble Supreme Court is preferred under Section 35L; the pre-deposit under Section 35F is required to be made pending any appeal under Chapter VI A of the Central Excise Act, 1944; as Section 35L, under which appeal is made to Hon'ble Supreme Court, also falls under Chapter- VI A, the requirement of pre-deposit under Section 35F applies to pending appeals before Hon'ble Supreme Court; in view of the above said circulars and the decision of Hon'ble Supreme Court, such a deposit requires to be returned to the appellant on succeeding in the

appeal before Hon'ble Supreme Court without the application of Section 11B.

13.1. Learned Counsel further submits that just because First Proviso to Section 35F speaks of dispensation of pre-deposit by Commissioner (Appeals) and the Tribunal and not by Hon'ble Supreme Court, it does not mean that pre-deposit made pending appeal to Hon'ble Supreme Court is not pre-deposit under Section 35F; on a plain reading of Section 35F gives an understanding that the amount deposited pending appeal before Hon'ble Supreme Court is also a pre-deposit under Section 35F; it is settled law that the scope of main provision/section is governed by the plain language of the main provision/section and proviso cannot control the main provision/section; there is no necessity for the proviso to confer power on the Hon'ble Supreme Court to dispense with pre-deposit and to grant stay as the power already vests with the Hon'ble Supreme Court under Order XX(1) of the Supreme Court Rules, 1966 and Order XVII (2) of the Supreme Court Rules, 2013 which provide that in any case under appeal to the Hon'ble Supreme Court, the Court may subject to such terms and conditions as it may think fit to impose grant stay.

14. Learned Counsel for the appellants submits further that the contention of the Special Counsel that Section 35FF provides for interest only on refunds of amounts deposited pursuant to orders of the Commissioner (Appeals) and Tribunal under First Proviso and not on amounts deposited pending appeal before Hon'ble Supreme Court is incorrect; even the amount deposited during the appeal before Hon'ble Supreme Court is a pre-deposit under Section 35F and

consequently, there can be no rational basis to deny interest under Section 35FF on refund of such deposit; in case the submission of the Special Counsel for Revenue is accepted, right to interest continues to be governed by the judgment of the Hon'ble Supreme Court in the case of ITC Ltd. (supra) which was followed by Tribunal in the case of Parle Agro Pvt. Ltd.-20222 (380) ELT 219 wherein it was held that when there is no provision in the Central Excise Act for grant of interest on refund of deposit, interest is to be given @ 12% Per Annum. He submits that for the period post 10.05.2008, the appellant is entitled to interest under Section 35FF.

15. Heard both sides and perused the records of the case. Both ACC Ltd and M/s Ambuja Cements Ltd, the appellants, are manufacturers of cement and have claimed exemption from payment of duty on clinker captively consumed in the manufacture of cement, under the Notification No.67/95-CE dated 16.03.1995; the original authority rejected the claim of the appellants on the ground that the cement manufactured by them is exempt under Notification No.50/2003; on an appeal filed, first appellate authority and the CESTAT directed the appellants to pay the duty as confirmed by the jurisdictional Assistant Commissioner, as pre-deposit under Section 35F; accordingly, the appellants paid the full amount as pre-deposit and filed appeals before CESTAT, which rejected their appeals; the appellants approached the Apex Court, which though refused to grant stay, decided the issue in favour of the appellants vide order dated 21.08.2015, in civil appeal No.2793 of 2006 filed by M/s ACC Ltd and Civil Appeal No.2912 of 2006 filed by M/s Ambuja Cement Ltd.

Consequentially, both the appellants filed refund claims; the adjudicating authority held that refund cannot be granted to them and needs to be credited to consumer welfare fund; first appellate authority upheld the decision vide impugned orders which came to be rejected on the issue of unjust enrichment. The appellants submit that their application for dispensation of pre-deposit was rejected by Commissioner (Appeals) and thus the appellants had to deposit the duty as demanded by the original authority as a pre-deposit under Section 35F; further CESTAT also did not waive the pre-deposit and therefore, the appellants had to pre-deposit the duty demanded as per the order of the first appellate authority; for exercising their right of appeal before Supreme Court, under Section 35L, which also falls under Chapter VIA, the appellants had to continue pre-deposit the duty as the as Hon'ble Supreme Court did not grant any stay. Therefore, the amount paid by them, under protest, during the pendency of the appeal at tribunal and the Apex Court is a deposit for the purposes of Section 35F of Central Excise Act, 1944 and therefore, not hit by bar of unjust enrichment. The appellant further submits that the original authority held that once the commissioner (appeals) dismissed the appeal, the amounts pre-deposited lost the character of pre-deposit and acquired the character of duty and hence refund was subject to bar of unjust enrichment; the first appellate authority has not examined the appellants' plea that the duty paid by them is in the nature of deposit and hence not subject to the rigors of unjust enrichment; he has proceeded on the premise that unjust enrichment is applicable; as the appellants debited the amounts to profit and loss account and thus, the appellants have passed on the incidence of duty

to their customers.

16. The lower Adjudicating Authority concerned himself with the four questions i.e. Whether there was an excess payment of duty necessitating subject refund claim, if so, for what amount? Whether the claim was filed in time? Whether the appellants are entitled for interest under Section 35FF? and whether the subject claim is hit by bar of unjust enrichment? We find that the Original Adjudicating Authority has given findings on the questions framed as follows:

(i) The appellants have filed refund claims for the amounts mentioned therein and have agreed to deduct the CENVAT credit availed on inputs used in the manufacture of clinker; however, the appellants did not agree to pay interest on the CENVAT credit availed for the reason that all the while the Department kept the deposits made by them with themselves.

(ii) The refund claims have been filed within time limit.

(iii) The amounts deposited by the appellants has assumed the nature of duty, after the Commissioner (Appeals) declined to stay the payment and after confirming that the duty is payable vide Order passed in 2005, and not as deposit under Section 35F; interest under Section 35FF is not payable as the payment was not a pre-deposit and as provisions pertaining to interest came into existence in 2008.

(iv) The appellants have shown the amounts deposited under the Head "Manufacturing Expenses and Other Expenses" under Profit & Loss Account and have not shown them as receivables and therefore, the appellants failed to rebut the presumption that the incidence of duty has not been passed on to their customers; the appellants have also not submitted any Chartered Accountant

certificate to substantiate their claim; Therefore, the said amount needs to be credited to consumer welfare fund.

17. Learned Commissioner (Appeals) upheld the order of the original authority and rejects the claim of the appellants on the issue of treatment of the amounts deposited in their books of accounts. The impugned order upholds the findings of the lower authority that the appellants have shown the amounts deposited under the Head "Manufacturing Expenses and Other Expenses" under Profit & Loss Account and have not shown them as receivables and therefore, the appellants fail to rebut the presumption that the incidence of duty has not been passed on to their customers and thus, the appellants have failed to rebut the presumption in terms of Section 12B read with Section 11B of the Central Excise Act, 1944. We find that the learned Commissioner (Appeals) has not appreciated the submission of the appellants that the impugned case is of refund of amount deposited under Section 35F and hence, is not hit by the provisions of Section 11B.

18. The following is the gist of the arguments on behalf of the department.

- the appellants have not made deposit in terms of Section 35F but have paid the duty on manufacture of clinker as per the order dated 24.06.2005; after dismissal of their appeal by the Hon'ble Tribunal; the amount was paid in terms of Section 35N ibid; amount paid under Section 35 N is not a pre-deposit but is payment of duty;
- the appellants have availed the Cenvat credit on the inputs



used in manufacture of Clinker (Cenvat Credit can be claimed only on the duty incidence on final products) and on the other hand have claimed that the amount was being deposited under protest; the stand taken by the appellant is self-contradictory;

- Order in Original rejecting the claim for refund was passed on 16.09.2016, whereas the appellant had procured CA certificate on 12.05.2017 i.e. after the date of order in original; it clearly shows that CA certificate was procured to fill up the lacuna;
- interest is payable under Section 35 FF of the Central Excise Act, 1944 (inserted by finance act, 2008 w.e.f. 10.05.2008), on delayed refund; interest under Section 35 FF is payable only where an amount is deposited by the appellant under Section 35 F is required to be refunded consequent upon the order of the appellate authority; in the instant case as the entire amount was not deposited under Section 35F, interest under the provisions of Section 35FF is not applicable;

19. The following is the gist of the arguments on behalf of the appellants.

- the contention that amounts deposited during the pendency of the appeal before Hon'ble Supreme Court is not pursuant to order under first proviso of Section 35F and therefore, not a pre-deposit under Section 35F is *ex facie* erroneous; appeal to Hon'ble Supreme Court is preferred under Section 35L; the pre-deposit under Section 35F is required to be made pending any appeal under Chapter VI A of the Central Excise Act, 1944; as Section 35L, under which appeal is made to Hon'ble Supreme Court, falls under Chapter- VI A, the requirement of pre-deposit

under Section 35F also applies to pending appeals before Hon'ble Supreme Court; circulars issued by CBEC/CBIC and a catena of decisions of Hon'ble Supreme Court, High Courts and Tribunal the payments during the pendency of appeal amount to deposit under Section 35F and requires to be returned to the appellant on succeeding the appeal; Section 11B is not applicable.

- A plain reading of Section 35F shows that amount deposited pending appeal before Hon'ble Supreme Court is also a pre-deposit under Section 35F; scope of main provision/ section is governed by the plain language of the main provision/ section; proviso cannot control the main provision/ section; there is no necessity for the proviso to confer power on the Hon'ble Supreme Court to dispense with pre-deposit and to grant stay; power already vests with the Hon'ble Supreme Court under Order XX(1) of the Supreme Court Rules, 1966 and Order XVII (2) of the Supreme Court Rules, 2013;
- A constricted view that Section 35FF provides for interest only on refunds of amounts deposited pursuant to orders of the Commissioner (Appeals) and Tribunal cannot be taken; amount deposited during the appeal before Hon'ble Supreme Court is also a pre-deposit under Section 35F and consequently, there can be no rational basis to deny interest under Section 35FF; if the contention of the department is accepted, interest @ 12% Per Annum requires to be paid as per the judgment of the Hon'ble Supreme Court in the case of ITC Ltd. which was followed by Tribunal in the case of Parle Agro Pvt. Ltd.-20222

(380) ELT 219, for the period post 10.05.2008, the appellant is entitled to interest under Section 35FF.

20. On going through the records of the case and the rival contentions, we find that the following are the issues that require our consideration in the instant case.

(i) Whether the duty continued to be paid by the appellants, under protest, during the pendency of the appeal qualifies to be pre-deposit for the purposes of Section 35F of Central Excise, Act, 1944?

(ii) Whether the provisions of Section 11B and the doctrine of unjust enrichment are applicable to such payments?

(iii) Whether the appellants are eligible to claim interest on the amount duty paid or deposited? and if so, at which rate?

21.. We find that it will be beneficial to have a look at the provisions of Section 35F of the Central Excise Act, 1944. Section 35F, as it existed prior to 06.08.2014, is as follows.

SECTION 35F: Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is

filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

Explanation. – For the purposes of this section “duty demanded” shall include, —

- (i) amount determined under section 11D;
- (ii) amount of erroneous CENVAT credit taken;
- (iii) amount payable under rule 57CC of Central Excise Rules, 1944;
- (iv) amount payable under rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004;
- (v) interest payable under the provisions of this Act or the rules made thereunder

21.1. Section 35F of the Central Excise Act, 1944 with effect from 06.08.2014, is as follows.

SECTION 35F. The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal-

- (i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or Commissioner of Central Excise;
- (ii) against the decision or order referred to in clause (a) of sub-Section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;
- (iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against: Provided that the amount required to be deposited under this section shall not exceed rupees ten crores: Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the

commencement of the Finance (No.2) Act, 2014.

Explanation. - For the purposes of this section "duty demanded" shall include, -

- (i) Amount determined under Section 110;
- (ii) Amount of erroneous CENVAT credit taken;
- (iii) Amount payable under Rule 6 of the CENVAT Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the CENVAT Credit Rules, 2004

22. It appears from the above, that prior to 06.08.2014, a person who desires to prefer any appeal, against the order of any adjudicating authority, had to deposit the duty demanded or the penalty levied pending the appeal. However, Commissioner (Appeals) or the Appellate Tribunal were conferred with the power to dispense with such deposit subject to such conditions as the Commissioner (Appeals) or the Appellate Tribunal, as the case may be, may deem fit to impose so as to safeguard the interests of revenue. Changes were affected w.e.f. 06.08.2014 to the extent that the law prescribed that the appellant shall pay an amount equal to 7.5% for filing an appeal before commissioner (Appeals) and an amount equal to 10 percent for filing an appeal before the Tribunal. Therefore, before 06.08.2014, general Rule was that the appellant pays the duty and penalty demanded and confirmed; however, the provisions empowered Commissioner (Appeals) or CESTAT, as the case may be, to stay the recovery of the duty or penalty confirmed, subject to such conditions that may be fixed by them. Therefore, it appears that payment of total duty and penalty confirmed was the general rule while grant of stay of the same was an exception subject to the discretion of appellate authorities and the conditions that the appellants may put as deemed fit. After 06.08.2014, the filing of appeals was subject to payment of an amount equal to 7.5 percent or

10 percent, of the duty/ penalty demanded as the case may be. However, there is no provision to discriminate against an appellant who chooses to deposit duty *in toto* in comparison to the appellant who pays an amount equal to 7.5 percent or 10 percent as the case may be. It appears that before 06.08.2014, the payment of total duty demanded, during the pendency of the appeal, to exercise the right to appeal, would not take away the character of being a deposit from the sums deposited during the pendency of the appeal, under Section 35F or for that matter Section 35L as both fall under Chapter VIA.

23. CBEC vide Circular No 984/08/2014-CX, dated 16.09.2014, issued vide F. No.390/Budget/1/2012-JC clarified that any payment made during investigation shall be counted as part of pre-deposit during the filing of appeal in Central Excise & Service Tax matters. Relevant extract from the circular regarding the same is as follows –

3. Payment made during investigation:

3.1 Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10%, subject to the limit of Rs 10 crores, can be considered to be deposit made towards fulfilment of stipulation under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962. Any shortfall from the amount stipulated under these sections shall have to be paid before filing of appeal before the appellate authority. As a corollary, amounts paid over and above the amounts stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, shall not be treated as deposit under the said sections.

3.2 Since the amount paid during investigation/audit takes the colour of deposit under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962 only when the appeal is filed, the date of filing of appeal shall be deemed to be the date of deposit made in terms of the said sections.

3.3 In case of any short-payment or non-payment of the amount stipulated under Section 35F of the

Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed by the appellant is liable for rejection.

24. We find that during the impugned period i.e. 2005-2015, the appellants continued to pay duty under Protest and indicated the same in the ER-1 Returns as follows:

(i) M/s ACC Ltd.-

Remarks: Excise duty & Education Cess on clinker captively consumed in July, 05 (75857mt) amounting Rs.27080949/- and for August, 05 amount of Rs.33022500/- advance deposited on 16.08.2005 (against the actual duty of Rs.31312827/- as per actual clinker captively consumed 87711mt), as "Pre-deposit" under Section 35F of Central Excise Act, 1944."

(ii) M/s Ambuja Cement Ltd.

"Amount relatable to duty on clinker captively consumed during the month of Aug-06 deposited vide T.R. 6 Challan No.10 dated 01.09.2006. Amount paid under protest and without prejudice and as pre-deposit due to pendency of appeal before Supreme Court."

25. The issue as to whether the amount of duty deposited during the pendency of appeal amounts to pre-deposit was deliberated by tribunal and Courts in several Cases. Hon'ble Supreme Court in the context of the Maharashtra VAT Act, 2002, in the matter of VVF (India) Ltd Vs State of Maharashtra, as reported in (2023) 4 Centax 421 (SC), held that amount pre-deposited under protest prior to assessment order was required to be included in computing amount of mandatory pre-deposit. Hon'ble Bombay HC in the case of Vinod Metal vs. State of Maharashtra, as reported in (2023) 9 Centax 178 (Bom), held that the principle laid out by the Apex Court in VVF (India) *supra* is applicable in the context of GST too and relied on the same to hold that Voluntary deposit as made under protest by petitioner during adjudication cannot be excluded from considering it as part of pre-

deposit for filing appeal before appellate authority.

26. Hon'ble High Court of Gujarat held in the case of C.C. (Preventive) Vs Ghaziabad Ship Breakers Ltd (Supra) that amount deposited during the pendency of an appeal before the Hon'ble Supreme Court would squarely fall within the ambit the Section 129E of the Customs Act, 1962. We find that Section 129E of the Customs Act, 1962 is *parimateria* with the Section 35F of Central Excise Act, 1944. Hon'ble High Court held that

6. On a plain reading of Section 129E of the Act, it is apparent that the same provides that a person desirous of appealing against an order relating to any duty or interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under the Act, is required to deposit the duty and interest demanded or penalty levied with the proper officer. Under the section such amount has to be paid by such person on his own and does not require any order to be passed before making such deposit. Deposit of the said amount is a pre-condition for entertaining the appeal. What is important to note is that the amount to be deposited before the appeal can be entertained on merits is nothing else but the amount of duty and/or interest, or penalty demanded in consequence of an order-in-original. In principle the deposit is of duty or interest or penalty. The term "pre-deposit" is conveniently used to denote payment before entertaining the appeal. It is only a mode of payment prescribed by legislature with an intention to protect interest of Revenue.

7. However, if the person desirous of preferring appeal seeks waiver of the pre-deposit on the ground of undue hardship as contemplated under sub-section (2) of Section 129E, he is required to file an application seeking dispensation of such deposit, in which case he is required to make the pre-deposit in terms of the order that may be passed by the Commissioner (Appeals) or the Appellate Tribunal. Thus, the contention that it is only the payment made pursuant to any order of



any appellate authority or judicial forum under Section 129E or Section 131 of the Act would fall within the ambit of pre-deposit under the said provision is fallacious and contrary to the provisions of the section itself and as such does not merit acceptance.

8. Another aspect of the matter is that under Section 129E of the Act in case of any appeal under the Chapter, the person desirous of appealing against an order relating to any duty and interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under the Act, is required to deposit with the proper officer duty and interest demanded or penalty levied. Section 129-E of the Act falls under Chapter XV under the heading Appeals. Chapter XV of the Act is comprised of various provisions from Section 128 to Section 131C of the Act. Section 130 of the Act which provides for appeal to High Court and Section 130-E of the Act which provides for appeal in Supreme Court also fall under Chapter XV. Thus, an appeal before the Supreme Court would also be an appeal under the said Chapter as envisaged under Section 129E of the Act. Thus, any amount deposited during the pendency of an appeal before the High Court or the Supreme Court would also be by way of deposit under Section 129E of the Act and has to be treated accordingly.

9. Adverting to the facts of the present case, it is an undisputed position that the amount in question had been deposited by the respondent during the pendency of the appeal before the Supreme Court. In the circumstances, it is apparent that the amount so deposited would squarely fall within the ambit of Section 129-E of the Act and has to be treated as pre-deposit. Thus, the contention raised on behalf of the appellant that the amount has been paid by way of duty and not pre-deposit, being contrary to the provisions of section 129E of the Act, does not merit acceptance.

27. Hon'ble High Court of New Delhi in the case of Prabhat Zarda Factory Co Vs Commissioner of C. Ex., Delhi-I as reported in 2018 (362) ELT 248 (Del.) considered the amount of excise duty paid under protest as pre-deposit under Section 35F of the Central Excise

Act, 1944. Hon'ble Madras High Court in the case of Daily Tanti (supra) held as follows.

89. Therefore, the amount paid by the petitioner on 21-3-2001 as a consequence of the recovery notice issued by the office of the Customs Department long after the completion of assessment and clearance of the imported goods pending its appeals before the Hon'ble Supreme Court cannot be said to be a "duty" for the purpose of Section 27 of the Customs Act, 1962. Therefore, presumption under section 28D of the Customs Act, 1962 that the incidence of duty paid has been passed on to the buyer cannot be inferred.

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

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

92. The Court further held that a deposit under Section 35F (which is parimateria with Section 129E of the Customs Act, 1962) is not a payment of duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief. There the Hon'ble Court castigated the conduct of the department by observing "In our judgment, the claim raised by the Department in the show-cause notice is thoroughly dishonest and baseless."

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

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

Excise Act, 1944 and Section 27 of the Customs Act, 1962 in 1991.

28. Tribunal in the case of National Organic Chemical Industries Ltd Vs C.C. (Import), Mumbai (supra) held that

12. There can be no two opinions that the law, as it stood then, prescribed the deposit of the disputed amount as pre-condition for submitting to the jurisdiction of the Tribunal. It is also unambiguously clear that this requirement could be whittled down only on specific direction of the Tribunal upon consideration of plea of hardship and subject to terms and conditions for safeguarding revenue. Safeguarding the interest of revenue, and, not unnaturally, considering that empowered authority did, in the present dispute, re-determine the duty liability and imposed penalty, is the underlying intent of this prescription. Sans hardship, there was no scope for a lesser alternative to be wheedled from the Tribunal; having complied with the statutory pre-requisite, the appellant would have been commercially derelict in not securing possession of the goods by exercising the option of redemption. If the proposition of the lower authorities is to be accepted, remittance of duty would be 'pre-deposit' only for those who could satisfy the Tribunal that such payment caused undue hardship or who were prepared to perjure themselves with claims that may not have withstood the scrutiny of the Tribunal. The attempt to persuade us that this absurdity has been legislatively intended does not evoke resonance from us. It would not be wrong to posit that 'pre-deposit' is contingent not upon orders of the Tribunal but on carrying disputes to the Tribunal.

13. It is consistent with this provision that, while an aggrieved person may have the right to impugn the order causing grievance, the sanctity of the order remains unimpaired unless stayed by the appellate authority. The purpose of the proviso in Section 129E of Customs Act, 1962 is to forestall initiation of recovery proceedings during the pendency of appeal and for 'pre-deposit' to be restricted as designating only those that are in compliance with such conditions, as may be prescribed for grant of stay, would be inconsistent with the intent. This has been articulated by a Larger Bench of the Tribunal in *Haldiram India Pvt.*

Ltd. v. Commissioner of Central Excise, Delhi [2014 (309) ELT 81 (Tri. - LB)] thus

'6..... As a consequence of the amendment (substitution) of Section 35F w.e.f. 6-8-2014 the earlier requirement under provision (of having to deposit the entirety of the adjudicated liability subject of waiver, either wholly or pro tanto of the pre-deposit by the Tribunal on exercise of discretion) was repealed and a fixed pre-deposit regime came into existence....'

on considering the legal position before and after the mandatory pre-deposit was legislated.

14. In appeal of Revenue against order of the Commissioner of Central Excise (Appeals) directing the refund of duties of central excise paid, under protest by debit of 'personal ledger account' upon adjudication, before filing of appeal, the Tribunal, in Commissioner of Central Excise, Nasik v. Siemens Ltd. [2004 (173) ELT 41 (Tri. - Mumbai)], had held that

'3... ... The payment therefore has been made for no protest but has been made to enable the appellant to file an appeal in Commissioner (Appeals). The reliance of the Ld. advocate for the application on Section 35F of the Central Excise Act stipulating the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied as a force to conclude that payments were made in the nature of deposit to enable this appeal and are not payments of duty.... When we find that the refunds are return of deposit made under Section 35F of the Central Excise Act & are required to be returned as per the order of the Board vide F. No. 275/37/2K-CX 8A, 2-1-2002, with filing of a refund application.'

15. We also take note that the Hon'ble High Court of Gujarat has, in, re Ghaziabad Ship Breakers Ltd., observed that

On a plain reading of Section 129E of the '6. Act, it is apparent that the same provides that a person desirous of appealing against an order relating to any duty or interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under the Act, is required to deposit the duty and interest demanded or penalty levied with the proper officer. Under the section such amount has to be paid by such person on his own and does not require any order to be passed before making such deposit. Deposit of the said amount is a pre-condition for

entertaining the appeal. What is important to note is that the amount to be deposited before the appeal can be entertained on merits is nothing else but the amount of duty and/or interest, or penalty demanded in consequence of an order-in-original. In principle the deposit is of duty or interest or penalty. The term "pre-deposit" is conveniently used to denote payment for entertaining the appeal. It is only a mode of payment prescribed by legislature with an intention to protect interest of Revenue.

However, if the person desirous of 7. preferring appeal seeks waiver of the pre-deposit on the ground of undue hardship as contemplated under sub-section (2) of Section 129E, he is required to file an application seeking dispensation of such deposit, in which case he is required to make the pre-deposit in terms of the order that may be passed by the Commissioner (Appeals) or the Appellate Tribunal. Thus, the contention that it is only the payment made pursuant to any order of any appellate authority or judicial forum under Section 129E or section 131 of the Act would fall within the ambit of pre-deposit under the said provision is fallacious and contrary to the provisions of the section itself and as such does not merit acceptance'

16. In view of the specific provision of Section 129E of Customs Act, 1962, as elaborated by us, and the several decisions cited supra, the position adopted in the impugned order that the original authority was, in discarding the claim of the appellant that the payment of differential duty was pre-deposit, is not incorrect cannot be affirmed by us as legal and proper. Consequently, the competent authorities are directed to ensure compliance with Circular No. 984/8/2014-CX, dated 16th September, 2014 of Central Board of Excise & Customs for disposal of the refund without fail and without delay. Appeal is allowed.

29. Tribunal held in the case of Hawkins Cookers Ltd Vs CCE, Chandigarh – I(supra) that

10. I have gone through the Issue No. 2, Whether the amount paid by the assessee under Section 35N of the Act is a pre-deposit under Section 35F of the Central Excise Act or not?

The said issue came up before the Hon'ble High Court of Gujarat in the case of Ghaziabad Ship

Breakers Ltd. (surpa) wherein the Hon'ble High Court observed as under:

8. Another aspect of the matter is that under Section 129E of the Act in case of any appeal under the chapter, the person desirous of appealing against an order relating to any duty and interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under the Act, is required to deposit with the proper officer on duty and interest demanded or penalty levied. Section 129E of the Act falls under Chapter XV under the heading Appeals. Chapter XV of the Act is comprised of various provisions from Section 128 to Section 131C of the Act. Section 130 of the Act which provides for appeal to High Court and Section 130E of the Act which provides for appeal in Supreme Court also fall under Chapter XV. Thus, an appeal before the Supreme Court would also be an appeal under the said Chapter as envisaged under Section 129E of the Act. Thus, any amount deposited during the pendency of an appeal before the High Court or the Supreme Court would also be by way of deposit under Section 129E of the Act and has to be treated accordingly.

11. On going through the order of the Hon'ble High Court of Gujarat, I find that the Hon'ble High Court has held that any amount of pre-deposit during the pendency of the appeal is a amount of pre-deposit and the same is to be treated accordingly, therefore, I hold that the amount of pre-deposit paid by the assessee under Section 35N is equivalent to the amount paid under Section 35F of the Act and the same is to be treated as pre-deposit accordingly. Moreover, in the adjudication order, the refund claim of the assessee was sanctioned treating the said amount as pre-deposit of Section 35F of the Act, therefore, the said issue cannot be raised by the Revenue at this stage and this issue has also answered in favour of the assessee.

30. Madras High Court in the case of CCE, Coimbatore vs. Pricol Ltd (Supra) held that

7. The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in Mafatlal Industries case [1997 (89) ELT 247 (SC)]. Relevant portion of the order

passed by the Supreme Court in Mafatlal Industries case (supra) has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed that it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court of Bombay in *Suvidhe Ltd. v. Union of India* - 1996 (82) ELT 177 (Bom.), and by the Gujarat High Court in *Commissioner of Customs v. Mahalaxmi Exports* - 2010 (258) ELT 217 (Guj.), which has been followed in various cases in *Summer king Electricals (P) Ltd. v. CEGAT* - 1998 (102) ELT 522 (All.), *Parle International Ltd. v. Union of India* - 2001 (127) ELT 329 (Guj.) and *Commissioner of Central Excise, Chennai v. Calcutta Chemical Company Ltd.* - 2001 (133) ELT 278 (Mad.) and the said view has also been maintained by the Supreme Court in *Union of India v. Suvidhe Ltd.* - 1997 (94) ELT A159 (SC). There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee.

31. Allahabad High Court held in the case of *CCE, Lucknow Vs Eveready Industries India Ltd* (Supra) that

**3.** This is an appeal filed under Section 35G of Central Excise Act, 1944 (hereinafter referred to as "Act, 1944") arising from judgment dated 26-12-2014 passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "Tribunal") [[2015 \(323\) ELT 612](#) (Tri.-Del.)] whereby Tribunal has allowed assessee's appeal with regard to refund of money to assessee, which was denied on the ground that he could not

show that he has not transferred the burden upon consumers or third parties.

**4.** We find that in *Commissioner of Central Excise, Coimbatore v. Pricol Ltd.* - [2015 \(39\) S.T.R. 190](#) (Mad.) = [2015 \(320\) ELT 703](#) (Mad.) a Division Bench of Madras High Court had an occasion to look into a similar dispute. Therein payment was made during investigation by assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose. An argument was raised that unless assessee proves that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held 'it is not a case of refund of duty but return of pre-deposit made by assessee at the time of investigation under protest'. Court has said as under:

"There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."

**5.** Madras High Court in *Commissioner of Central Excise v. Pricol Ltd.* (supra) relied on a Bombay High Court judgment in *Suvidhe Ltd. v. Union of India* - [1996 \(82\) ELT 177](#) (Bom.); Gujarat High Court judgments in *Commissioner of Customs v. Mahalaxmi Exports* - [2010 \(258\) ELT 217](#); *Parle International Ltd. v. Union of India* - [2001 \(127\) ELT 329](#) (Guj.) and this Court's judgment in *Summerking Electricals (P) Ltd. v. CEGAT* - [1998 \(102\) ELT 522](#) (All.).

**6.** Against the judgment of Bombay High Court in *Suvidhe Ltd.* (supra), Revenue preferred an appeal before Supreme Court but High Court's view was maintained. The said judgment is reported in *Union of India v. Suvidhe Ltd.* - [1997 \(94\) ELT A159](#) (SC).

**7.** Referring to above authorities a Division Bench of this Court presided over by one of us (Hon'ble Sudhir Agarwal) has taken the same view in Writ Petition (Writ Tax) No. 578 of 2016 (*M/s. Ebiz.com Pvt. Ltd. v. Commissioner of Central*



*Excise, Customs and Service Tax and Others*)  
decided on 12-9-2016 [[2017 \(49\) S.T.R. 389](#)  
(All.)].

32. In view of the above, it appears that the issue whether amounts paid during the pendency of appeal takes the colour of a pre-deposit under Section 35F of the Central Excise, Act 1944, or for that matter Section 35N, has been settled for the period before the amendment of Section 35F w.e.f. 06.08.2014. After 2014, the appellants are required to pay a certain percentage (7.5% or 10% as the case may be) of duty or penalty as the case may be and there is no such requirement to deposit entire duty for preferring an appeal. However, in the instant case, the appeals are filed before the amendment. CBEC circular No 984/08/2014-CX dated 16<sup>th</sup> September 2014 clarifies that the amended provisions apply to appeals filed after 6th August, 2014. Therefore, we find that the jurisprudence evolved in the present issue clearly lays down that amount pre-deposited under protest during the pendency of appeal is required to be considered as a mandatory pre-deposit under Section 35F. As discussed above, Hon'ble High Court of Gujarat held in the case of Ghaziabad Ship Breakers case that Chapter XV of the Act is comprised of various provisions from Section 128 to Section 131C of the Act. Section 130 of the Act which provides for appeal to High Court and Section 130-E of the Act which provides for appeal in Supreme Court also falls under Chapter XV. Thus, an appeal before the Supreme Court would also be an appeal under the said Chapter as envisaged under Section 129E of the Act. Thus, any amount deposited during the pendency of an appeal before the High Court or the Supreme Court would also be by way of deposit under Section 129E of the Act and has to be treated accordingly.

33. We find that the provisions of Central Excise, Act, 1944 are *parimateria* with the provisions of Customs Act, 1962 so far as the appellants relate to appeals. In the case on hand, both the appellants have deposited the amount as confirmed by the order of the original authority and continued to deposit the amount equivalent to duty under protest during the pendency of their appeal before Commissioner(appeals); tribunal and Hon'ble Supreme Court, who were not inclined to grant a stay. The appellants had no choice but to deposit the amount of duty in order to exercise their right to appeal. It was held by Hon'ble Bombay High Court in the case of Suvidhe (Supra) that the amount is deposited by the Petitioners is not towards Excise Duty but by way of deposit under Section 35F for availing the remedy of an appeal. This decision was affirmed by Supreme Court also (supra). In the instant case, Hon'ble apex Court has finally decided the issue in favour of the appellants, vide their order dated 21.08.2015, holding that appellants are not required to pay duty on the clinker manufactured by them and captively consumed. We find that the original authority and the first appellate authority have not considered the submissions of the appellants that the amounts paid/deposited, during the pendency of the appeal, are in the nature of pre-deposit, for the purposes of Section 35F, and as such, it would not attract the provisions of section 11B. The authorities below proceeded with the assumption that the amount deposited, under protest, during the pendency of the appeals as payment of duty; the provisions of Section 11B are attracted; the appellants treated the same as expenditure in the Profit and Loss Account in financial statements and thus as it can be assumed that incidence of duty

was not borne by the appellants but was passed on to the customers. Thus, the adjudicating authority credited the refund to consumer welfare fund.

34. In view of the legal position as discussed above, the contention of the original authority that the moment commissioner(A) has refused to grant stay and confirmed the demand, the amount paid takes the colour of duty and no longer remains a pre-deposit, under Section 35F, is a wrong construction of Law. Taking such a stand would defeat the provisions of Chapter VIA and would render the appeals before Tribunal and Courts redundant, more so as regards the power to stay is concerned. Consequent to the decision of the Supreme court in the impugned issue, the amount continued to be deposited/paid by the appellants, under protest, on the clearance of clinker for captive consumption, from time to time, cannot be considered to be duty as held by the original authority. Such an interpretation would tantamount to disregarding Hon'ble Supreme Court's order, holding finally that the appellants are eligible to avail exemption contained under Notification No. 67/95 on the clinker consumed captively and are not required to pay duty. The averment of Adjudicating authority that the moment First Appellate authority confirmed the demand, the nature of the payment ceased to be that of Deposit, in fact negates the decision of the Hon'ble Apex Court that duty is not required to be paid on the clinker cleared for captive consumption. The appeal and Hon'ble Supreme Court's decision would be rendered ineffective or superfluous or redundant. Such an argument would not find resonance with any legal forum. We find that there is an inherent contradiction in

the order of the lower authority. The authorities while considering that the amounts continued to be deposited, by the appellants from time to time during the pendency of the appeals, lost the colour of a deposit, with the First appellate authority held that the appellants were required to pay duty, have considered the refund claim, filed in 2015, for amounts deposited during 2005-2015, to have been filed within the time limit prescribed under Section 11B. If the lower authorities held the amounts paid by the appellants, during 2005-2015, to be duty, in no way, the refund claims, filed by the appellants in 2015, could have been considered to have been filed in time.

35. In view of the judicial pronouncements on the issue, as discussed above, we are of the considered opinion that the amounts, deposited/paid by the appellants, during the pendency of the appeals, have to be considered as a mandatory pre-deposit made under Section 35F. We find that the submissions of the learned special counsel for the revenue that only the deposits made pursuant to the orders of Commissioner (Appeal) and CESTAT, under first proviso, have to be considered as deposits for the purposes of Section 35F, are not legally tenable. We find that prior to 06.08.2014 paying entire duty demanded was the rule and grant of stay subject to certain conditions or payment certain amount was an exception. As Section 35L falls under Chapter VI A of Central Excise Act, amounts deposited, under section 35N, during pendency of appeal before Supreme Court, under Section 35L, are very much in the nature of Pre-deposit to exercise the right to appeal. Any interpretation the other way makes the main part of Section 35F redundant. Such an interpretation would put an appellant who pays total duty as deposit before preferring

an appeal at a disadvantageous position vis a vis an appellant who deposits a percentage of duty, as per the conditions imposed by the authorities, under first proviso to Section 35F. This could have never been the intention of the statute. The legislative intent that there can be two types of deposit, i.e. of full amount payable under main proviso to section 35F and partial payment as decided by Commissioner (Appeals) or CESTAT, is made clear by the introduction of Section 35F, w.e.f. 10.05.2008, so as to provide for the payment of interest in respect of deposits made in pursuance of deposits made only under First proviso to Section 35F. This difference was obliterated by the amendment w.e.f. 06.08.2014 prescribing a uniform pre-deposit, under Section 35F, as percent of duty or penalty confirmed, as a pre-condition for appeal and providing for payment of interest, under Section 35FF, for all deposits made under 35F. In view of the discussion above, we are of the considered opinion that first point for consideration is answered in affirmation.

36. Coming to the second point for consideration i.e. Whether the provisions of Section 11B and the doctrine of unjust enrichment are applicable to such payments, we find that the appellants argue that claim for refund of any pre-deposit made during the pendency of the adjudication proceedings is not a claim for refund of duty and therefore, not subject to the doctrine of unjust enrichment. It was held by the Bombay High Court in the case of *Suvidhe* (Supra) {(affirmed by Supreme Court (Supra))} that the amount deposited by the Petitioners is not towards Excise Duty but by way of deposit under Section 35F for availing the remedy of an appeal and that in respect of a deposit made under Section 35F, provisions of Section 11B can

never be applicable; such amount is bound to be refunded when the appeal is allowed with consequential relief.

37. We find that CBEC vide Circular No.275/37/2K-CX A dated 02.01.2002 clarified that pre-deposit made during the pendency of appeal is other than duty and such deposits should be returned in the event the appellant succeeds in appeal. The said clarification was reiterated in Circular No.802/35/2004-CE dated 08.12.2004; Hon'ble Apex Court has approved both the circulars in their decision *CC Vs Fina cord Chemicals Pvt. Ltd. - 2015 (319) ELT 616 (SC)* while reaffirming their decision in the case of *SuvidheLtd(supra)*.

38. Hon'ble Madras High Court, in the case of *CCE, Coimbatore VsPricol Ltd*, held that:

7. The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in *Mafatlal Industries case [1997 (89) ELT 247 (SC)]*. Relevant portion of the order passed by the Supreme Court in *Mafatlal Industries case (supra)* has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed that it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court of Bombay in *Suvidhe Ltd. v. Union of India - 1996 (82) ELT 177 (Bom.)*, and by the Gujarat High Court in *Commissioner of Customs v. Mahalaxmi Exports - 2010 (258) ELT 217 (Guj.)*, which has been followed in various cases in *Summerking*

*Electricals (P) Ltd. v. CEGAT* - [1998 \(102\) ELT 522](#) (All.), *Parle International Ltd. v. Union of India* - [2001 \(127\) ELT 329](#) (Guj.) and *Commissioner of Central Excise, Chennai v. Calcutta Chemical Company Ltd.* - [2001 \(133\) ELT 278](#) (Mad.) and the said view has also been maintained by the Supreme Court in *Union of India v. Suvidhe Ltd.* - [1997 \(94\) ELT A159](#) (SC). There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the *first substantial question of law against the Revenue and in favour of the assessee*.

39. The above decision or the principle enunciated in the above decision was followed/ laid down in by Allahabad High Court in the case of CCE, Lucknow Vs Eveready Industries India Ltd. - 2017 (357) ELT 11 (All.); Gujarat High Court in Commissioner of Customs v. Mahalaxmi Exports - 2010 (258) ELT 217 (Guj.), and Parle International Ltd. v. Union of India - 2001 (127) ELT 329 (Guj.); Madras HC in Commissioner of Central Excise, Chennai v. Calcutta Chemical Company Ltd. - 2001 (133) ELT 278 (Mad.) and by the Tribunal in Instrument Transformers vs. Commissioner (Appeals), CGST & Central Excise, Indore 2021 (378) ELT 238 (Tri.-Del),; in Safal Food Products Pvt Ltd. vs. Commissioner of Customs, Central Excise and CGST, Jabalpur (2023) 4 Centax 9 (Tri.-Del); in Chambal Fertilizers & Chemicals Ltd. vs. Commissioner Central Goods and Service Tax, Uadipur(2023) 3 Centax 121 (Tri.-Del).

40. Tribunal in the case of Dewsoft Overseas P. Ltd v CST - Final Order No.50781/2019 dt. 17-6-2019 observed that:

21. It is, therefore, clear from the aforesaid decisions that any amount deposited during the pendency of adjudication or investigation is in the nature of a deposit and, therefore, cannot be towards payment of service tax or excise duty. The principles of unjust enrichment, therefore, would not apply if a refund is claimed for refund of this amount.

41. However, in the case of *Sahakari Khand Udyog Mandal Ltd* 2005 (181) ELT 328 (SC) observed in the facts and circumstances of that case that unjust enrichment is applicable even in the case of refund of pre-deposit on the principles of equity. However, in a few subsequent judgments in Apex Court has held that in the case of refund of deposits made under Section 35F are not hit by the provisions of Section 11B while affirming the decision of Bombay High Court in the case of *Suvidhe* (Supra). We find that Hon'ble Bombay High Court in the case of *SandvikAsia Ltd.*-2015 (323) E.L.T. 431 (Bom.) held that repeatedly the Hon'ble Supreme Court has clarified that section 11B, which deals with the claims of refund of duty, will not apply to a case where the amount in question was deposited in compliance with the interim order. If the amount is directed to be deposited not towards duty liability but as a condition for grant of interim relief or interim stay, then this question of unjust enrichment would not arise at all. Tribunal, in the case of *Indoswe Engineers Pvt. Ltd* 2008 (225) ELT 502 (Tri. – Mumbai), distinguished the above case, relying upon the judgment of the Hon'ble High Court of Judicature at Bombay in the case of *Suvidhe Ltd* (Supra) and the decision of Hon'ble High Court of Punjab and Haryana in the case of *CCE, Chandigarh-I v. Modi Oil & General Mills* - [2007 \(210\) ELT 342](#) (P&H), held that

As against these, the reliance placed by the Id. SDR on the judgment of the Apex Court in the case of *M/s. Sahakari Khand Udyog Ltd.* (supra)



requires to be addressed. I find that in the case of M/s. Sahakari Khand Udyog Ltd. (Supra), Hon'ble Supreme Court was dealing with a case where the rebate on the production was considered and in Para 49 it was held that "All the authorities below have expressly recorded a finding that the appellant-Mandal has recovered the amount from consumers and as such excise duty is passed on to consumers/customers." This would indicate that the facts in that case were undisputed as regards the recovery of the amount (for which refund claim was sought) by the petitioner therein. In the current case it is undisputed that the amount has been paid as a deposit, that also subsequent to the clearance made by appellant. In such situation, I am convinced that the judgments of the Hon'ble Punjab & Haryana High Court and the Hon'ble High Court Bombay will directly apply and the impugned order holding otherwise is liable to be set aside and I do so. The appeal is allowed with consequential relief if any.

42. Tribunal had an occasion to discuss the decision of Hon'ble Apex Court while dealing with the case of Universal Specialty Chemicals Pvt. Ltd Vs. Commr. of C. Ex., Raigad 2015 (315) ELT 106 (Tri-Bom), Tribunal held that

Having considered the rival contention, I find that the ruling of the Hon'ble Apex Court in the case of Sahakari Khand Udyog Mandal (supra) is not applicable in the facts of this case, the facts being totally different and there is no finding in this case that the appellant have collected the disputed amount from anybody. Secondly, I find that so far the amount of Rs. 6 lakhs deposited during the investigation is concerned, the said amount was paid under protest and also relying on the ruling of this Tribunal in the case of Plas Pack Industries (supra) wherein it was held that bar of unjust enrichment is not attracted. So far the amount of Rs. 4 lakhs deposited as pre-deposit under Section 35F of the Act following the Hon'ble Bombay High Court's decision in the case of Suvidhe Ltd. (supra), I hold that the doctrine of unjust enrichment is not attracted on the said amount.

43. Tribunal in the case of National Organic Chemical Industries Ltd<sup>2021</sup> (378) ELT 314 (Tri. – Mumbai), also discussed the decision of Hon'ble Apex Court in the case of Sahakari Khand Udyog Mandal Ltd and held that in the particular facts of the case the ratio is not applicable. We find that the unmissable conclusion, of the above discussion, is that the refund of amounts deposited during the pendency of appeal are not subjected to the provisions of Section 11B; however, the bar of unjust enrichment is applicable as principal of equity and that the application of the same depends on the facts and circumstances of each case. Hon'ble Supreme Court in *Mafatlal Industries Ltd* [1997 (89) ELT 247 (SC)], in every statutory determination of eligibility for refund, by the proper officer under Section 27 of Customs Act, 1962, the test of 'unjust enrichment' should be applied with reference to the facts peculiar to each such claim.

44. As discussed above, in the instant case, the amount was deposited by the appellants consequent upon the order passed by the Commissioner (Appeals); as both CESTAT and Hon'ble Apex Court declined to grant stay of the amounts involved, the appellants continued to pay the amount under protest, on the clearances of clinker made by them for captive consumption. Till 2015, the matter was under litigation and therefore, the amount deposited, to exercise the right to appeal, has to be treated as deposits made under Section 35F and Section 35L. The dispute concerns an intermediate product used in the manufacture of cement which is cleared without payment of duty under the exemption available for the units established in Himachal Pradesh. In the case of Sahakari Khand Udyog Mandal Ltd,

the issue related to rebate based on production and it was found that the appellant therein passed on the duty to his buyers. In the impugned case before us, the facts are different. It is not evident that the appellants have passed on duty to the Customers. The question involved in the instant case is as to whether the refund of pre-deposit is subject to the rigors of unjust enrichment and as to whether the presumption that incidence of duty has been passed on is applicable and not the question of equity where the passing on of incidence is established. We find that the appellants are manufacturing cement at various plants spread across the country; in respect of all other plants, clinker is exempt by virtue of Notification No 67/95; the same was disputed by the Revenue in respect of unit in Himachal Pradesh and the matter was finally decided in appellants favour by the Hon'ble Apex Court. The prices of cement not being unit specific, it is not probable that the appellants could have taken in to account the amount, deposited during the pendency of appeal in respect of one unit, while fixing the price of cement. Therefore, we find that the facts of the case are not comparable to that of Sahakari Khand Udyog Mandal Ltd is not applicable.

45. In addition to the above, the assessments made during the pendency of appeal, though on self-assessment basis, are to be considered as provisional assessments which are deemed to have been finalised after the decision of the Hon'ble Apex Court in favour of the appellants notwithstanding the fact that the procedure of provisional assessments are not followed. Hon'ble Supreme Court in the case of Allied Photo graphics India Ltd 2004 (166) ELT 3 (SC) held

that:

**14.** As stated above, Para 104 of the judgment in the case *Mafatlal Industries Ltd.* (supra) states that if refund arises upon finalisation of provisional assessment, Section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case *Sinkhai Synthetics & Chemicals Pvt. Ltd.* (supra). In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17-1-1991. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied Para 104 of the judgment of the Constitution Bench in the case of *Mafatlal Industries Ltd.* (supra), which with respect, had no application. As stated above, Para 104 of the judgment in the case of *Mafatlal Industries Ltd.* (supra) dealt with refund consequent upon finalisation of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalisation of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of *Mafatlal Industries Ltd.* (supra). We may also point out that the judgment in the case of *Sinkhai Synthetics & Chemicals Pvt. Ltd.* (supra) is based on the concession made by the Counsel appearing on behalf of the Department. That judgment is, therefore, *per incuriam*. Learned Counsel for the respondent herein placed reliance on the judgment of this Court in the case of *TVS Suzuki Ltd.* (supra). In that case, application for refund was filed. This was on completion of final assessment. On 9-7-1996, the Department issued a show cause notice as to why the refund claim should not be rejected for non-compliance of Section 11B. By order dated 17-7-1996, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner (Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of Para 104 of the judgment of this Court in *Mafatlal Industries Ltd.* (supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B(5). The judgment of this Court in the case of *TVS Suzuki Ltd.* (supra), therefore, supports the

view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment.

46. We find that after the decision of Hon'ble Supreme Court that the appellants are not liable to pay duty on clinker captively consumed by them, amounts deposited by the appellants during the pendency of the appeal do not take colour of duty and therefore, have to be considered as amounts deposited. Legally, the same cannot be retained by the Government. Therefore, we find that the amounts deposited by the appellants, under protest, during the pendency of appeal, is a pre-deposit for the purposes of Section 35F and thus, provisions of Section 11B are not attracted, in view of a catena of judgments and the CBEC/CBIC Circulars No.275/37/2K-CX A dated 02.01.2002; No.802/35/2004-CE dated 08.12.2004 and No. 984/8/2014-CX, dated 16th September, 2014. Thus, the second question under consideration is answered in the negative.

47. Without prejudice to the above averments, learned Counsel for the appellants submits that even on the issue of unjust enrichment, learned Commissioner (Appeals) was not correct in rejecting the refund claim of the appellants; merely because the amounts were debited to expenses in Profit & Loss Account, it does not necessarily follow that the incidence of duty was passed on to the buyers; the Chartered Accountant certificate has clearly established that the price of cement was market-driven and the appellant had not ability to increase the price as per the amounts the appellants deposited; the amounts had been absorbed and borne by the appellants. He submits that as analyzed by the Chartered Accountant, the sale of cement at a

given point of time in a particular area would be at the market price prevailing at that time in that area irrespective of the plant in which cement was manufactured; at any given point of time, cement manufactured by the appellants, in their plants situated in different states, would be sold at the market price and the appellants can in no way sell the cement manufactured by their plants at Himachal Pradesh at a particular enhanced price so as to pass on the incidence of duty suffered by them on captively consumed clinker; learned Commissioner (Appeals) has completely disregarded the Chartered Accountant certificate which was given after analyzing the cost and price stands from 2010 to 2015; the Cost Accountant certificate was not even rebutted. He submits that in a number of cases when the Department did not rebut the Chartered Accountant certificate, refund cannot be rejected.

48. We find that Hon'ble High Court of Mumbai in the case of Sandvik Asia Ltd. – 2015 (323) ELT 431 (Bom.) held that

**4.** On perusal of the impugned order and considering the arguments of both learned counsel, we are unable to agree with Mr. Kantharia. The Tribunal was not concerned with the treatment given to the amount and as deposited in the Assessee's profit and loss account. It is immaterial and irrelevant for the Tribunal and equally for us as to what the Assessee terms this amount in his Books of Account. Even if it is shown on the 'expense side' that does not mean that the presumption that the burden has been passed to the consumer can be raised.

49. In addition to the appellant's claim that the prices of cement in a particular place at a particular point of time are governed by market forces. The appellants are having a number of plants in different States of the country. The appellants submit that the prices of cement manufactured at a particular place would not be high just because of

the reason that the appellants have paid duty or deposited amount for the clinker the appellants have cleared for manufacture of cement. The appellants have submitted that the mere fact that the appellants have debited the amount deposited to expenses in Profit & Loss Account would not in itself be an indication that the incidence of duty has been passed on. The Chartered Accountant in his certificate has been categorical in asserting that the prices of cement being market-driven, the appellants do not have capacity to pass on the incidence of duty to the customers. We find that the impugned order has not controverted the said certificate. It is not open for Revenue to arrive at a conclusion in disregard of the certificate without challenging or controverting the same with cogent evidence and reasoning.

50. Hon'ble Delhi High Court in the case of Hero Motor Corp. Ltd. – 2014 (302) ELT 501 (Del.) held that:

17. While examining the question whether or not burden of duty has been discharged by the assessee, one has to be practical and adopt a realistic approach and not be oblivious as to nature and character of proof which will be available. When the assessee is able to show that the burden of duty has not been passed on, he asserts and submits affidavits and certificate of a chartered accountant along with copy of the balance sheet, indicates and shows sales invoices for pre and post-period and when there is no other negative factor or evidence to the contrary to disbelieve, the contention should be accepted. To deny what was paid and has to be refunded by law to the said person is not fair, just and equitable.

51. Tribunal in the case of Allied Chemicals Ltd. (supra) held that:

24. The certificates given by the Chartered Accountant to the effect that the incidence of duty had not been passed on also could not have been ignored. These certificates were issued

on the basis of detailed scrutiny of the books of accounts and could not have been ignored in the absence of any evidence to disprove it. The Bench of the Tribunal at Bangalore in *Tirumala Bearings Pvt. Ltd. vs CCE & Cus (Appeals)*, Visakhapatnam, reported in 2016 (335) ELT 145, observed that the certificate of the Chartered Accountant shifts the burden to the Revenue to prove recovery of extra duty collected from the customer by producing positive evidence but as the Revenue failed to advance any evidence to rebut the certificate, the allegation of unjust enrichment cannot be upheld. It is for this reason that the Tribunal observed that the certificate given by the Chartered Accountant is good evidence to show that the disputed duty amount had not been collected from the customers and the said certificate could not have been sidelined without production of any evidence to show that the certificates were wrong certificates.

25. Thus, in the face of documentary evidence available on record, namely, copies of the invoices indicating that the incidence of duty had not been passed on, the certificates given by the Chartered Accountant and the ER-1 returns filed by the Appellant, the Commissioner (Appeals) could not have held that the incidence of duty had been passed on to the customers merely on account of the statements contained in the Profit & Loss A/c. The finding, therefore, that the claim for refund was hit by doctrine of unjust enrichment cannot be sustained.

52. It was held in *Sipani Automobiles Ltd.- 2004 (176) ELT 807 (Tri. Del.)* that:

7. It is settled law that the presumption is that the incidence of duty paid on raw material must have been passed on by the manufacturer to the customers of its final product and it is to be proved by the manufacturer that the incidence of duty had not been passed on. This presumption is a rebuttable one. The Appellants in the present matter has produced a Certificate dated 24-12-96 from the Chartered Accountant wherein the cost structured of a montego car was given and it included "selling, general and other overheads" also. Except alleging that the overhead, is on the higher side, Revenue has not brought on record any material in support of that contention and to falsify the Certificate given by the Chartered Accountant.



The Chartered Accountant has given the Certificate after verifying the books of accounts produced and information furnished to them. The Revenue has to controvert the Certificate by adducing material or evidence based on records. It can not simply brush aside the Certificate by observing that the details of overheads were not furnished. The Revenue can not arbitrarily fix the percentage of overhead. The learned Advocate has also produced a copy of the audited balance sheet along with schedules and notes of 31-3-1996 according to which the amount of refund claimed by them has been shown as Customs Deposits under the Head "Loans and Advances" and has contended that this goes to show that the incidence of duty was not passed on to their customers. In the case of Jaipur Syntex Ltd. v. CCE, Jaipur, supra, the Tribunal has held that the Appellants are entitled to receive the refund amount for having not passed on the incidence of duty to the customers as "the Appellants have produced all the balance sheets.... Wherein the disputed amount has been shown as claim receivable," and "all the figures had been duly certified by the Chartered Accountant." Following the said decision, we hold that the Appellants are entitled to get the amount of refund sanctioned to them by the Adjudicating Authority.

53. It was also held in the case of Elgi Tyres & Tubes Pvt Ltd. – 2009 (248) ELT 574 (Tri. Bang.) that:

8. Learned Commissioner (Appeals) while arriving at the above reproduced conclusion has relied upon the decision of this bench in the case of ATS India [(2006 (199) E.L.T. 123)] Sipani Automobiles [(2004 (176) E.L.T. 807)] and ITC Bhadrachalam Paper Boards [(2002 (146) E.L.T. 582)]. We find that the learned Commissioner (Appeals) findings in paragraphs 7 are very clear. We also concur with the view expressed by the learned Commissioner (appeals) that if the adjudicating Authority is not able to arrive at conclusion based upon the Cost Accountant's Certificate, he could have ordered the inspection of the records, by resorting to the provisions in the CEA 1944. Having not done so, plainly inferring that the Cost Accountant's certificate is not backed with corroborative evidences is not sufficient reason for rejecting the refund claim. On perusal

of the cost Accountant's certificate, we find that the Cost Accountant has clearly indicated in his certificate that he had gone through all the accounts/records of the Company and then only, he has come to the conclusion that the amount of refund claim by the respondents has not been passed on to the customers at any stage, against this certificate. There is no contrary evidence adduced by revenue. Accordingly in view of the above reasoning we find that the order of learned Commissioner (Appeals), is legal and correct. It does not require any interference. The appeal filed by the revenue is rejected.

54. The Tribunal held in the case of Supreme Industries Ltd. – 2017 (358) ELT 318 (Tri. Mum.) that:

5.1 It is a fact that the appellant had filed price list along with Chartered Accountant's certificate and the same were approved. The assessments were finalised and the RT-12 were also approved. In the show cause notice it has been alleged that certain expenses viz., depreciation and financial expenses have not been considered in the assessable value. The appellants have vehemently sought the basis of this assertion by the Revenue. The appellants have also sought the data on the basis of which the said expenses have been quantified, in the second round of litigation also. Revenue has not only failed to provide the same but also refused to provide the same. If a Chartered Accountant's certificate needs to be rejected then there has to be some concrete basis for rejection of the same. Similarly, if any amount needs to be included in assessable value that revenue has to be some concrete basis for quantification of such amount. The same also needs to be communicated to the appellant to enable them to defend their case. In the instant case, revenue has failed to do so. In the absence of any reasonable ground for rejection of the Chartered Accountant's certificate, the same cannot be rejected.

55. Tribunal in the case of Shyam Coach Engineers- 2024 (1)

TMI 245-CESTAT New Delhi held that:

5.8 Department has relied upon the decision of this Tribunal, Mumbai Bench, in the case of Mahindra Engg. (supra), where it has been held, relying upon the other decisions mentioned in the said decision, that since the refund has been shown on the expenditure side in Profit and Loss Account of the appellant, the same would have definitely been recovered from the customers. We are of the opinion that this is a presumptive outcome. All amounts shown under 'expenses' cannot always be the amount of duty. The burden was still of Revenue to prove that the amount shown as 'expenses' in Profit and Loss Account of the appellant, the incidence thereof has increased the sale price. As already observed above, the goods in the present case were sold much prior the payment of the impugned amount. The amount could not possibly be added to the sale price which has already been received by the appellant. Otherwise also, the said decision is with respect to a situation of suo moto adjustment of the excess payment against the short payment of central excise duty during the relevant period of the said case, same is not the fact for the present case. Hence we held that the said decision is not applicable to the present case. 6. In light of the entire above discussion, we hold that merely because the amount, the refund whereof was claimed, was shown as expenses in Profit and Loss Account of the appellant, the incidence thereof cannot be presumed to be passed on to the consumers that too in absence of any positive evidence produced by the Revenue. The Chartered Accountant Certificate should have been relied upon by the Commissioner (Appeals). Support has been drawn from the earlier decision of this Tribunal in the case of Rambagh Palace Hotel Pvt Ltd. Vs. Commissioner of Central Excise & CGST, Jaipur-I reported as 2022 (60) G.S.T.L. 48 (Tri. Del.). With these observations, the order under challenge is hereby set aside. Consequent thereto, the appeal stands allowed.

56.As discussed above, the amounts deposited by the appellants, during the pendency of the appeal, are to be considered as a pre-deposit for the purposes of Section 35F and the return of which is not

governed by the rigors of Section 11B. As an alternative plea, the appellants have submitted a Chartered/Cost accountant's certificate to the first appellate authority. We find that there is merit in the argument of the appellants that the impugned order has not given any specific findings regarding the correctness and genuineness of the Cost Accountant Certificate. Revenue has not controverted the Chartered Accountant certificate. It is trite in law that the Chartered Accountant Certificate is one of the sufficient conditions to substantiate that the incidence of duty has not been passed on to the customers; the onus to disprove the Chartered Accountant Certificate is on the Department and the same has not been discharged. The certificate was issued after going through the accounts of the appellants and after satisfying himself about the truthfulness of the same. A certificate given by a professional cannot be dis-regarded unless it is proved to be blatantly wrong and contrary to the facts and evidence available on the hand. Thus, the certificate given by the Cost/Chartered Accountant has an evidentiary value and cannot be rejected in a half-handed manner. The impugned order having been issued without giving reasons as to why the same has not been taken into account cannot be held to be legally sustainable.

57. Learned Special Counsel for the Revenue submits that the appellants have availed Cenvat Credit on one hand and on the other hand have claimed that the amount paid by them was a deposit and the same be refunded after the Hon'ble Supreme Court decided the issue in their favour is contradictory. We fail to understand this argument. Hon'ble Supreme Court in the final order cited above, while deciding the case in favour of the appellants on merits, held that taking

of CENVAT credit is not an issue raised in these cases. We find that neither the original authority nor the first appellate authority have denied Cenvat Credit. The adjudicating authority records a finding that the appellants have submitted that the refund claimed by them may be reduced to the extent of the Cenvat credit the appellants have availed on the inputs used in the manufacture of clinker. We also find that the original authority records that the appellants did not agree to the deduction of interest on the Cenvat credit availed by them. We are of the considered opinion that, in case the appellants have Cenvat Credit in a wrongful manner, revenue could have taken necessary steps to recover, the same along with the interest, as per law. We find that the appellants have fairly conceded that the Cenvat credit, availed by them, on the inputs used in the manufacture of clinker, during the entire period in dispute. We find that the availment of Credit cannot be a bar for claiming refund of duty paid on intermediate or final products. Moreover, special counsel submits that the appellant had produced CA certificate on 12.05.2017, whereas the Order in Original rejecting the claim for refund was passed on 16.09.2016 whereas the i.e. after the date of order in original. We find that the appellants have filed the refund claim consequent to the Hon'ble Apex Court's decision in their favour. The appellants had filed the claim under the belief that the refund was of deposit made under Section 35F of Central Excise, Act 1944. No opportunity was accorded, by the original authority, to the appellants to be aware that there was a need to rebut the presumption under Section 11/12 of the Central Excise Act, 1944. When the adjudicating authority did not appreciate their argument and rejected their claim on the issue of unjust enrichment, the appellants have

submitted the said Certificate to the first appellate authority.

58. On going through the records of the case and having considered the rival contentions, we find that Revenue ignores the settled law that the amounts deposited by the appellants, during the pendency of appeal, to exercise right of appeal, amount to pre-deposit under Section 35F and that such refund claims are not subject to the provisions of Section 11B and proceeds to credit the refund to the consumer welfare fund instead of refunding the same to the appellants. We find that the presumption contained in the provisions pertaining to refund of Central Excise duty are rebuttable. The appellants have submitted evidence and argument in their favour. To that extent, we find that the presumption has been rebutted by the appellants. As a result, it is for the Department to negate the evidence submitted by the appellants. We find that while doing so, the Revenue, instead of analysing the rebuttal submitted by the appellants and instead of discarding the Chartered Accountant certificate with tangible evidence and cogent arguments, continued to entertain the opinion that the appellants have passed on the duty, paid on clinker cleared for captive consumption, to the customers, on the basis of their accounting practice. Revenue has not taken into consideration that the appellants have cement plants all over the country and are not in a position to alter the prices of cement just because in one of the many plants, duty has been paid or deposited on the clinker cleared for captive consumption in the manufacture of cement. We find that the appellants are manufacturing cement at various plants spread across the country; in respect of all other plants, clinker is exempt by virtue of Notification No 67/95; the same was disputed by the Revenue in respect of unit in

Himachal Pradesh and the matter was finally decided in appellants favour by the Hon'ble Apex Court. The prices of cement not being unit specific, it is not probable that the appellants could have taken in to account the amount, deposited during the pendency of appeal in respect of one unit, while fixing the price of cement.

59. We find that there cannot be any set of fixed principles and assumptions in dealing with the presumption that the incidence of duty has been passed on. The presumption under Section 11B being a rebuttable one, such rebuttal put forward by the appellant is required to be considered in the facts and circumstances of the case and the nature of the product. Therefore, we are of the considered opinion that the presumption cannot continue to prevail in spite of the rebuttal, which is not controverted. However, having held that in the instant case, the amounts deposited by the appellants, during the pendency of the appeal before Commissioner (Appeals), CESTAT and Hon'ble Supreme Court take a colour of pre-deposit under Section 35F and those refunds are not subject to the provisions of Section 11B. Even assuming that the principle of unjust enrichment is applicable as a principle of equity, if not by a presumption as per Section 11B or 12D, the Revenue could not show any evidence to show that the duty/amount deposited by the appellants has actually been passed on to the customers. The presumption rebutted by way of submissions and CA Certificate has not been controverted with evidence to show that the incidence of duty has been actually passed on to the customers. Moreover, this is only an alternative argument put forward by the appellants and as per our discussion, as above, we have concluded that the amount paid by the appellants is a pre-deposit under Section 35F

and as such the same is to be returned without subjecting the same to the provisions of Section 11B.

60. Now, we turn our attention to the third issue of payment of interest on the delayed payment of refund of pre-deposit. Learned Counsel for the appellants submits that since the deposit was made under Protest as pre-deposit, the appellants are entitled for interest under Section 35FF as introduced w.e.f. 10.05.2008; even before 10.05.2008, the appellants are eligible to pay interest as per the settled provisions of law in the case of Hawkins Cookers Ltd. (supra) Bharat Petroleum Corporation Ltd. (supra). He further submits that even if it is held that the refund is subject to the provisions of Section 11B, interest is payable in terms of Section 11BB. On the other hand, learned Special Counsel for the Department submits that interest under Section 35FF is payable only when the deposit is made, underfirst proviso to Section 35F, for the period 10.5.2008 to 06.08.2014; as the deposits are not made under first proviso to Section 35F, but as payment of duty on the clearance of clinker for captive consumption, which is not the pre-deposit, interest is not payable.

61.Provisions relating to payment of interest on delayed payment of refund of pre-deposit were introduced vide Section 85 of the Finance Act, 2008 w.e.f. 10.05.2008. The new Section 35FF introduced provides as follows:

**Section 35FF: Interest on delayed refund of amount deposited under the proviso to Section35F.**

Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority),



under the first proviso to section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section 11BB after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount.

61.1. The Section 35FF was further amended w.e.f. 06.08.2014 by Finance Act, 2014. The amended Section reads as under:

**SECTION 35FF. Interest on delayed refund of amount deposited under section 35F.** - Where an amount deposited by the appellant under section 35F is required to be refunded consequent upon the order of the appellate authority, there shall be paid to the appellant interest at such rate, not below five per cent. and not exceeding thirty-six per cent. per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such amount from the date of payment of the amount till, the date of refund of such amount:

**Provided** that the amount deposited under section 35F, prior to the commencement of the Finance (No. 2) Act, 2014, shall continue to be governed by the provisions of Section 35FF as it stood before the commencement of the said Act.

60. We find that a perusal of the provisions of Section 35FF gives a clear understanding that w.e.f. 10.05.2008; a provision has been made to grant interest on the refund of amounts deposited under the proviso to Section 35F. The wordings used in the new Section 35FF, makes it unambiguously clear that a provision to pay interest is made in respect of amounts deposited in terms of the orders passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to section

35F. The Section as it stood before 06.08.2014 did not provide for payment of any interest on the deposits made under the main Section 35F. However, it is provided w.e.f. 06.08.2014 that interest shall be sanctioned on the delayed refund of the deposit made under Section 35F. In view of this, we are of the considered opinion that the legislative intent is very clear that w.e.f. 10.05.2008, interest was proposed to be given on the delayed refund of the amounts deposited under the first proviso to Section 35F, whereas w.e.f. 06.08.2014, it is provided that interest shall be granted on the delayed refund of amounts deposited under Section 35F, irrespective of the fact as to whether such deposit was under main clause or under First Proviso. When the provision of the statute or law is very clear, there is no scope for any interpretation. However, we find that the amendment carried out in 2014, clearly establishes the legislative intent that amounts deposited as per the main Section 35F, are also to be considered as deposit under Section 35F. This fortifies the argument of the appellants that total duty/ amount deposited under Protest, during the pendency of the proceedings in the Hon'ble Supreme Court, should be considered as deposit under Section 35F. However, we are not inclined to accept the submissions of the learned Counsel for the appellants that the appellants are eligible for interest on delayed refund of the sums deposited after 10.05.2008 under the main part of the Section 35F.

61. The legislative intent is very clear, from the wording of Section 35FF, that interest shall be payable on the delayed refund of amounts deposited as per the orders passed under first proviso to Section 35FF. Learned Counsel for the appellants has also taken a plea that even if it is held that the refund claimed by the appellants is subject to

the provisions of Section 11B, interest is payable under the provisions of Section 11BB. We find that the arguments of the learned Counsel for the appellants are contradictory; on the one hand, the appellants argue that the amounts paid during the pendency of appeal are to be considered as deposits for the purpose of Section 35F; hence it is liable to be refunded without taking recourse to the provisions Section 11B and on the other hand, the appellants claimed that interest is payable in terms of Section 11BB. In view of our discussion in the preceding Paragraphs, the amounts deposited by the appellants, during the pendency of the appeal, to exercise the right of appeal, are to be considered deposits under Section 35F. Therefore, the argument of the counsel for appellants that the appellants are eligible for interest on the delayed refund w.e.f 10.05.2008 is not acceptable. However, w.e.f. 06.08.2014, the amended Section 35FF provides for payment of interest on the delayed refund of amount deposited under Section 35F irrespective of the fact whether such payment was under main Section or first proviso of Section 35F. Therefore, the appellants are eligible for interest on the delayed refund of amounts deposited by them after 06.08.2014.

62. Learned Counsel for the appellants also submits that for the period prior to 10.05.2008, the appellants are entitled for interest on delayed refund as per the judicial pronouncements cited by them, we find that CESTAT being the creature of the statute, cannot traverse beyond the provisions in the Statute as held in Veer Overseas – 2015 (18) GSTL 59 (Tr. LB); Bocharanwasi Shri Aksharapurushottam Swaminarayan Sanstha – 2022 (380) ELT 82 (Tri. Ahmd.); Kali Aerated Water Works – 2023 (383) ELT 413 (Mad.); Ajay Exports – 2016 (335) ELT 150 (Tri.

Mumbai) and Maa Mahamaya Industries Ltd. – 2014 (310) ELT 244 (A.P.). We also find that it has been held by the Hon'ble Apex Court in the case of Willowood Chemicals Private Limited – 2022 (60) GSTL 3 (SC); in Gujarat Fluoro Chemicals – 2017 (51) STR 236 (SC) and in VKC Foosteps (India) Private Limited – Civil Appeal No.290 of 2023, that once there are statutory provisions, no authority can grant interest beyond the statutory provisions.

62. In view of the discussion in the preceding Paragraphs and the judicial pronouncements on the issue, we hold that amounts paid during the pendency of appeal, continuously at the level of Commissioner (Appeals), CESTAT and the Hon'ble Apex Court, are to be considered as deposits for the purpose of Section 35F and the refund of the same is to be made in terms of the CBEC/ CBIC Circulars issued from time to time without application of provisions of Section 11B. We also hold that even if the principle of unjust enrichment is held applicable on the principle of equity, the presumption has been rebutted by the appellants and in the facts and circumstances of the case, the same is not controverted with evidence by the Revenue. The appellants have fairly submitted to the original authority that the amount of Cenvat credit availed by them, on the inputs used in the manufacture of clinker, during the impugned period, may be deducted from the amount the appellants claimed as refund.

63. In view of the above, the appeals are partially allowed and the impugned orders are modified to the extent to say that:

- (i) Both the appellants are entitled to the refund of amount deposited, during the pendency of litigation, to

exercise the right of appeal, before the Commissioner (Appeals), CESTAT and the Hon'ble Supreme Court of India;

(ii). However, refund as at (i) above, be granted after deducting the Cenvat Credit availed by them on the inputs used in the manufacture of Clinker, during the period in dispute.

(iii). The appellants are entitled to interest, on the delayed payment of refund only, at the rate statutorily prescribed, in respect of amounts deposited on or after 06.08.2014.

(Order pronounced in the open court on 01.07.2024)

**(S. S. GARG)**  
**MEMBER (JUDICIAL)**

**(P. ANJANI KUMAR)**  
**MEMBER (TECHNICAL)**