

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
SCO 147-148, SECTOR 17-C, CHANDIGARH-160017

**DIVISION BENCH**  
**COURT NO.1**  
**Appeal No. E/60442/2016**

[Arising out of the Order-in-Appeal No. 112/CE/DLH/2016 dated 13.06.2016 passed by the CCE (Appeals), Rohtak]

Date of Hearing/Decision: 30.08.2018

For Approval & signature:

**Hon'ble Mr. Ashok Jindal, Member (Judicial)**  
**Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**

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**Gawar Construction Limited**

**Appellant**

**Vs.**

**CCE, Rohtak**

**Respondent**

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**Appearance**

Shri. Jagmohan Bansal, Advocate- for the appellant  
Shri. G.S. Dhillon, AR- for the respondent

CORAM: **Hon'ble Mr. Ashok Jindal, Member (Judicial)**  
**Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**

**FINAL ORDER NO: 63176 / 2018**

**Per Ashok Jindal:**

The appellant is in appeal against the impugned order wherein the refund claim has been filed by the appellant rejected by the adjudicating authority.

2. The facts of the case are that M/s GR- Gawar (J.V.) got a contract from Haryana State Road and Bridge Development Corporation Ltd. The partner of said Joint Venture is the appellant who executed entire work on 99.5% of the rate accepted by Joint Venture contractee. The material to be used in the implementation of said contract was exempt from Central Excise Duty in terms of Notification No. 108/95 dated 28.08.1995. The

appellant procured steel and cement without payment of duty, however bitumen was purchased from Oil Marketing Companies on payment of duty because the suppliers did not agree to supply material without payment of duty. During the period 22.09.2011 to 24.01.2012, the appellant purchased bitumen on payment of duty and filed refund claim of duty paid on bitumen with the Assistant Commissioner, Central Excise, Hissar on 26.08.2013. A show cause notice was issued to the appellant on 21.11.2013 to deny refund claim on the following grounds:

(a) there is no provision of refund under Notification No. 108/95-CE dated 28.08.1995 as the Notification grants the complete exemption from payment of duty and the said Notification nowhere provides for payment of duty and subsequent grant of refund of the said duty.

(b) Notification No. 108/95 dated 28.08.1995 provides exemption only the party, who is a manufacturer of the goods.

(c) Party has executed its project in Jhajjar District and has procured Bitumen from the various manufacturers who also do not fall under the jurisdiction of this division. Moreover, the party is neither a manufacturer nor registered with Central Excise Division, Hissar thus it appears that the party has not filed the refund claim with the proper jurisdictional officer.

(d) A plain reading of Section 11B of the Central Excise Act, 1944, has revealed that the refund claim is not admissible to the party in terms of the said section.

(e) The scrutiny of the above said refund claim has also revealed that an amount of Rs. 1,78,40,339.51 out of Rs. 2,32,19,020.91, is also hit by the time bar clause, as the claim has been filed beyond a period of one year from the date of the purchase of the goods, in contravention of the provisions of Rule 11-B of the Central Excise Act, 1944 and the remaining

amount of Rs. 53,78,681.40 also appears to be inadmissible as per the reasons stated above.

(f) It also appears that the party's refund claim, is also barred by the provisions of unjust enrichment, as the party has paid the amount of the Central Excise Duty and has also passed the burden of the duty to United Nations or an International Organisation which has funded the cost of the execution of the project.

3. The matter was adjudicated and refund claim were denied to the appellant on the ground

(a) The contract was awarded to a joint venture for raising, widening, strengthening and providing side draining CC pavement on various rates whereas "Road Work" contract was awarded to the appellant.

(b) The date of project Authority Certificate (for short 'PAC') is 17.10.2012, whereas goods were supplied during 27.09.2011 to 24.11.2012.

(c) The quantity mentioned in PAC is less the quantity of mentioned in certificate of payment of PAC was not counter signed by Principle Secretary or Secretary (Finance) of state.

(d) The appellant filed application before DGFT who rejected their application and Central Excise Department is not Appellate Authority of DGFT.

(e) The claim is barred by limitation because the application was filed beyond one year from the date of purchase of goods

(f) and the adjudicating authority have no jurisdiction to entertain the refund claim.

Against the said order, the appellant is before us.

4. The Id. Counsel appearing on behalf of the appellant submits that the Id. Commissioner has no power to travel beyond the scope of the show cause notice, therefore, the grounds (a) to (e) above cannot be considered for the rejection of refund claim.

5. It is submitted that as subsequent to the impugned period, the appellant purchased bitumen without payment of duty under Notification No. 108/95 and department did not raise any objection. It is his further contention that the appellant has purchased cement and steel without payment of duty which indicates that goods used in the project were exempt from duty, in terms of Notification No. 108/95. It also confirms that the appellant was not required to pay duty on bitumen and duty has been wrongly paid by the appellant. It is submitted that as per proviso of Section 11B (2)(e) the Central Excise also permits refund to buyer, therefore, the appellant had every right to file refund claim. Even otherwise, it is case of payment of duty by mistake and Government has no right to retain because it amounts to violation of article 265 of the Constitution of India.

6. It is further submitted that Notification No. 108/95 is an exemption notification and Central Excise duty is an indirect tax, therefore, even though notification exempt manufacturer from payment of duty at the time of clearance of goods, nevertheless exemption is actually extended to product in question and its buyer. Therefore, it is wrong to say that manufacturer could avail exemption and said notification is not applicable to buyer. The said notification does not prescribe manner of refund, but the respondent has no right to retain legal money of the Appellant when there is no dispute of bearing the burden. It is submissions that in the entire Act, there is no prescribed Assistant Commissioner to entertain refund claims. The propriety further demands that if any authority feels that he is not competent to entertain refund application, he must transfer

to Competent Authority. The Id. Assistant Commissioner did not reject the refund claim on the sole ground of jurisdiction whereas the refund claim was dealt with on merits and the Id. Commissioner (A) dealt the entire case on merits, therefore, the question of jurisdiction cannot be raised at this stage as the authorities below have dealt with the refund application on merits.

7. It is his submissions that the grounds for rejection of refund in the show cause notice were contrary to each other which formed basis of impugned orders. On one hand, it was alleged that refund is not admissible to the Appellant in terms of Notification No. 108/95 and on the other hand, it was alleged that refund is not admissible in terms of Section 11B of the Act or in the absence of specific provisions under Notification No. 108/95. It is true that there is no provision under the notification dealing with refund and in the taxation jurisprudence, the notifications exempting goods, but do not deal with refund arising on account of duty payment by mistake/wrongly. It is Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. As per the notification, the exempted goods in question were manufactured and wrongly paid duty and burden of duty was borne by the appellant. As there is no provision in the notification, it does not mean that the State has got right to retain the funds of the appellant. There was no provision of interest under Section 11B of the Act and the Hon'ble Punjab and Haryana High Court while dealing with refund of interest in the case of ***CCE versus Northern Minerals Ltd. 2007 (216) ELT 198 (P&H)*** held that State has no right to retain wrongly paid interest and it amounts to violation of Article 265 of the Constitution if refund is not sanctioned.

8. It is further submitted that the goods were exempt from duty and seller wrongly charged duty, therefore, it is a case of wrong payment of duty and rigour of limitation under Section 11B cannot come in the way of

refund. This contention is supported by the decision of the ***Hon'ble Karnataka High Court in the case of CCE versus K.V.K. Construction, 2012 (26) STR 195 (Karnataka) and Hon'ble Madras High Court in the case of Nataraj and Venkatt Associates Versus Assistant Commissioner, 2010 (249) ELT 37.***

9. It is his contention that the claim was filed initially with DGFT who rejected application on one or the other ground as the appellant paid duty under Central Excise Act, so refund is governed by Central Excise Act read with Constitution of India. It is not a case of appeal from one authority to another whereas it is a case of two independent authorities when both are competent to consider the claim. The DGFT did not consider because duty was paid under Central Excise Act. The period spent before DGFT needs to be excluded as per the decision of the ***Hon'ble Gujarat High Court in the case of Choice Laboratories 2015 (315) ELT 197 (Guj.)***. therefore, he prayed that the impugned order is to be set aside and refund claim be allowed.

10. On the other hand, the Ld. AR reiterated the finding in the impugned order.

11. He further submits the appellant has purchased bitumen for execution of work in Jhajjar District of Haryana whereas, the manufacturer of bitumen were not within the jurisdiction of jhajjar District of Haryana and the appellant as well as the manufacturer was not registered with Central Excise Division, Hissar, therefore, the refund claim are not maintainable. He further submits that the manufacturer of bitumen have never approached to the jurisdictional Assistant Commissioner having jurisdiction, therefore, the refund claim cannot be entertained in the light of the decision of this Tribunal in the case of ***Oswal Chemical Vs.CCE reported in 2004 (164) ELT 89 (Tri. Del.) and M/s Hindustan Zinc Vs. Commissioner of Central Excise, Chennai reported in 2002***

**(142) ELT 419 (Tri. Chennai.)**. He also submits that the argument advanced by the Id. Counsel that if the refund claim has been entertained on merits, jurisdiction issue cannot be raised. It is his submissions that in the case of **B.L. Mehta Vs. CCE & ST, Chandigarh reported in 2018 (8) GSTL 92 (Tri. Chan.)** this Tribunal has entertained a view that jurisdiction falls in different commissionerate, therefore, the adjudication order was set aside. He also submitted that it is not a case where duty was paid under any misunderstanding or confusion about admissibility of exemption rather, the appellant chose to pay the duty in its own volition, therefore, the refund is not maintainable. To support this contention, he relied on the decision of this Tribunal in the **case MIL India Ltd. reported in 2008 (222) ELT 197 (Allahabad.)**. He also submits that as the appellant's claim of TED (Terminal Excise Duty) has been rejected by the DGFT, therefore, the appellant cannot file the refund claim. He also submitted that the exemption notification has to be interpreted strictly, therefore, the refund claim is not maintainable. He also submitted that the refund claims are barred by limitation, therefore, the same are not admissible. To support this contention, he relied on the decision of the **Hon'ble Apex Court in the case of Mufatlal Industries Ltd. Vs. UOI reported in 1997 (89) ELT 247 (SC)**. He also relied on the decision of this Tribunal in the case of **CCE, Hyderabad III Vs. XL Telecom Limited reported in 2006 (206) ELT 303 (Tri. Bang.)**. He further submitted that the case laws relied upon by the Id. Counsel are not applicable to the facts of this case, therefore, the refund claim is to be rejected.

12. Heard the parties and considered the submissions.

13. On careful considerations of submissions made by both the sides, as per the show cause notice, the refund claim sought to be denied on the following grounds:

- (a) there is no provision of refund under Notification No. 108/95-CE dated 28.08.1995 as the Notification grants the complete exemption from payment of duty and the said Notification nowhere provides for payment of duty and subsequent grant of refund of the said duty.
- (b) Notification No. 108/95 dated 28.08.1995 provides exemption only to the manufacturer of the goods as per their refund claim.
- (c) Party has executed its project in Jhajjar District and has procured Bitumen from the various manufacturers who also do not fall under the jurisdiction of this division. Moreover, the party is neither a manufacturer nor registered with Central Excise Division, Hissar thus it appears that the party has not filed the refund claim with the proper jurisdictional officer.
- (d) A plain reading of Section 11B of the Central Excise Act, 1944, has revealed that the refund claim is not admissible to the party in terms of the said section.
- (e) The scrutiny of the above said refund claim has also revealed that an amount of Rs. 1,78,40,339.51 out of Rs. 2,32,19,020.91, is also hit by the time bar clause, as the claim has been filed beyond a period of one year from the date of the purchase of the goods, in contravention of the provisions of Section 11-B of the Central Excise Act, 1944 and the remaining amount of Rs. 53,78,681.40 also appears to be inadmissible as per the reasons stated above.
- (f) It also appears that the party's refund claim, is also barred by the provisions of unjust enrichment, as the party has paid the amount of the Central Excise Duty and has also passed the burden of the duty to United Nations or an International Organisation which has funded the cost of the execution of the project.

14. We find that although as per the notification, the supplier of bitumen was not required to pay duty in terms of Notification No. 108/95-CE dated 28.08.1995, but the supplier has supplied the goods on payment of duty to the appellant and it is a fact that as per the said notification duty was not payable on the goods. As per the notification bitumen was not liable to pay duty. In that circumstances, the persons who has suffered duty on the said goods is entitled to file refund claim in terms of the proviso to Section 11(B)(2)(e) of the Central Excise Act as held by the Hon'ble Apex Court in the case of Mafatlal Industries Limited (Supra) wherein the Hon'ble Apex Court observed as under:

**" 88.** *There is yet another circumstance : Section 12B does not create a new presumption unknown till then; it merely gives statutory shape to an existing situation, as explained hereinbefore. At the most, it can be said that there were two views on the subject and Section 12B affirms one of them. Even without Section 12B, the true position is the same, as held by us in the earlier part of this judgment. The obligation to prove that duty has not been passed on to another person is always there as a pre-condition to claim of refund. It cannot also be said that by giving retrospective effect to Section 11B, any vested rights or substantive rights are being taken away. The deprivation, if at all, is not real. The manufacturer has already collected the duty from his purchaser and has thus reimbursed itself. By applying for refund yet, he is trying to reap a windfall; deprivation of that cannot be said to be real or substantial prejudice or loss. A manufacturer had no vested legal right to refund even when he had passed on the burden of duty to others. No law conferred such a right in him - not Article 265, nor Section 11B. It was only on account of an incorrect view of law taken in Kanhaiyalal - and that cannot be treated as a vested legal right. Correction of judicial error does not amount to deprivation of vested/substantive rights, even though a person may be deprived of an unwarranted advantage he had under the over-ruled decision. In cases, where the burden is not passed on, there is no prejudice; he can always get the refund.*

**IS SECTION 11B A MERE DEVICE TO RETAIN ILLEGALLY COLLECTED TAXES ?**

**89.** *A major attack is mounted by the learned Counsel for petitioners-appellants on Section 11B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is*

*a mere pretence and not an honest exercise. By reading the Rules framed under Section 12D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Sri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Sri Nariman. It is a colourable device - declaimed Sri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Sri Parasaran to this criticism runs thus : it ill-becomes the manufacturers/assesseees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method - says Sri Parasaran.*

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

*it is pointed out that the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund - it is submitted - he has to go to the place where the duty has been paid by the manufacturer and apply there. It is also pointed out that purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claim will be filed only by purchasers of high priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground - assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg and other decisions cited in Paras 78 and 79)."*

15. Therefore, the grounds for rejection of refund claim in clause (a) & (b) of the show cause notice are not sustainable. The arguments advanced by the Id. AR are also not acceptable.

16. We further take note of the fact that in terms of the Notification No. 108/95-CE dated 28.08.1995, the goods in question to be procured by the appellant without payment of duty, therefore, it will be wrong to say that only manufacturer can have availed exemption and the said notification is not applicable to the buyers. In fact, the appellant have been burdened with duty for the product which was not dutiable, therefore, the refund claim cannot be rejected on the said ground. We also take note of the fact that the notification does not describe manner of refund, but it does not mean that the appellant is not entitled to claim refund.

17. The refund claims sought to be rejected on the ground that the appellant has executed project in Jhajjar and procured bitumen from various manufacturer but did not fall under the jurisdiction of that Division. It was also alleged that as the appellant is neither a manufacturer not registered with Central Excise Division, Hissar, therefore, the refund claim has been filed without proper jurisdiction.

18. We find that in a case where the assessee is not registered with the Central Excise Department, where to file refund claim of duty borne by him has not been prescribed under the Central Excise Act. We further find that if the adjudicating authority was of the view that the appellant has not filed refund claim with the authorities which is not competent to entertain the refund claim, he would have transferred the application for refund claim before the competent authority but could not have rejected the refund claim simply on the ground that he had no jurisdiction. We also take note of the fact that the adjudicating authority although held that he has no jurisdiction, despite having no jurisdiction, has entertained the refund claim on merits.

19. As the issue raised in the show cause notice is that the authorities with whom the refund claim has been filed have no jurisdiction but the said authority entertained the refund claim filed by the appellant on merits, therefore, in the light of the decision of this Tribunal in the case of ***Swiber offshore Construction PTE. Ltd. reported in 2012 (281) ELT 545 (Tri. Mum.)*** wherein it has been observed that this Tribunal have no jurisdiction to entertain the appeal but Member (Technical) has remanded the matter back for fresh consideration. As "Hon'ble Member (Technical) has exercised his jurisdiction to entertain the appeal. In that circumstance, the appeal cannot be dismissed on the ground of lack of jurisdiction", therefore, as in this case, the adjudication authority as well as the appellate authority has dealt the refund claim on merits, in that circumstances, it cannot be said that the authorities below have no jurisdiction to entertain the refund claim with regard to admissibility of refund claim.

20. We further find that it is fact on record in terms of Notification No. 108/95 *ibid.*, the appellant was not required to pay duty on bitumen but as the supplier insisted to the appellant to pay the duty. In that

circumstances, the appellant has borne duty which were not required to pay by the appellant.

21. We further take note of the fact that the Id. AR relied on the decision of this Tribunal in the case of **B.L. Mehta (Supra)** to say that once the jurisdiction issue has been entertained on the merits, the same can also be raised later on. We find that the fact of the said case was not similar to the case in hand. In fact, the said case of it was held that the Id. Adjudicating authority have no jurisdiction to issue show cause notice was the contention of the appellant whereas in this case, the show cause notice was issued and entertained on the merits, therefore, the said case laws are not applicable to the facts of this case.

22. We further take note of the fact that it is not a case of jurisdiction of one State Versus another state or State vs. Centre. It is a case of entertaining the refund claim by one Assistant Commissioner Versus Another Assistant Commissioner and both the authorities are working under the same Chief Commissioner as well as the same Department i.e. Department of Revenue, therefore, it is unjustified that the adjudicating authority was not having jurisdiction when they have entertained the refund claim on merits.

23. We further take note of the fact that in the show cause notice, it is alleged that refund claim is not admissible in terms of the Section 11B of the Central Excise Act, 1944. We find that the issue has been discussed in the precedent paragraphs whereas it has been held that in terms of proviso Section 11B(2)(e) of the Act, the refund claim is admissible as per the decision of Mafatlal Industries Limited (Supra).

24. The another ground of rejection claim is that the refund claim is barred by time limit in terms of the provisions of Section 11B of the Act. As per the time limit prescribed, it is admitted position that in terms of

Section 11B of the act, the relevant date for filing the refund claim is within one year from the relevant date. Admittedly, in this case, the refund claim initially was filed by the appellant before the DGFT and DGFT has rejected their refund claim only on 10.03.2013, thereafter the refund claim was filed by the appellant on 26.08.2013. In these circumstances, limitation for filing the refund claim was start on 10.06.2013 i.e. relevant date and the refund claim was filed in time. Moreover, we also take note of the fact that the appellant was not liable to pay duty on the said goods but the supplier of bitumen forced the appellant to pay duty. In that circumstances, the duty which were not payable by the appellant cannot be held duty in terms of the Central Excise Act, therefore, the said amount is only a amount paid by the appellant and that does not form the part of duty paid by the appellant and the same has been paid under bona-fide mistake. In that circumstances, the said amount cannot be retained by the Revenue and is required to be refunded.

25. We further take note of the fact that in the case of *Nataraj and Venkatt Associates (Supra)* the Hon'ble High Court of Madras has entertained the issue wherein the service tax was not payable by the assessee and the petitioner filed claim of refund of service tax paid in the said case, the Hon'ble High Court observed as under:

**"14.** *Therefore, it is clear that if what was paid cannot be taken to be duty of excise, the bar of limitation under section 11B(1) cannot be applied. This is on account of the fact that the bar of limitation prescribed under Section 11B(1) applies only to "any person claiming refund of any duty of excise and interest". Therefore, I am of the considered view that the claim of the petitioner for refund can be entertained by this Court, since there is no dispute about the fact that no service tax was payable by the petitioner and as a corollary, what was paid by them was not service tax.*

**15.** *Coming to the second question, the petitioner has produced proof to show that no service tax was collected by them from their customers. In the affidavit filed by the petitioner, the petitioner has stated that they actually received less than the invoice value and they did not collect any service tax from their customers. Along with the affidavit, the petitioner has also filed*

*the e-mail correspondence and the certificates of foreign inward remittance dated 12-4-2005, 26-5-2005 and 11-1-2007, to show the actual payment received. These documents clearly show that the petitioner is not attempting to make an unjust enrichment for themselves, by seeking refund of service tax which they had already collected from their customers. Therefore, even on merits, the petitioner is entitled to seek refund.*

**16.** *In view of the above, the petitioner is entitled to succeed. Hence the writ petition is allowed and the respondent is directed to make a refund of the amount payable to the petitioner, within 8 weeks from the date of receipt of a copy of this order. There will be no order as to costs."*

26. Further, in the case of Northern Minerals Ltd. (Supra), the issue of refund of interest came before the Hon'ble Jurisdictional High Court, wherein, the Hon'ble High Court of Punjab and Haryana observed that the case of delayed payment of duty would be unauthorised imposition of tax which is impermissible by provisions of Article 265 of Constitution of India. Admittedly, in this case no duty was required to be paid on the goods which have purchased by the appellant in terms of Notification no. 108/95, therefore, it was amount retained by the Revenue is impermissible in terms of Article 265 of constitution of India. In that circumstance, the appellant is entitled for refund claim of duty paid by them by mistake or forced to pay by the supplier and held that the refund claim is entertainable.

27. Further in the case of ***Parijat Construction vs. CCE, Nashik reported in 2018 (359) ELT 113 (Bom.)***, the issue came up before the Hon'ble High Court of Bombay wherein tax was paid under mistake of law. The Hon'ble High Court observed as under:

**"5.** *We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer res integra. The two decisions of the Division Bench of this Court in Hindustan Cocoa (supra) and Commissioner of Central Excise, Nagpur v. M/s. SGR Infratech Ltd. (supra) are squarely applicable to the facts of the present case.*

**6.** *Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of Collector of C.E., Chandigarh v. Doaba Co-Operative Sugar Mills (supra) relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case where admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable.*

**7.** *We accordingly allow the present appeals and quash and set aside the impugned order, insofar as it is against the appellant in both appeals. We fully allow refund of Rs. 8,99,962/- preferred by the appellant. We direct that the respondent shall refund the amount of Rs. 8,99,962/- to the appellant within a period of three months. There shall be no order as to costs.”*

and allowed the refund claim by holding that the limitation under Section 11B of the Act is applicable.

28. We also find that in this case it is not disputed that the appellant was not required to pay duty which they have paid as they are entitled to procure the goods without payment of duty, therefore, the appellant has borne the duty and they are entitled to claim refund of the same as they have suffered duty.

29. The Id. AR also contested that as the refund claim has been rejected by the DGFT, therefore, the appellant cannot file the refund claim. The refund claim has been rejected by the DGFT on the ground that the appellant paid is central Excise Duty which is governed by the Central Excise Act read with Constitution of India. It is not a case of appeal from one authority to another, but it is a case of filing the refund claim with two independent authorities when both are competent to consider the refund claim. The DGFT did not consider the refund claim because duty was paid under Central Excise Act. In that circumstance, in the light of the decision

of the Hon'ble High Court in the case of Choice Laboratores Ltd. (Supra) the time spent in pursuing its remedy before the DGFT is to be excluded, therefore, we hold that the refund claim filed by the appellant is in time.

30. We further take note of the fact that bar of unjust enrichment is not applicable as the duty has been borne by the appellant because the duty was not payable on the said goods and moreover, no duty has been recovered by the appellant from the service recipient, as the execution of the said work was exempted from payment of duty/service tax, therefore, the appellant has been able to pass the bar of unjust enrichment.

31. We further take note of the fact that the refund claim in the impugned order has been denied on the ground which were not alleged in the show cause notice. The said grounds cannot be entertained by the appellate authority as those grounds are not the part of the show cause notice and the Id. Commissioner (A) cannot travel beyond the allegation made in the show cause notice, therefore, the said refund claim cannot be rejected on the said grounds.

32. In view of the above analysis, we hold that the appellant is entitled for refund claim in terms of Notification No. 108/95-CE dated 18.08.1995 of the duty paid on bitumen as the appellant has borne the duty on the bitumen, therefore, the impugned order is set aside.

In result, the appeal is allowed with consequential relief.

(order dictated and pronounced in the open court)

**Anil G. Shakkarwar**  
**Member (Technical)**

**Ashok Jindal**  
**Member (Judicial)**

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