

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

REGIONAL BENCH - COURT No. III

(1) Excise Appeal No.40877 of 2014

(Arising out of Order-in-Appeal No.38 & 39/2014-CE dated 29.01.2014 passed by Commissioner of Central Excise (Appeals), No.1, Foulks Compound, Anai Road, Salem 636 001).

M/s. K.G.Denim Ltd.,
Jadyampalayam,
Mettupalayam,
Coimbatore 641 302

...Appellant

VERSUS

The Commissioner of GST & Central Excise
No.1, Foulks Compound,
Anai Road,
Salem 636 001.

...Respondent

WITH

(2) Excise Appeal No.40878 of 2014

(Arising out of Order-in-Appeal No.38 & 39/2014-CE dated 29.01.2014 passed by Commissioner of Central Excise (Appeals), No.1, Foulks Compound, Anai Road, Salem 636 001).

M/s. K.G.Denim Ltd.,
Jadyampalayam,
Mettupalayam,
Coimbatore 641 302

...Appellant

VERSUS

The Commissioner of GST & Central Excise
No.1, Foulks Compound,
Anai Road,
Salem 636 001.

...Respondent

WITH

(3) Excise Appeal No.40891 of 2014

(Arising out of Order-in-Appeal No.51/2014/-CE dated 05.02.2014 passed by Commissioner of Central Excise (Appeals), No.1, Foulks Compound, Anai Road, Salem 636 001).

M/s. K.G.Denim Ltd.,
Thenthirumalai,
Mettupalayam,
Coimbatore 641 302

...Appellant

Excise Appeal Nos. 40877 & 40878 of 2014
Excise Appeal Nos. 40891 to 40893 of 2014

VERSUS

The Commissioner of Central Excise

...Respondent

No.1, Foulks Compound,
Anai Road,
Salem 636 001

WITH

(4) Excise Appeal No.40892 of 2014

(Arising out of Order-in-Appeal No.40/2014-CE dated 29.01.2014 passed by Commissioner of Central Excise (Appeals), No.1, Foulk's Compound, Anai Road, Salem 636 001).

M/s. K.G.Denim Ltd.,

...Appellant

Thenthirumalai,
Mettupalayam,
Coimbatore 641 302
Tamilnadu

VERSUS

The Commissioner of GST & Central Excise

...Respondent

No.1, Foulks Compound,
Anai Road,
Salem 636 001

AND

(5) Excise Appeal No.40893 of 2014

(Arising out of Order-in-Appeal No.50/2014-CE dated 05.02.2014 passed by Commissioner of Central Excise (Appeals), No.1, Foulks Compound, Anai Road, Salem 636 001).

M/s. K.G.Denim Ltd.,

...Appellant

Thenthirumalai,
Mettupalayam,
Coimbatore 641 302

VERSUS

The Commissioner of GST & Central Excise

...Respondent

No.1, Foulks Compound,
Anai Road,
Salem 636 001

APPEARANCE:

Shri Raghavan Ramabhadran, Advocate
For the Appellant

Shri M. Selvakumar, Assistant Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER Nos. 40411-40415/2024

DATE OF HEARING :12.03.2024

DATE OF DECISION:15.04.2024

Per: Ms. SULEKHA BEEVI C.S.

The issue involved in all these appeals being same, they were heard together and are disposed of by this common order.

2. Brief facts are that the appellant is engaged in the manufacture of cotton fabrics and holds Central Excise registration. They commenced production of Denim fabric in January 1994. They filed classification list with the Superintendent of Central Excise on 09.02.1994 classifying the products under heading 5206, claimed total exemption from excise duty vide Notification No. 31/93 dated 28.02.1993 and so discharged only additional excise duty (as per Goods of Special Importance Act, 1957) at the rate specified in the Notification No.48/90 CE dated 20.03.1990 as amended. The classification list was approved by the Assistant Commissioner, Coonoor on 03.03.1994 and the appellant accordingly paid duty till December 1994. Subsequently, on 09.12.1994 the appellant filed classification list claiming classification of Denim fabrics under tariff heading 5206 and claiming benefit of exemption Notification No.253/82 dated 08.11.1992 which allows total exemption from Basic Excise Duty and additional Excise duty under the erstwhile Central Excise and Salt Act, 1944 read with Goods of Special Importance Act, 1957. It

was stated that they were discharging additional excise duty under Notification No.33/94 under the misconception that their product was 'shrink proof'. It was explained that their product could not be considered 'shrink proof' for the reason that residual shrinkage in the fabric is always more than 1.5%. To support this, they referred to the definition of 'shrink proofed fabric' as per Board's letter F.No.115/110/64 CX-I dated 27.04.1964 and contented that the Denim fabrics manufactured by them could not be considered as 'shrink proofed'.

3. The Assistant Commissioner of Central Excise, Coonoor ordered for provisional assessment under Rule 9B of Central Excise Rules, 1944 with effect from 16.12.1994. The appellant thereafter cleared Denim fabrics (finished goods) provisionally without payment of Excise duty after executing the necessary Bond - 13 and furnishing the required bank guarantee.

4. Subsequently, the Assistant Commissioner finalized the provisional assessment by passing Order in Original No. 32/1996 dated 18.03.1996 under Rule 9B (5) of Central Excise Act, 1944 holding that the process undertaken by the appellant amounts to 'manufacture' and that the appellant is liable to pay duty on the Denim fabrics cleared by them for the period 16.12.1994 to 29.02.1996. In terms of finalization of assessment the duty amount was quantified and confirmed to the extent of Rs.3,28,12,544.46.

5. Against such order, the appellant filed an appeal before the Commissioner (Appeals) and vide Order in Appeal No. 421/1996

dated 18.06.1996 the Commissioner (Appeals) upheld the order passed by the Original Authority.

6. Against such order the appellant preferred an appeal before the Tribunal (CEGAT). As per Final Order No.334/1999 dated 04.02.1999 the Tribunal remanded the matter to the Original Authority for *de nova* adjudication. The relevant paragraph of the said order is of much importance in further analyzation of the issue in these appeals and therefore reproduced as under:

“14. We notice that the true import and the ratio of the Hon’ble Supreme Court judgement rendered in the case of **M/s.Siddeshwari Cotton Mills** has not been gone into by the Tribunal in the case of **M/s.Amtex India Pvt. Ltd.** and, therefore, this judgement is subsilentio and not in keeping with the principles of the Hon’ble Supreme Court. Therefore, this judgement of **Amtex India Pvt. Ltd.** is not only distinguishable but it is not at all helpful in determining the controversy in the present case. On this count alone the order of Commissioner (Appeals) is unsustainable and requires to be set aside. The question is whether the matter can be referred to the Commissioner (Appeals) to deal with the materials placed by the appellants and also to answer the points dealt with by the Assistant Commissioner. We would have been inclined to send the matter to the Commissioner (Appeals). However, we find that the Assistant Commissioner in the Order-in-Original has not properly comes to grasp with the allegations made by the revenue and has not analysed the effect of the evidences placed by the assessee.

...

18. We also find that in view of our order noted above, that the additional evidence sought to be introduced at this stage by the appellants is in fact relevant to the issue and should be considered to arrive at the truth. Therefore, in view of this as well as the above infirmities in the Assistant Commissioner's order, interest of justice would clearly require that the matter is remanded back

to the Assistant Commissioner concerned for a *de novo* consideration of these issues as well as any other evidence which both sides may lead before him.

19. While remanding the matter to the original authority, we are acutely aware of the delays that this course of action may likely cause and have, therefore, adverse effect on either side's interest. We, therefore, order that the Assistant Commissioner concerned shall forthwith commence these proceedings on *de novo* basis and after hearing both sides, pass a speaking order in terms of the directions contained above within 4 months from the date of receipt of this order. This time limit has been ordered with the consent of both sides in court. The appellants also assures full co-operation in the matter with the revenue for the purpose of expediting the proceedings.

20. The appeal succeeds by way of remand in terms of the above directions.”

7. Pursuant to remand, *de novo* adjudication was conducted by the Original Authority and passed the *de novo* Order-in-Original dated 13.07.1999 by which it was held that the process undertaken by the appellant does not amount to ‘manufacture’. It was therefore held that the appellant is not liable to pay excise duty. Against this order, the Department preferred an appeal before the Tribunal as Appeal No. E/887/2000.

7.1 Meanwhile, Central Excise officers had registered an offence case against the appellant on 23.12.1997 on the allegation of mis-declaring Denim fabrics which were subject to processing in the Monfort machine as unprocessed and cleared without payment of Central Excise duty. A SCN dt. 18.06.1998 was issued. During the investigation the appellant paid Rs.2,05,00,400/-. The goods / fabric seized during the investigation was then released provisionally.

8. After the earlier OIO dt. 18.03.1996 finalizing the assessment, the appellant had started paying duty. They also availed the benefit of deemed credit of duty paid vide Notification No.29/98 (NT) dated 03.09.1996. This notification prescribed different rates of credit for the fabrics as under :

- (a) 50% of duty of excise leviable on final products of cotton (not containing any other textile materials)
- (b) 60% of duty of excise leviable on the final products other than those specified in sub-clause (a).

The appellant was availing credit at the rate specified in clause (b) being final product of cotton but containing other textile materials, viz; monofilament and polyester. The department was of the view that appellant is not eligible for credit and show cause notices dt. 29.07.1998, 7.9.1998, 27.11.1998, 13.01.1999, 16.03.1999 and 31.05.1999 were issued for different periods proposing to disallow the credit and to recover the wrongly availed credit.

8.1 While conducting *de nova* adjudication of the matter which had been remanded by the Tribunal, the assessee requested to adjudicate the Show Cause Notice dated 18.06.1998. The appellant was yet to reply to this SCN. In para 13 of the *de novo* order dt. 13.07.1999, the original authority observed that since the question of manufacture is the root issue which has to be decided first, and this question being now open and the Tribunal having found that the failure to decide this question being fatal, this issue which goes to root of the matter is taken up first. Thus, in the *de nova* Order in Original dated 13.07.1999, the Original Authority had taken up the matter of finalization of provisional assessment remanded by the Tribunal as well as the demand raised by the department in Show Cause Notices dated 18.06.1998, 29.07.1998 (Rs.8,19,95,136/-) and 07.09.1998 (Rs.95,80,312/-) and 27.11.1998, 13.01.1998,

16.03.1999, 31.05.1999 (Rs.4,65,47,453/-). In *de novo* proceedings, Original Authority held that the process does not amount to 'manufacture' and that appellant is not liable to pay duty and also dropped all the proceedings initiated in the Show Cause Notices dated 29.07.1998 (Rs.8,19,95,136/-), 07.09.1998 (Rs.95,80,312/-) and 27.11.1998, 13.01.1999, 16.03.1999, 31.05.1999 (demands of an amount of Rs.4,65,47,453/-).

9. Against the *de novo* Order in Original dated 13.07.1999 the department filed an appeal No.E/887/2000 before the Tribunal. As per Final Order No.1204/2005 as reported in 2005 (205) ELT 957 (Tribunal-Bang.), the order passed by the adjudicating authority was upheld. The Tribunal upheld the *de novo* order that the process undertaken by the appellant does not amount to manufacture and that the appellant is not required to pay excise duty. Against this, though the department filed appeal before the Hon'ble High Court as CMA No.1193/2007, the same was dismissed by judgment dated 21.08.2014. Against this, the Department again filed appeal before the Hon'ble Apex Court as Civil Appeal No.014538/2015 and is still pending.

10. Meanwhile, the appellant approached the Hon'ble High Court by filing Writ Petition No.8324 of 1999 seeking for refund of the duty paid by them. The Hon'ble High Court directed the department to refund the entire amount due to the writ petitioner within 12 weeks from the date of communication of the order. The relevant part of the order of the Hon'ble High Court is reproduced as under.

"4. Learned Counsel for the respondents represents that a sum of Rs.1.20 crores being the pre-deposit has already been refunded on 8.10.1999. Apart from the said sum, the writ petitioner has already made number of claims for refund of

various amounts collected by way of excise duty. It is clearly admitted by the Learned Counsel for the respondents that the amounts are to be refunded subject to verification of accounts. Learned Counsel for the respondents requests twelve weeks' time to issue consequential orders of refund of all levels so far collected and the actual refund of the amount. In the circumstances, there will be a direction to the respondents to pass consequential orders of refund and refund entire amounts due to their writ petitioner as provided in the Central Excise Act and the Rules therein within twelve weeks from the date of communication of this order.

5. There will be an order in this writ petition on the above terms. No costs. Consequently, WMPs are dismissed"

11. Pursuant to the order of the Hon'ble High Court, the refund claim dated 23.07.1999 to the tune of Rs.2,05,00,400/- (paid during investigation) was refunded to the appellant vide refund sanction order dated 17.08.1999. Against such sanction of refund, the department filed appeal before the Commissioner (Appeals) and vide Order-in-Appeal No.40/2014 dated 29.01.2014 the Commissioner (Appeals) set aside the sanction of refund. Aggrieved by such order the appellant has filed E/40892/2014.

12. The other four appeals arise out of the refund claim filed by the appellant on 04.11.1999. The appellant filed this refund claim for refund of the duty that was paid by the appellant from 01.04.1996 to 12.05.1999. It is to be noted that this does not relate to the period 16.12.1994 to 29.02.1996 which was the period taken up for finalization of the assessment. The appellant was not paying duty from 16.12.1994 to 29.02.1996 under provisional assessment. They started paying duty only w.e.f. 01.04.1996 after the earlier Order-in-Original dt. 18.03.1996 finalising the assessment.

13. After the earlier finalization of assessment vide order dated 18.03.1996 the appellant informed the department vide letter dated 22.03.1996 and subsequently on various dates that they do not accept the order dated 18.03.1996 and intend to prefer an appeal. They stated that they would continue to clear the goods under provisional assessment. After the *de novo* Order in Original dated 13.07.1999 by which the original authority held that the process undertaken by the appellant does not amount to manufacture and that the appellant is not required to pay duty, the appellant filed this refund claim on 04.11.1999 for refund of duty paid by them from 01.04.1996 to 12.05.1999. Show Cause Notices were issued proposing to reject the refund claim. Three separate Show Cause Notices were issued on 10.01.2000 which are categorized as claim of refund of the duty paid through PLA (Rs.16,06,23,409/-) duty paid through RG.23A (Rs.4,06,82,939/-) and the duty of Rs.26,66,026/-. After due process of law, the original authority rejected the refund claim in toto holding that the claim is hit by limitation as well as the doctrine of unjust enrichment. Against such order, the appellant preferred appeals before Commissioner (Appeals) who vide OIA No.38 and 39/2014 dt. 29.01.2014 and OIA 50 and 51/2014 upheld the rejection of refund claims. The appellant has thus filed appeal E/40877 and 40878/2014 and E/40891 and 40893/2014.

14. The Ld. Counsel Shri Raghavan Ramabhadran appeared and argued for the appellant. The details of the period of refund, amount of refund involved and Show Cause Notices in different appeals are summarized in the table below:

Appeal No.	E/40877/2014	E/40878/2014	E/40891/2014 & E/40893/2014	E/40892/2014
Period	01.04.1996 to 12.05.1999	11.09.1996 to 07.05.1999	31.03.1998 to 10.06.1999	06.01.1998 to 03.02.1998; 11.05.1998
Show Cause Notice (SCN)	SCN No. V/52/18/101/99 dated 10.01.2000	SCN No. V/52/18/103/99 dated 10.01.2000	SCN No. V/CH.52/18/104/99 RF dated 10.01.2000	N/A
	SCN No. V/52/18/99/99 dated 10.01.2000			
	SCN No. V/52/18/100/99 dated 10.01.2000			
	SCN No. V/52/18/102/99 dated 10.01.2000			
Order in Original (OIO)	OIO No. 32/2000 dated 11.04.2000	OIO No. 33/2000 dated 26.04.2000	OIO No. 38/2000 dated 01.05.2000	Sanction Order C No. V/CH 52/18/50 dated 17.08.1999
Disputed Refund amount (in INR)	16,06,23,409 [duty paid under provisional assessment through PLA]	4,06,82,939 [duty paid under provisional assessment through RG 23A]	26,66,026 [duty paid under provisional assessment]	2,05,00,400 [Paid during investigation – refunded to Appellant]
Date of refund claim	04.11.1999	04.11.1999	04.11.1999	23.07.1999
Unit claiming refund	DTA Unit		EOU Unit	DTA Unit

Order in Appeal No. (Impugned Orders)	Order in Appeal No. 38 & 39/2014 dated 29.01.2014	Order in Appeal No. 50 & 51/2014 dated 05.02.2014	Order in Appeal No. 40/2014 dated 29.01.2014
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15. It is submitted that the Appellant is engaged in the business of processing of cotton fabrics, commonly known as Denim fabrics since 1994. The denim fabrics processed by the Appellant fall under Tariff Heading 5206 during the period prior to 16.03.1995 and under 5207 after such date. of the Central Excise Tariff, 1985. The present appeals pertain to the rejection of refund of excise duties. These excise duties were paid provisionally on clearance of denim fabrics from the DTA unit, EOU Unit, refund of deemed credit availed in terms of Notification No. 29/96-Central Excise (Non-Tariff) dated 03.09.1996 and refund of excise duty paid as advance deposit under protest during investigation. The factual matrix regarding both the issues is explained as follows.

15.1 The process undertaken on the denim fabrics viz., calendaring, dampening and singeing is exempted from payment of excise duty vide Notification No. 253/1982-Central Excise (Tariff) dated 08.11.1982 ('Exemption Notification'). Accordingly, the Appellant filed a letter dated 09.06.1994 with the Assistant Commissioner, Coonoor, stating that they are not liable to pay any excise duty on processing of denim fabrics.

15.2. The Assistant Commissioner, Coonoor passed an Order dated 16.12.1994 under Rule 9B of Central Excise Rules, 1944 ["CER, 1944"] permitting the Appellant to effect clearances without payment of duty under provisional assessment. Consequently, the Appellant cleared denim fabrics ('goods') provisionally without

payment of excise duty, after executing the necessary Bond-13 and furnishing the required bank guarantee.

15.3. Subsequently, the Assistant Commissioner finalized the provisional assessment by passing an Order in Original No. 32/1996 dated 18.03.1996 under Rule 9B (5) of CER, 1944 holding that the process undertaken by the appellant will qualify as manufacture and that the Appellant is liable to pay duty on the denim fabrics cleared during the period between 16.12.1994 to 29.02.1996.

15.4. Events that transpire after the Order dated 18.03.1996, finalizing the provisional assessment, is tabulated below.

Date	Event
22.03.1996	Appellant informed the department about non-acceptance of the Order dated 18.03.1996 and that they continued to clear under provisional assessment.
18.06.1996	Order in Appeal No. 421/96 dated 18.6.1996 ["OIA dated 18.06.1996"] upheld the Order dated 18.03.1996 finalizing provisional assessment.
25.06.1996	Appellant informed the department about non-acceptance of OIA dated 18.06.1996 and that they continued to clear under provisional assessment.
04.02.1999	CEGAT Madras vide Final Order No. 334/99 dated 04.02.1999 set aside the OIA dated 18.06.1996 and consequently the Order dated 18.03.1996 and remanded the matter for de-novo adjudication.
13.07.1999	Ld. Commissioner, Coimbatore passed a <i>de novo order</i> vide Order in Original No. 8/99 dated 13.07.1999 (' <i>de novo order</i> ') in favour of the Appellant holding that the process undertaken on denim fabric does not amount to manufacture.
04.11.1999	Filed refund claim of duty paid under provisional assessment for the period 01.04.1996 to 12.05.1999.

26.07.2005	CESTAT vide Final Order No. 1204/2005 dated 26.07.2005 affirmed the <i>de novo order</i>
21.08.2014	High Court dismissed department's C.M.A No. 1193 of 2007 before the Madras High Court
02.11.2015	Department filed Civil Appeal No. 014538 of 2015 before the Supreme Court and the same is pending

15.5. In light of the above events that transpired from the Order dated 18.03.1996 till the *de novo order* dated 13.07.1999, duty was paid by appellant under provisional assessments and the assessments were finalized only vide the *de novo order* dated 13.07.1999.

15.6. Accordingly, during this period (i.e. from order dated 18.03.1996 to *de novo order* dated 13.07.1999), the Appellant cleared goods on payment of duty amounting to Rs.16,06,23,409/- using PLA and amount of Rs. 4,06,82,939/ using RG23A credit from the DTA Unit. The Appellant cleared goods from their EOU Unit on payment of duty amounting to Rs. 26,66,026/-.

15.7. The refund claims of the Appellant were rejected by adjudicating authority on grounds of limitation and unjust enrichment. Aggrieved by the same, Appellant filed an appeal before the Commissioner (Appeals). The department also filed an appeal against the OIO rejecting the refund of amount claimed by the EOU unit of Rs. 26,66,026/- on the ground that the OIO is non-speaking on merits. A common Impugned Order in Appeal No. 50 & 51 of 2014 was passed by the Commissioner (Appeals).

15.8. Pursuant to initiation of a case alleging misdeclaration of goods, the Appellant had deposited Rs.2,00,00,000/- as advance deposit in seven dates vide TR-6 Challan from 06.01.1998 to 03.02.1998 and Rs. 5,00,400/- vide TR-6 challan dated 11.05.1998 as duty in respect of the goods seized by the department.

16. Consequent to the *de novo* order, which also dropped the proceedings of the said case, the Appellant filed refund claim of Rs. 2,05,00,400/-, which was duly granted by the department vide Sanction Order C.No.V/CH52/18/50/99 dated 17.08.1999 ('Sanction Order') pursuant to the directions of the Hon'ble Madras High Court in Writ Petition No.15613 of 1999 and Writ Appeal No.39 of 2000.

16.1 No recovery notice has been issued to the Appellant for recovering the refund that has been sanctioned as per direction of the Hon'ble High Court.

16.2 However, the department filed an appeal against the Sanction Order and the Commissioner (Appeals) vide Order in Appeal No. 40/2014 dated 29.01.2014 set aside the sanction of refund vide Order dated 17.08.1999.

16.3 All issues are common in these appeals. According to department :

- a. Provisional Assessments: The assessments were not provisional during the period as there is no express order of provisional assessment.

- b. Time Limit: The date of payment/adjustment of duty would be the criterion for determining the time limit in this case and hence the refund claims are time barred.
- c. Unjust Enrichment: The refund claims are hit by the doctrine of unjust enrichment as the Appellant has charged and collected duty from the buyers.

16.4 It is argued by the Ld. Counsel that impugned OIAs are incorrect and merits to be set aside. In this regard, the Appellant makes the following submissions without prejudice to each of the grounds :

A. In light of the CEGAT order dated 04.02.1999, assessment during the entire period from 16.12.1994 to 13.07.1999 was provisional. Hence, the Appellant is eligible for refund without resort to Section 11B.

A.1. The Order dated 18.3.1996 which finalized the provisional assessments was set aside by CEGAT, Madras vide its Final Order No.334/99 dated 4.2.1999, and the matter was remanded for *de novo* decision.

A.2. In light of the order passed by CEGAT, Madras, *status quo ante* has been restored and the position that prevailed prior to the passing of Order dated 18.3.1996 gets restituted.

A.3. The provisional assessment was restituted in view of CEGAT's Final Order dated 04.02.1999 and hence the Department cannot take a stand that the assessment stood finalized vide the *de novo* order dated 13.07.1999.

A.4. In this regard, it is submitted that when an order is set aside by an appellate forum, the law of restitution will apply, and the matter will go back to the original position as it was before the order set aside was passed. To support this submission reliance is placed upon decision of the Hon'ble Supreme Court in **South Eastern Coalfields Ltd v. State of M.P. and others 2003 SCC Online SC 1127**.

A.5. Therefore, by applying the principle of restitution, duty paid during the disputed period which is claimed as refund has been paid under provisional assessment. The order permitting clearance under provisional assessment dated 16.12.1994 will continue till the date of the *de novo order* dated 13.07.1999, which finalized the provisional assessment with NIL duty liability.

A.6. Consequently, the refund claims are in accordance with law and the Impugned Orders merits to be set aside.

B. The goods ('denim fabrics') cleared on payment of duty from 01.04.1996 are deemed to be cleared under provisional assessment in terms of Rule 9B of CER, 1944.

B.1 Without prejudice, the Appellant submits that the department has not denied the request(s) made by Appellant vide letters dated 22.03.1996 and 25.06.1996 to clear denim fabrics under provisional assessment.

B.2 The Appellant submits that in terms of the Proviso to Rule 9B (1) of CER, 1944, from the date of filing of request for provisional assessment to the date of decision of proper officer, the assessment will be 'deemed to be provisional'. Reliance is also placed on Para 1.2 of the Circular No. 288/4/97- Central Excise dated 14.01.1997.

B.3 The Tribunal in **Commissioner of Central Excise, Nagpur v. White Cliff Tea - 2004 (168) E.L.T. 413 (Tri. - Mumbai)**, has held that assessments are deemed to be provisional if no

directions are issued by the proper officer on receipt of application for provisional assessment.

B.4 Hence, the common finding in OIAs, Para 5 of the Impugned Order (Appeal No. E/40877 & 40878/2014), that the assessments are not provisional in absence of express order is incorrect and the Impugned Orders merit to be set aside on this ground.

C. Time limit prescribed under Section 11B is not applicable for refunds arising out of finalization of provisional assessment.

C.1 The Impugned Order has denied the refund claim on the ground of limitation by invoking the time limit of six months under Section 11B of Central Excise Act, 1994 ('CEA') as it then existed and by applying the 'relevant date' to file refund claim as the date of payment of duty. The Appellant submits that Section 11B of the CEA is not applicable to refunds arising out of finalization of provisional assessment. Reliance is placed on the decision of **Mafatlal Industries Ltd v. Union of India 1997 (89) E.L.T. 247 (S.C.)**.

C.2 The Appellant submits that only with effect from 25.06.1999, the provisions of Section 11B was made applicable to Rule 9B of CER by way of an Amendment. For the period prior to 25.06.1999, refund claims arising out of finalization of provisional assessments were not governed by the time limit prescribed under Section 11B of CEA.

C.3 Therefore, the refund applications of the Appellant which arose out of finalization of provisional assessment under Rule 9B (5) of CER cannot be rejected on the ground that the refund applications are time-barred.

C.4 Without prejudice to the above, even assuming that the time limit prescribed under Section 11B of CEA is applicable, the refund claims in the instant appeal are not time barred. The Appellant submits that the 'relevant date' for filing the refund claims arising

out of the order finalizing provisional assessment is the date of the order finalizing provisional assessment which in the instant case is the *de novo order* dated 13.07.1999.

C.5 The Appellant has submitted the refund claims with respect to refund of duty paid under provisional assessment on 04.11.1999, within 6 months from the *de novo order* dated 13.07.1999, which finalized the provisional assessment. Further, with respect to the refund of the amount paid under investigation, the appellant has filed the refund claim on 23.07.1999 which is also well within 6 months from the *de novo order* dated 13.07.1999.

C.6 Therefore, the refund applications in the instant appeal are not time barred on this ground as well.

C.7 Hence, the instant Appeal(s) are to be allowed and refund claims are not time-barred.

D. Unjust Enrichment is not applicable for duty paid under provisional assessment during the period under dispute.

D.1. The Appellant submits that unjust enrichment is not applicable to provisional assessment during the period under dispute.

D.2. The Appellant submits that Rule 9B of CER 1944, which provides for provisional assessment, did not provide for the principle of unjust enrichment during the period of dispute (i.e., 01.04.1996 to 12.05.1999).

D.3. Reliance is placed on the decision of the Hon'ble Bombay High Court in **Commissioner of Central Excise, Mumbai-III v. CEAT Ltd. 2018 (361) E.L.T. 420 (Bom.)**, wherein it is held that the principle of unjust enrichment cannot be made applicable to the refunds arising out of finalization of the provisional assessments pertaining to the period prior to 25.06.1999 even if the assessments are finalized after 25.06.1999. This principle has been followed in the following decisions of this Tribunal:

- **The Commissioner of Central Excise, Visakhapatnam-I v. Hindustan Shipyard Ltd 2020 (4) TMI 338 - CESTAT Hyderabad**
- **Commissioner of GST & Central Excise, Chennai v. M/s. Royal Enfield (Unit of M/S. Eicher Motors Ltd.) 2023 (3) TMI 496 - CESTAT Chennai**

D.4. Therefore, it is a settled position in law that principle of unjust enrichment is not applicable to the refund claims arising out of the finalization of the provisional assessment prior to 25.06.1999. Accordingly, the appeals merit to be allowed.

E. The fact of not passing on the duty paid by the Appellant is evidenced by the fact that the price of denim fabrics cleared remained the same.

E.1. Without prejudice, even assuming that the doctrine of UJE is applicable, the Appellant has established that the price charged was not changed when fabrics were cleared without payment of duty and after payment of duty. This fact has not been disputed at all.

Before finalization of provisional assessment			After finalization of provisional assessment		
Type of fabric	Invoice No.	Rate	Type of fabric	Invoice No.	Rate
16 OZ DS	1192 2.2.96	Rs.88	16 OZ DS	70 22-4-96	Rs. 80 + Rs. 8
16 OZ FH	1192 2.2.96	Rs.109	16 OZ FH	70 22-4-96	Rs. 99.09 + Rs. 9.91

E.2. The Appellant submits that this factual position has been confirmed by the authorities vide Annexure to the show cause notice V/Ch52/18/71/2000 dated 04.04.2000 and the Impugned Order draws an incorrect inference that the duty has been passed on by the Appellant to its customers.

E.3. The submission of the Appellant before the lower authority to prove that the duty has not been passed on by the Appellant to its customers has not been considered in proper light by the

Impugned Order. Hence, the Impugned Order is to be set aside on this ground.

F. The amount deposited during investigation is in the nature of deposit and hence Section 11B does not apply to refund of such amount. Hence, the refund claim is not barred by limitation nor subject to the test of unjust enrichment.

F.1. The Appellant submits that the de novo order has dropped the proceedings of the case of misdeclaration and consequentially the Appellant is eligible for refund of the amount of Rs. 2,05,00,400/- which was deposited during the investigation.

F.2. The Order in Original dated 17.08.1999 has correctly held that Rs.2,00,00,000/- is an advance deposit and Rs. 5,00,400/- is the amount paid for provisional release of goods and hence the time limit is not applicable and also that the question of unjust enrichment does not arise.

F.3. The amount paid during investigation, would be in the nature of deposit under protest and therefore the principles of unjust enrichment would not apply. In this regard, reliance is placed on the decision of the Hon'ble Madras High Court in **Commissioner of C. Ex., Coimbatore v. Pricol Ltd. 2015 (320) E.L.T. 703 (Mad.)**. The said decision of the Hon'ble Madras High Court has also been relied in the decision of the Hon'ble Tribunal in **Chambal Fertilizers & Chemicals Ltd. v. Commissioner of CGST, Udaipur 2023 (71) G.S.T.L. 171 (Tri. - Del.)**.

F.4. The Appellant submits that it is a well settled principle that the time limit prescribed under Section 11B will not apply for amounts deposited during the course of investigation as the same shall be deemed to have been paid under protest. In this regard, reliance is placed on the decision of the Hon'ble Supreme Court in **Mafatlal Industries Ltd v. Union of India 1997 (89) E.L.T. 247 (S.C.)**

F.5. Hence, the refund claim of Rs.2,05,00,400/- cannot be barred by limitation and the question of unjust enrichment does not arise.

F.6. Hence, the finding in the Order in Original dated 17.08.1999 is to be upheld and the Impugned Order in Appeal No. 40/2014 dated 29.01.2014 merits to be set aside.

17. The Ld. Counsel prayed that the appeals may be allowed.

18. The Learned A.R Shri M. Selvakumar appeared and argued for the department. It is submitted that the contention of the appellant that the provisional assessment was not finalized vide order dated 18.03.1996 and that the same has been finalized only vide *de nova* order dated 13.07.1999 cannot be accepted. During the period of provisional assessment from 16.12.1994 to 29.02.1996 the appellant was not paying duty on the Denim Fabrics cleared by them. Thereafter on 18.03.1996 the adjudicating authority has passed order finalising the provisional assessment and holding that the process undertaken by the appellant amounts to manufacture and that appellant is liable to pay duty. The appellant filed appeal before the Commissioner (Appeals) and also later appealed before the Tribunal. Merely because an appeal is filed against the order passed finalising the provisional assessment, it cannot be said that the assessment is not finalized. The Tribunal vide Final Order dated 04.02.1999 had remanded the matter for *de novo* adjudication. In such *de novo* adjudication the original authority held that the process undertaken does not amount to 'manufacture' and that appellant is not liable to pay duty. The department filed appeal against such order before the Tribunal and vide Final Order dated 26.07.2005, the Tribunal upheld the *de novo* order passed by the adjudicating authority. However, the matter is still pending before the Hon'ble Apex Court

as the department has filed Civil Appeal No.014538 of 2015 against the order of the Hon'ble High Court of Madras. It is argued by the Ld. AR that the finalization has happened on 18.03.1996 and it cannot relate back when the Tribunal has remanded the matter for *de nova* adjudication. For this reason, the refund claim filed by the appellant on 04.11.1999 is barred by limitation. As per Section 11B the time limit to file the refund claim was six months during the relevant period. The refund claim having been filed only on 04.11.1999 after the finalization of assessment on 18.03.1996, the adjudicating authority has correctly held that the refund claim is barred by limitation.

19. The second ground on which the refund claim has been rejected is that the appellant has not been able to establish that the duty element has not been passed on to the customers. In the present case, from 01.04.1996 to 12.05.1999 the appellant has been paying duty on the denim fabrics cleared by them. Merely by stating in a letter issued to the department that they continue to clear goods under provisional assessment and is paying duty under protest it cannot be said that the provisional assessment continues. There is no order passed by department to continue provisional assessment. The argument of the assessee that doctrine of unjust enrichment is not applicable to provisional assessment under Rule 9B during the relevant period (prior to 25.06.1999) cannot be accepted. The assessment having finalized much prior to such date, the duty paid is not provisional and therefore the doctrine of unjust enrichment applies.

19.1 It is the burden of the assessee to establish that the duty has not been passed on to another. Though the appellant contends that

they have borne the incidence of duty, it can be seen that they have issued invoices while clearing the denim fabrics. As per Section 12A of the Central Excise Act 1944, an assessee has to indicate the price of goods and the amount of duty in the invoices. As per Section 12B of Central Excise Act 1944, every person who has raised invoices and paid the duty of central excise on any goods is deemed to have passed on incidence of duty to the buyer of the goods. The assessee having issued invoices it has to be presumed that the duty is passed on to ultimate consumers. It is clearly brought out from evidence that the refund is hit by unjust enrichment.

20. It is submitted that the Commissioner (Appeals) has correctly rejected the refund. The Ld. AR prayed that the appeals may be dismissed.

21. Heard both sides.

22. The issue to be analysed is whether the refund claim is hit by limitation and the doctrine of unjust enrichment.

23. According to the appellant, they have discharged the duty with effect from 01.04.1996 to 12.05.1999 (period of refund claim) under provisional assessment as the finalisation has happened only as per *de novo* order dt. 13.07.1999. It is to be noted that the period involved for finalisation of assessment is from 16.12.1994 to 29.12.1996. The refund claim is for subsequent period which is from 01.04.1996 to 12.05.1999. Thus, the period of dispute for finalisation of assessment is not the period of dispute in the refund claims. The appellant was issued SCN for finalisation of assessment. So also, separate SCNs were issued proposing to reject the refund claims. The argument of the appellant is that

since the issue of finalisation was remanded and thereafter *de novo* order was passed only 13.07.1999, the period from 16.12.1994 till 13.07.1999 has to be treated as under provisional assessment. The department contends that the finalisation has happened on the date of earlier order (18.03.1996) itself and therefore the refund claim pertaining to subsequent period is hit by limitation having filed beyond six months. It is also observed by the department that the relevant date is the date of payment of duty and therefore hit by limitation. The appellant contends that if the date of finalisation is taken as 13.07.1999, the refund claim dt. 04.11.1999 is well within time limit of six months.

24. The relevant part of the final order passed by the Tribunal while remanding the matter has already been reproduced in para 6 of this order. It can be seen that the Tribunal set aside the order passed by Commissioner (Appeals) and the matter was remanded for *de novo* adjudication. This means that the finalization which has happened on 18/03/1996 has been completely set aside and has become *non-est*. The order of finalisation dt. 18.03.1996 becomes an order having no force of law. The department did not file any appeal against such order of remand passed by Tribunal. Thus order of setting aside the finalisation of assessment dt. 18.03.1996 and remand has attained finality. When an appellate court invalidates the verdict of an adjudicating court, the said order of adjudicating authority is annulled. In other words, it is to be ignored for all purposes. When the Tribunal remanded the matter for fresh consideration of the finalisation of assessment, it vacated the earlier order of finalisation dt. 18.03.1996 and put the parties to *status quo ante*. The parties return to the status prior to finalisation. No doubt that finalization has happened only by the *de novo* order dt. 13.07.1999. Only after finalization of a provisional assessment, the duty, if any, would be payable / recoverable for

the period for which the finalization was carried out. So also, in continuation of finalisation, the duty so determined would be applicable to the goods cleared for the subsequent periods also. In the present case, the appellant started paying duty as determined by the finalization order dt. 18.03.1996 and intimated the department that they do not accept the order and are paying duty provisionally.

25. The Ld. Counsel for appellant has asserted that during the period pertaining to the refund claim, the assessment continued to be provisional. It is thus submitted that the duty paid is only provisional and therefore the relevant date for computing the period of limitation of six months would be the date of *de novo* order of finalisation which is 13.07.1999. The Ld. A.R argued that the finalisation has happened on 18.03.1996 and that merely by writing letters, the appellant cannot continue under provisional assessment. Let us proceed to examine the issue whether the duty paid from 01.04.1996 to 12.05.1999 was only provisional. This point has bearing to the issue of limitation as well as unjust enrichment.

26. It is submitted by appellant that though the original authority had finalized the assessment as per order in original dated 18.03.1996, the appellant had issued letters to the department stating that they intend to file appeal against such order of finalization, and also that they would be discharging the duty on their final products under provisional assessment. The letter dated 22.03.1996 is reproduced as under:

Excise Appeal Nos. 40877 & 40878 of 2014
Excise Appeal Nos. 40891 to 40893 of 2014



K G Denim Limited

Jadayampalayam Post - 641 302 Coimbatore (Dist) India.
Phone (4254) 52331-4 Tlx 855 369 KG IN Fax (4254) 22999

22-03-96

The Assistant Commissioner of Central Excise
No. 16B Kushal Kiruba
Mount Pleasant Road
Coonoor - 2.

Sir

Sub: Provisional Assessment.

Ref: Your Order-in-Original No. 32/96 dated 18.3.96.

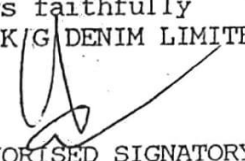
Today we have received a copy of your above order by Post. Please note that we are not accepting the above order and we will be going on appeal to the appropriate authorities and all payments we make towards duty from now on should be treated as payments under provisional assessment.

At the time of availing provisional assessment, we have executed a B-13 Bond to cover the liability, if any and the bond is in force even now.

Kindly acknowledge.

Thanking you

Yours faithfully
for K/G DENIM LIMITED


AUTHORISED SIGNATORY

27. In the above letter it has been expressly stated by the appellant to treat the payment of duty to be under provisional assessment. The department has remained silent and chose not to respond to this letter. After the order passed by Commissioner (Appeals) dated 18.06.1996 upholding the finalization of provisional assessment and holding that the process undertaken by the appellant amounts to 'manufacture', the appellant preferred an appeal before the Tribunal. Appellant again intimated the

department vide letter dated 25.06.1996 requesting the department to treat all the payments of duty made by them under provisional assessment. The said letter reads as under :

"The Asst. Commissioner of Central Excise
16-B, Kushal Kiruba
Mount Pleasant Road,
COONNOOR – 2. 25.06.1996

Sir,

Sub : Central Excise – Our appeal dated 27.5.96.

Reg : Your Order-in-Original No.32/96 dated 18.3.96.

In continuation of our letter dated 22.3.96 we write to inform you that against the above cited Order-in-Original we filed an appeal before the Commissioner Appeals, Tichy and today we have received Order-in-Appeal No.421/96 (CBE) dated 18.6.96. We shall be going on appeal the order dated 18.6.96 and we request you to treat all the payments we make towards duty as payments under provisional assessment.

At the time of availing provisional assessment, we have executed a B-13 Bond to cover the liability, if any and the bond is in force even now.

Please acknowledge receipt of this letter.

Thanking you,

Yours faithfully,
For K G DENIK LIMITED

Sd/-
AUTHORIZED SIGNATORY"

27.1 The department did not respond to any of these letters. The department by not responding to the letters has accepted the intention of the appellant to continue with the provisional assessment. In the case of **CCE Nagpur Vs White Cliff Tea** (supra) in a similar situation where the department did not issue any direction under Rule 9B after receiving an application for provisional assessment, it was held that the assessment is deemed

to be provisional. In the present case, even after receiving the letters issued by appellant informing the department that they intend to continue under provisional assessment the department has not passed any order rejecting the said request. Pertinently, there was already an earlier order for provisional assessment passed under Rule 9B. It is not a situation where there is no order passed under Rule 9B at all. When the finalisation of assessment dt. 18.03.1996 is set aside and matter remanded both parties are put to *status quo ante*. The parties return to the state of affairs that existed previously. The adjudicating authority while passing the *de novo* adjudication order in page 2 at para 12 has observed as under :

“I propose to dispose of the proceedings initiated by Assistant Commissioner of Central Excise, Coonoor Divisional which resulted into his finalizing the provisional assessment vide his order referred at para 3 above (For this case, SCN was issued on 6.3.1996)”

The matter reached the Tribunal and vide Final Order dated 04/02/1999, the matter was remanded for *de novo* adjudication. The Tribunal while remanding the matter has set aside the earlier order of finalization of assessment. The question to be looked into is whether after such remand the date of finalization of assessment would relate back to 18.03.1996 as contended by Department or whether the finalization has happened only on 13.07.1999 as argued by the Appellant. We hold that finalization of assessment has happened only on 13.07.1999 and the payment of duty for the period of refund is only provisional.

27.2 In the application for refund dated 04/11/1999 the appellant has stated as under :

C. We were allowed to clear under provisional assessment from 23.12.94. The provisional assessment was finalized by the Assistant Commissioner on 18.03.96 for the period upto 28.02.96.

During provisional assessment we have executed a B-13 Bond and bank guarantee for Rs.22.5 lakhs. The bank guarantee was enforced by the department but the security bond executed by us remain in force even now.

We did not agree for the provisional assessment finalized by the Assistant Commissioner and we went on appeal up to CEGAT, Chennai. The Hon'ble Tribunal have set aside both the order of the Assistant Commissioners and the Commissioners Appeals and also remanded the matter to the original authority with some specific directions and observations. The Commissioner of Central Excise, Coimbatore has adjudicated and held that there is no manufacture and dropped all the proceedings and also allowed consequential benefits to us.

In view of the above till the finalization of the provisional assessment by the Commissioner on 13.07.99 the duty should be deemed to have been paid under protest.

2. We enclose the following documents in support of the claim.

a) Copy of PLA for the month of April'96 to March 97

b) B-13 Security Bond dated 21.12.1994

3. The amount paid was originally paid by us in PLA account in month of April'96 to March'97 on various dates.

4. The payment of refund may please be made in our favour by crossed cheque.

5. We declare that no refund on this account has been claimed / received by us earlier.

6. We undertake to refund on demand being made within six months of the date of payment of refund if erroneously paid to us.

28. Rule 9B of Central Excise Act 1944 provides for provisional assessment. The provision is noticed in para 33 of this order. The appellant has also adverted to the circular no.288/04/97-CX dated 14/01/1997 issued by the department in regard to provisional assessment. The said circular reads as under:

Consequent upon introduction of self assessment system, amendments in Rule 9B has been affected by Notification No. 36/96-CE(NT) dated 20.11.96 to align it to the new system. The assessee may request for provisional assessment in two situations: (1) Where the assessee is unable to determine the value of excisable goods in terms of Section 4 of the Act on account of non-availability of any document or any informations.or

(2) Where the assessee is unable to determine the correct classification of the goods while filing the declaration under Rule 173B.

1.1 The proper officer may also direct for resorting to provisional assessment in case he finds that self assessment is not in order and he decides to conduct further inquiry.

1.2 A "deeming provision has been made to the extent that from the date of filing of request for provisional assessment to the date of decision of proper officer, the assessment will 'deemed to be provisional' so as to enable the assessee to furnish his provisionally assessed return within the stipulated time frame.

1.3 It has also been provided that notwithstanding the provisions of self assessment, the final assessment in such cases will be made by the proper officer

2. In order to streamline the procedure and to have effective monitoring system, it has been decided to prescribe the following guidelines

2.1 'Provisional Assessment' should be resorted to sparingly and normally as a last option. The dispute regarding classification and valuation should be settled first of all by personal discussion with the highest levels of the assessee's management and where unavoidable, by way of adjudication proceedings.

2.2 Provisional Assessment can be ordered only under circumstances mentioned in rule 9B read with Rule 173B & Rule 173C(5).

2.3 Wherever an assessee finds that final assessment is not possible, (in situations mentioned in Rule 9B only) he will make a detailed request to the Divisional Assistant Commissioner of Central Excise, indicating

a) Specific grounds, and the documents or information's, for want of which final assessment, cannot be made.

b) Period for which provisional assessment is required

c) The rate of duty or the value or both, as the case may be proposed to be applied by the assessee for provisional assessment.

d) Undertakes to appear before the Assistant Commissioner within 7 days or such date fixed by him and furnish all relevant information and documents within the time specified by the Assistant Commissioner in his order, so as to enable the proper officer to finalise the provisional assessment.

29. In the present case, the request of the assessee for provisional assessment was allowed initially. The dispute was being litigated by both sides before various forums. In fact, the appeal filed by department is still pending before the Hon'ble Apex Court. The department did not respond to the letters, and did not pass order rejecting the request. As there was already an order passed

under Rule 9B for provisional assessment, by following the decisions above, we have to hold that the payment of duty by appellant from 01//04/1996 to 12/5/1999 has to be considered as provisional under Rule 9B of Central Excise Act 1944. Therefore the refund claim is not hit by limitation, for this reason also.

30. Let us now consider the issue of unjust enrichment. The appellant has vehemently argued that as the payment of duty was provisional, the refund is not hit by unjust enrichment. We will first examine whether the appellant has been able to establish that they have borne the incidence of duty and not hit by unjust enrichment regardless of the assessment being provisional. The refund application is filed under Section 11B of the Central Excise Act, 1944. Along with refund application, the appellant has to furnish documents to establish that the incidence of duty has not been passed on by him to any other person. Section 12B of Central Excise Act, 1944 draws a presumption that the incidence of duty has been passed on to another on issuing invoices. The presumption is a rebuttable one. In the present case, though the appellant has issued invoices, the duty element is not mentioned in these invoices. This means the duty is not collected from the buyer. The invoices are therefore more in the nature of a delivery challan. The description and price of goods has been indicated in the invoices. We fail to understand the procedure for issue of such invoices. Though it was well within the knowledge of the department, there has been no dispute raised by the department as to issuance of these invoices. The invoices placed before us clearly show that the appellant has not collected the duty from their customers. The appellant has paid duty from their PLA account.

K.G. DENIM LIMITED

Jadavampalayam, Mettupalayam - 641 302.
Coimbatore, INDIA.

Phone. No. : (04254) 52331 - 4
Fax : (04254) 22999, 52335, 573715
Telex No. : 0855 - 369-KG IN

TNGST No. : 188087 Area Code No. 2-01-14
CST No. & Date 626189/11-19-92.



QUADRUPPLICATE FOR ASSESSEE

K. G. DENIM LIMITED
JADAVAMPALAYAM-641302
(Vib) SIRONJAL
METTUPALAYAM FL
S. E. L. NO: 12193.

STOCK TRANSFER Authenticated by

INVOICE CUM GATE PASS

Excise Registration No. 12/93 Code No. ECC/25/06/05/1972

No. : 1192

DATE : 02/02/96

DATE : 02/02/96

Consignee's Name & Address INDIGO FABRICS [DIVISION OF K G DENIM LTD], K.G.R. MILLS PREMISES, JADAVAMPALAYAM, COIMBATORE	Central Excise Range Address 69, KARAMADAI ROAD, METTUPALAYAM	Central Excise Division Address 16 - B, MOUNT PLEASANT ROAD, COONOR
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Tariff Heading Number: **5207.29**

Description of Goods : **100 % COTTON FABRIC**

Specification of Goods :

Description of Package :

Exemption Notification :

BED. EX.N.NO : 40/95 CE
AED.ST EX.N.N: Dt 16/03/95

STYLE No.	EAL/ROLL No.	Roll	No. of Metres	QUANTITY In Kgs	Number of Package	Assessable value/Metre	100 Rolls
14.5 Oz	FH 50713		1816.00	1409.400	98.00		177968.00
14.5 Oz	GO 50713		3170.00	2459.700	98.00		310660.00
16.0 Oz	DS 96602		416.00	367.450	88.00		36608.00
16.0 Oz	FH 96602		617.00	540.950	109.00		67253.00
16.0 Oz	GO 96602		3477.00	3066.000	109.00		378993.00
16.0 Oz	NM 96602		90.00	79.000	92.00		8280.00
16.0 Oz	SK 96602		629.00	552.650	92.00		57868.00
16.0 Oz	TD 96602		87.00	77.400	88.00		7656.00
Total			10302.00	8552.550			1045286.00

Contract No.

S. No of Debit Entry in PURRG 13

Date and Time of issue of Invoice

Date and Time of Removal of Goods

Despatch To

LR No. & Date

Transport

Mode of Transport

Vehicle Registration No

Payment Terms

202/02/96

15:50Hrs

02/02/96

16-00 Hrs

LORRY

TLR 2582

Deductions (-) Additions (+)	Total Assessable Value
Basic ED @	0.00
Special ED @	0.00
Add. ED @ 10%	0.00
Duty in Rupees	
Textiles Committee Cess	523.00
Other Taxes	
Handling & Freight	
Insurance	0.00
Rounded off	0.00
Total	1045809.00

Rupees Rupees Ten Lakh Forty Five Thousand Eight Hundred Nine only

For K.G. Denim Limited

[Signature]

Signature of the licensee / His Authorised Agent

Certified that the particulars given above are true and correct and the amount indicated represents the price actually charged and that there is no flow of additional consideration directly or indirectly from the buyer.

OR

Certified that the particulars given above are true and correct and the amount indicated represents the price actually charged and that there is no flow of additional consideration directly or indirectly from the buyer.

on acco.*****

As soon as the goods leave for Premises our responsibility leaves.

Any dispute arising out of this Invoice/Contract or otherwise shall be settled in Coimbatore Courts where in case of activity shall be deemed to have arisen.

All dispute arising out of this Invoice/Contract or otherwise shall be settled in Coimbatore Courts where in case of activity shall be deemed to have arisen.

or shall be settled by arbitration in accordance with the rules of arbitration of the Indian Council of arbitration and the award made in pursuance thereof shall be binding on the Parties.

31. Along with refund claim, the appellant has furnished to the department the details of payment of duty made by them as well as the copies of such invoices. These documents sufficiently establish that the appellant has not passed on the duty to any other person. Even if the assessment is considered to be not provisional the appellant has established that they have borne the burden of duty.

32. We have already held that the payment of duty was provisional. During the period prior to 25.06.1999, Rule 9B had not adopted provision of Section 11B of Central Excise Act, 1944 in regard to doctrine of unjust enrichment. Only w.e.f 25.06.1999 an amendment was brought forth by adding *proviso* to sub rule (5) of Rule 9B and Section 11B was adopted to Rule 9B. Thus, only after 25.06.1999 the issue of the unjust enrichment is applicable to refund of duty paid provisionally. Rule 9B as it stood prior to 25.06.1999 and after is reproduced as under :

Prior to 25.06.1999

RULE-9B. Provisional assessment to duty:- [(1) Notwithstanding anything contained in these rules,

- (a) where the assessee is unable to determine the value of excisable goods in terms of Section 4 of the Act on account of non-availability of any document or any information; or
- (b) where the assessee is unable to determine the correct classification of the goods while filing the declaration under rule 173B.

the said assessee may request the proper officer in writing giving the reasons for provisional assessment to duty, and the proper officer may direct after such inquiry as he deems fit, that the duty leviable on such goods shall be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of difference between the amount of duty as provisionally assessed and as finally assessed.

Provided that all clearances in respect of excisable goods covered under such request by the assessee submitted with the proper officer under the dated

acknowledgement shall be deemed to be cleared as provisionally assessed to duty at such rate or at such value as declared by the assessee, till the date when the direction of the proper officer is issued and communicated to the assessee.

Provided further that the proper officer where he is satisfied that the self-assessment made by the assessee is not in order, he may direct him to resort to provisional assessment and on receipt of such directions the assessee shall comply with such directions]

[(2) * * * * *]

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

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

(4) The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are not so assessed.

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the [assessee] shall pay the deficiency or be entitled to a refund, as the case may be]

(6) Notwithstanding the provisions of self-assessment in this rule, in cases of provisionally assessment, the final assessment shall be made by the proper officer].

32.1 Proviso to Sub-rule (5) of Rule 9B as amended w.e.f.

25.6.1999 reads as under :

“RULE 9B. Provisional assessment to duty —

.....

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficient or be entitled to a refund as the case may be.”

Provided that, if an assessee is entitled to a refund, such refund shall not be made to him except in accordance with the procedure established under subsection (2) of Section 11B of the Act.

33. It can be seen that after, the amendment the refund of any excess duty paid under provisional assessment is subject to subsection (2) of Section 11B of the Act *ibid*.

34. In the case of ***Titan Industries Ltd. Vs. CCE, Chennai 2009 (240) E.L.T. 571 (Tribunal, Chennai)*** the question considered was whether the principle of unjust enrichment is to be examined in a claim made for refund of duty paid under provisional assessment. It was held by the Tribunal that in consequential refund arising out of finalisation of provisional assessment the doctrine of unjust enrichment under Section 11B is not applicable for the period prior to 25.6.1999. The relevant part of the decision reads as under :

“2. Heard both sides. We find that the claim for refund arose pursuant to finalization of provisional assessment. The relevant statutory provisions contained in Rule 9B at the material time read as follows:-

“Rule 9B

Provisional assessment to duty –

(1)

(5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed fails short of, or is in excess of the duty finally assessed, the (assessee) shall pay the deficiency or be entitled to a refund, as the case may be.”

The Tribunal in the case of *Shriram Pistons & Rings Ltd. v Commissioner of Central Excise, Ghaziabad – 2003 (152) E.L.T. 359* decided that there was no need for the assessee claiming refund of the excess duty paid ascertained on finalization of provisional assessment. The Tribunal observed as follows:

“We are constrained to observe that the direction given therein to file refund claim is totally unwarranted in view of the provisions contained under Rule 9B of the Central Excise Rules, 1944. The above rule relates to the provisional assessment to duty Sub-rule 5 reads as under:-

“ When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed and if the duty, provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be”.

provisional assessment without the assessee making a claim for refund. The above rule envisages an order of refund to follow finalisation of the A direction, as contained in the order dated 14-7-2000 would only help in multiplicity of the proceedings which is not warranted by the statutory provisions."

The decision is to the effect that the assessing officer was required to determine and allow the excess duty, if any paid, on finalization of provisional assessment. Requiring the assessee to file refund claim entailed avoidable multiplicity of proceedings. We also find that the apex Court in para 95 of its judgment in Mafatlal Industries case reported in 1997 (89) E.L.T. 247 (S.C.) made the following observations.

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

Thus the refund of the excess duty paid under Rule 9(B)(5) was not governed by the provisions of Section 11B of the Central Excise Act (the Act). This implied that the excess duty paid determined by the assessing officer had to be granted as refund to the assessee without the assessee making a claim. Only the differential duty allowed as consequential relief following a successful appeal against the order of finalization granting refund by the proper officer under Rule 9 (B)(5) is governed by the provisions of Section 11B. In the instant case, even though the original authority finalized the provisional assessment of clearances

in the year 1994-95 vide Order-in- Original No. 109/96 dated 28-9-1996, the refund due was not sanctioned. The assessee was forced to file a claim for the excess duty paid, in October 1999. This is not a claim independent of the issues involved in provisional assessment and so governed by Section 11B. We find that under various Instructions issued by the CBEC, for example, Circular No. 288/4/97-CX., dated 14-1-1997 and Circular No. 382/15/98-CX., dated 19-3-1998, the field officers were directed to finalize provisional assessment within three months/six months. At present the relevant rule provides that provisional assessment should be finalized within six months of ordering it and in cases where such finalization is not possible, the proper officer should obtain permission for continued provisional assessment from the jurisdictional Chief Commissioner. In view of the ratio of the decision of the Tribunal in *Shriram Pistons & Rings Ltd. v. Commissioner of Central Excise, Ghaziabad* (supra) and the Apex Court's judgment in *Mafatlal Industries* case we hold that refund of the excess duty paid by the assessee while clearing watches and parts during 1994-95 is not governed by Section 11B at the time when the provisional assessment was finalized. Therefore, we hold that the finding that the claim for refund was barred by limitation is not sustainable.

3. As regards unjust enrichment, the apex Court held in *Mafatlal Industries* case that Section 11B did not apply to grant of refund arising out of finalization of provisional assessment. In the instant case the assessment was finalized before 25-6-99 when Rule 9(B) cases of refund were brought under the purview of Section 11B of the Act by amendment of the provisions. During the material time there were no provisions requiring an assessee to file claim for refund of excess duty paid. In the circumstances we hold that the assessee has to be allowed the excess duty determined to have been paid on the impugned clearances of watches and parts made by the appellants during the year 1994-95 without their having to satisfy the authorities that such refund would not entail unjust enrichment of the assessee.

(emphasis supplied)

35. In the case of ***CCE, Mumbai III Vs. CEAT Ltd. 2018 (361 ELT 420 (Bombay))*** the question of relevant date for finalisation of assessment as well as the issue of unjust enrichment in case of refund of duty paid under provisional assessment was considered. The Hon'ble High Court held that the relevant date of finalization of provisional assessment is the relevant date for computation of limitation for refund and that the bar of unjust enrichment is not applicable to provisional assessment before amendment to sub-rule (5) of Rule 9B.

36. In the present case the period of refund claim is from 16.12.1994 to 20.2.1996 and the assessment was finalized on 13.7.1999. Applying the ratio of these decisions, the principle of unjust enrichment is not applicable.

37. From the discussions made above, we hold that the assessment for the period 01.04.1996 to 12.05.1999 is provisional, and that the finalization has happened only on 13.07.1999. The duty having been paid under protest and the appellant having filed the refund claim on 04.11.1999 within a period of 6 months, the refund claim is not hit by limitation. From the documents furnished by appellant it is established that the duty is borne by them and not passed on to another. Moreover, the refund claim being for the period prior to 25.06.1999, the issue of unjust enrichment is not applicable to the provisional assessment under Rule 9B. The appellant is therefore eligible for refund. The order passed by Commissioner (Appeals) No.38 & 39/2014 and 50 & 51/2014 requires to be set aside. Ordered accordingly.

38. In appeal, E/40892/2014, the issue is with regard to rejection of refund of amount paid during investigation. An amount of Rs.2,05,00,400/- was paid by the appellant during investigation initiated by the department alleging mis-declaration of goods. This refund was sanctioned and paid to appellant pursuant to order of Hon'ble High Court. The sanction order dt 17.8.1999 reads as under :

"The claim has been preferred on the basis of the OIO No.8/99 dt. 13.7.1999 passed by the Commissioner of Central Excise, Coimbatore. The amount claimed as refund has been paid as advance deposit and duty on the seized goods at the time of provisional release. As such the time limit stipulated under Section 11B is not applicable in the instant case. The question of unjust enrichment under Section 11B (2) will not arise as the amount of Rs.2 Crores has been paid as advance deposit

and duty amount of Rs.5,00,400/- has been paid on the goods provisionally released. M/s.K.G. Denim Ltd. have in their letter dated 10.8.1999 informed that since their garments division made trousers out of the said fabric and since there is no duty of excise on garment, the question of unjust enrichment does not arise. I find that the view point of the claimant regarding non-application of the doctrine of unjust enrichment in respect of the sum of Rs.2 Crores and Rs.5,00,400/- is correct. In fact, the refund arises on account of the Order-in-Original passed by Commissioner of Central Excise, Coimbatore, and the refund has to be sanctioned suo motto. The assessee has submitted that the copies of TR-6 challans establishing payment of advance deposit and duty. The claim has been scrutinized and found to be in order”.

38.1 Against the above order of sanctioning refund the department filed appeal. We fail to understand how the department could file appeal against sanction of refund without issuing SCN for recovery of erroneous refund. The amount of Rs.2,05,00,400/- having been paid by appellant during investigation, which is in the nature of a deposit, the issue of limitation or unjust enrichment is not applicable. The view taken by refund sanctioning authority as noticed above is correct. From the foregoing, we find that the appellant is eligible for refund.

39. In the result, the impugned orders are set aside. The appeals are allowed with consequential reliefs if any.

(Order pronounced in the open court on 15.04.2024)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI C.S.)
Member (Judicial)