

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

EXCISE APPEAL NO. 50419 OF 2019

(Arising out of Order-in-Appeal No. 1361-63 (CRM)CE/JDR/2018 dated 17.12.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur)

Commissioner, CGST & Central Excise,
Jodhpur

...Appellant

versus

M/s. Prem Mehendi Center,
Vill. Vopari, marwar Junction,
Distt. Pali, Rajasthan

...Respondent

WITH

**Excise Stay Application No. 50207 of 2019
(on behalf of the appellant)**

AND

**Excise Cross Objection No. 50315 of 2019
(on behalf of the respondent)**

AND

EXCISE APPEAL NO. 50420 OF 2019

(Arising out of Order-in-Appeal No. 1361-63 (CRM)CE/JDR/2018 dated 17.12.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur)

Commissioner, CGST & Central Excise,
Jodhpur

...Appellant

versus

M/s. Prem Mehendi Center,
275-276, Kalab Kala Road, Dholi Magi
Choraha, Kalakot, Raipur,
Disstt. Pali, Rajasthan

...Respondent

WITH

**Excise Stay Application No. 50208 of 2019
(on behalf of the appellant)**

AND

**Excise Cross Objection No. 50316 of 2019
(on behalf of the respondent)**

APPEARANCE:

Shri Rakesh Agarwal, Authorised Representative for the Appellant
Shri Rupesh Kumar and Shri Jitin Singhal, Advocates of the Respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
 HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 21.08.2023
Date of Decision: 15.09.2023

FINAL ORDER No. 51297-51298/2023

JUSTICE DILIP GUPTA:

These two appeals have been filed by the department to assail the order dated 17.12.2018 passed by the Commissioner (Appeals) to the extent it holds that M/s. Prem Mehendi Center, Rajasthan¹ would be entitled to refund of excise duty paid on Henna Powder and Henna Paste in terms of the Notification No. 11/2017 C.E. (NT) dated 24.04.2017² issued under section 11C of the Central Excise Act 1944³ giving retrospective exemption to Henna Powder and Henna Paste from levy of excise duty for the period from 01.10.2007 to 01.03.2013. The respondent has also filed Cross Objections in the two appeals filed by the department.

2. The respondent is engaged in the manufacture of Henna Powder and Henna Paste. It believed that these two products manufactured by it would fall under Chapter 14 of the Central Excise Tariff Act, 1985⁴ attracting nil rate of duty. The department, however, believed that these two products would fall under Chapter 33 of the Excise Tariff Act, attracting excise duty at the rate of 12%. The respondent paid duty of

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1. **the respondent**
 2. **Notification dated 24.04.2017**
 3. **the Excise Act**
 4. **the Excise Tariff Act**

excise for the period from January 2012 to February 2013 under protest.

3. Subsequently, the Notification was issued under section 11C of the Excise Act directing that the whole of the duty of excise payable under section 3 of the Excise Act on Henna Powder and Henna Paste falling under Chapter 33 of the First Schedule to the Excise Tariff Act would not be levied during period commencing 01.01.2007 to 01.03.2013. As the respondent had claimed refund of the excise duty, it would be appropriate to reproduce this Notification which is as follows:

"Notification: 11/2017-C.E. (N.T.) Dated April 24, 2017

Heena Powder and Paste - Exemption under Section 11C for period from 1-1-2007 to 1-3-2013

Whereas the Central Government is satisfied that according to a practice that was generally prevalent regarding levy of duty of excise (including non-levy thereof) under section 3 of the Central Excise Act, 1944 (1 of 1944), (hereinafter referred to as the said Act), on Heena Powder and Paste falling under Chapter 33 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said goods), was not being levied according to the said practice, during the period commencing on the 1st day of January, 2007 and ending with the 1st day of March, 2013;

2. **Now, therefore, in exercise of the powers conferred by section 11C of the said Act, the Central Government hereby directs that the whole of the duty of excise payable under section 3 of the said Act on the said goods but for the said practice, shall not be required to be paid in respect of the said goods on which the said duty of excise was not levied during the period aforesaid in accordance with the said practice."**

(emphasis supplied)

4. Pursuant to the issuance of the aforesaid Notification, the respondent claimed refund of central excise duty paid on Henna Powder and Henna Paste during the period 01.04.2011 to 31.03.2013 by filing an application on 15.12.2017.

5. However, two show cause notices, each dated 09.03.2018, were issued to the respondent seeking to deny the refund of a certain portion of the amount claimed as refund. The relevant portion of the show cause notice 09.03.2018, which is the subject matter of Excise Appeal No. 50419 of 2019, is reproduced below:

"4. Whereas, in view of the above referred notification, M/s. Prem Mehendi Centre, Khasra No. 678/2, Desuri Road, Village- Vopari, Marwar Junction has claimed refund to central excise duty so paid on Heena Powder and Paste during the period 01.01.2012 to 28.02.2013.

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6. Whereas, on perusal of the invoices submitted by the assessee, it is noticed that they have not collected central excise duty from their buyers and the invoices indicate total price of goods arrived after deduction amount of central excise duty. Thus, it is clear that the duty incidence has not been passed on by the assessee. The detail of the invoices are as under:

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7. On perusal of the above table, the total of Excise duty including Cesses paid under protest comes to Rs. 1,47,87,105/-, whereas the assessee has filed Refund claim of Rs. 1,45,92,582/-.

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9. Whereas, out of the refund claim of Rs. 1,45,92,582/-, the assessee has paid Rs. 1,15,84,142/- (Duty- Rs. 1,12,01,685/- + Cess-Rs.3,82,457/-) through GAR-7 challans during the said period and remaining Rs. 30,08,440/- paid through Cenvat account.

10. Whereas, it appears that the assessee is only eligible for refund of central excise duty amounting to Rs. 1,12,01,685/- paid through PLA and remaining amount i.e Rs. 33,90,897/- (Rs. 30,08,440 paid through CENVAT+Rs. 3,82,457/- Cess paid in cash) is not liable to be refunded to them. Because after issuance of Notification No. 11/2017-CE(NT) dated 24.04.2017, the assessee got exemption of paying central excise duty on Henna Powder and Paste from 01.01.2007 to 01.03.2013, means no duty is payable for the period on Henna Powder and Paste and when duty is not there, they were not eligible to avail cenvat credit also during the period on Henna Powder and Paste.

11. **Now, therefore, M/s. Prem Mehendi Center, Khasra No. 678/2, Desuri Road, Vill- Vopari, Marwar Junction, Distt-Pali is hereby called upon to show cause and explain** to the Assistant Commissioner, Central Goods & Service Tax Division-D, having his office at Ground Floor, TDM Office Campus, BSNL, Mahavir Nagar, Pali-306401 (Rajasthan), **within 7 days from the date of receipt of this notice as to why the refund claim of Rs. 33,90,897/- out of Rs. 1,45,92,582/- filed by them should not be rejected for the reasons stated herein above."**

(emphasis supplied)

6. The relevant portion of the second cause notice dated 09.03.2018, which is the subject matter of Excise Appeal No. 50420 of 2019, is reproduced below:

"4. Whereas, in view of the above referred notification, M/s. Prem Mehendi Centre, Raipur has claimed refund to central excise duty so paid on Heena cone/Paste during the period 01.04.2011 to 31.03.2013.

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6. Whereas, on perusal of the invoices submitted by the assessee, it is noticed that they have not collected central excise duty from their buyers and the invoices indicate total price of goods arrived after deducting amount of central excise duty. Thus, it is clear that the

duty incidence has not been passed on by the assessee.
The detail of the invoices are as under:

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9. Whereas, out of the refund claim of Rs. 1,49,10,667/-, the assessee has paid Rs. Rs. 91,82,242/- (Duty- Rs. 89,14,798/- + Cess Rs.2,67,444/-) through GAR-7 challans during the said period and remaining Rs. 57,28,425/- paid through Cenvat account.

10. Whereas, it appears that the assessee is only eligible for refund of central excise duty amounting to Rs. 89,14,798/- paid through PLA and remaining amount i.e Rs. 59,95,869/- (Rs. 57,28,425/- paid through CENVAT+Rs. 2,67,444/-Cess paid in cash) is not liable to be refunded to them. Because after issuance of Notification No. 11/2017-CE(NT) dated 24.04.2017, the assessee got exemption of paying central excise duty on Henna cone/Paste from 01.01.2007 to 01.03.2013, means no duty is payable for the period on Henna Powder and Paste and when duty is not there, they were not eligible to avail cenvat credit also during the period on Henna Powder and Paste.

11. **Now, therefore, M/s. Prem Mehendi Center, 275-276, Kalab Kala Road, Dholi Magi Choraha, Kalakot, Raipur, Disstt. Pali, is hereby called upon to show cause and explain** to the Assistant Commissioner, Central Goods & Service Tax Division-D, having his office at Ground Floor, TDM Office Campus, BSNL, Mahavir Nagar, Pali-306401 (Rajasthan), **within 7 days from the date of receipt of this notice as to why the refund claim of Rs. 59,95,869/- out of Rs. 1,49,10,667/- filed by them should not be rejected for the reasons stated herein above."**

(emphasis supplied)

7. Thereafter, an Addendum dated 20.06.2018 to the show cause notice dated 09.03.2018 was issued by the department. The relevant portion of this Addendum, which is the subject matter of Excise Appeal No. 50419 of 2019, is reproduced below:

"3. On the basis of first proviso to the Section 11C (2) of the Central Excise Act, 1944 any refund arising out of Section 11 (C) (1) of the Central Excise Act, 1944 shall be filled within six months from the date of such Notification in the form refer in the sub-section 1 of the Section 11B of the Central Excise Act, 1944. **Therefore, the specific provision as contained in proviso to Section 11C(2) of the Central Excise Act, 1944 has overriding effect on time limit of one year provided in sub-section 1 of the Section 11B of the Central Excise Act, 1944. Therefore, where refund has been arising out of exemption under Section 11C of the Central Excise Act, 1944, the refund has to be filed within six months from the date of such Notification. In this case, the notification was issued on 24.04.2017 and the refund claim was required to be filled on or before 23.10.2017, whereas the refund claim was filed on 15.12.2017 and is time barred.**

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A. ISSUE REGARDING UNJUST ENRICHMENT

1. During the course of examination of the invoices forwarded along with the claim and draft OIO it is observed that the assessee was paying C.Ex. duty on the MRP declared. On verification of invoice, it appears that they had not charged C.Ex. duty from their immediate buyer i.e., their dealer and wholesaler, however the product was ultimately sold on MRP to the ultimate customer. **The MRP was cum duty price, constituted C.Ex. duty also and thus duty had been passed on to the ultimate consumer** and thus the concept of unjust enrichment taken place."

(emphasis supplied)

8. A similar Addendum dated 20.06.2018 to the show cause notice dated 09.03.2018 was issued by the department, which is the subject matter of Excise Appeal No. 50420 of 2019.

9. The Assistant Commissioner, by order dated 31.07.2018, rejected the refund claims holding that they were time barred under section 11C

and the burden of central excise duty had also been passed by the respondent.

10. Feeling aggrieved, the respondent filed appeals before the Commissioner (Appeals) and by a common order dated 17.12.2018 both the appeals were allowed holding that the respondent was eligible to the refund of the duty of excise paid on Henna Powder and Henna Paste in terms of the Notification. The relevant portions of the order passed by the Commissioner (Appeals) are reproduced below:

"2. Brief facts of the case are that the appellants are registered under Central Excise and had filed a refund claims under the provisions of Section 11B of CEA, 1944 for the period from 01.04.2011 to 31.03.2013 for the duty paid under protest. As per Notification No. 11/2017-CE(N.T.) dated 24.04.2017 issued under Section 11C, retrospective exemption to the duty on Heena Powder/paste from levy of excise duty was given during the period from 01.10.2007 to 01.03.2013. Thus, the appellants filed the applications for refund of duty paid on Heena Powder/Paste 'under protest'.

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5.4.1 Regarding rejection of refund claim on the ground of time bar, the allegation is that they were required to file refund claim within the period of six months from the date of retrospective exemption notification issued under Section 11C of the CEA, 1944. I find that every refund claim filed under Central Excise Laws is governed by the provisions of Section 11B of the Central Excise Act, 1944.

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I find that the issue regarding levy of central excise duty on Heena powder/Heena paste was sub-judice and the appeal of appellant was pending before the Tribunal. The Hon'ble Delhi Tribunal vide FINAL ORDER NO. A/54095/2017-EX[DB] dated 31.05.2017 has allowed the appeal of the appellant

by extending the benefit of retrospective exemption notification issued under Section 11C of the CEA, 1994. I find that since the matter pertaining to retrospective exemption notification was sub-judice, the provisions contained in explanation (ec) to section 11B of the CEA, 1944 would prevail and hence, the refund claim filed by the appellant on 15.12.2017 is well within the time limit, of one year as prescribed under section 11B of the CEA, 1944.

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5.4.3 I find that the adjudicating authority has been placed erroneous reliance on the decision given in the case of M/s Redington India Ltd. Vs Commissioner of Customs, Chennai reported in 2011-TIOL-863-CESTAT-MAD]. On other hand **I rely on recent decision given by the Hon'ble Hyderabad Tribunal in the case of HYDERABAD POWER INSTALLATIONS (P) LTD. VERSUS C.C.E., C. & S.T., HYDERABAD-II (supra) wherein it has been held that since there is conflict in the time limit prescribed by the provisions of section 11C and section 11B, the provision of section 11B would prevail by applying the legal principle of harmonious construction.** I find that the said decision is the latest one, I therefore hold that the benefit of the said decision should be extended to the appellant and the refund claims should not be denied on the ground of time bar issue to the appellants.

5.5 Now I am going to decide the issues of unjust enrichment raised in addendums one by one.

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5.5.6 xxxxxxxxxxxx. In this case, buyer and seller relationship has not been established and no evidences have come forward to prove that no incidence of duty has been passed on. I find that the allegation that they have not submitted any evidence with respect to proving that the incidence of duty burden is borne by them is not sustainable as they have enclosed invoices clearly deducting the duty amount and CA Certificate. **As such, I find that the principle of unjust enrichment is not applicable."**

(emphasis supplied)

11. Shri Rakesh Agarwal, learned authorised representative appearing for the department made the following submissions:

- (i) The Addendums to the show cause notices were issued prior to adjudication and were considered by the respondent in its defence and also by the adjudicating authority;
- (ii) Refund is time barred in terms of the provisions for filing refund under the proviso to section 11C (2);
- (iii) Refund was not claimed as a consequential relief granted by the Tribunal by the Final Order dated 31.05.2017;
- (iv) Refund is not payable on account of unjust enrichment as nothing contrary was pointed out to disprove that duty of excise had not been passed to end customer; and
- (v) The excise duty has not been shown as 'receivables' in the balance sheet.

12. Shri Rupesh Kumar learned counsel for the respondent assisted by Shri Jitin Singhal, made the following submissions:

- (i) The two Addendums issued to the two show cause notices contain substantial allegations that were not part of the show cause notices and, therefore, deserve to be ignored. In support of this contention, learned counsel placed reliance upon the decisions of the Tribunal in **Wipro Information Technology vs.**

**Commr. of C. Ex., Bangalore⁵ and JMC Projects
(India) Ltd. vs. Commr. of Service Tax,
Ahmedabad⁶;**

- (ii)** The time limit of six months to file the refund claim from the date of issuance of the exemption notification would not be applicable, as every refund claim filed under the Excise Act is governed by the time limit provided under section 11 B;
- (iii)** Where duty of excise becomes refundable as a consequence of a judgment, the time limit of one year prescribed under clause (ec) of Explanation (B) of section 11B would be applicable. In the present case, the matter pertaining to retrospective exemption Notification was pending before the Tribunal;
- (iv)** Non-mentioning of the Final Order in the refund claim cannot be made a reason to apply the time limit of six months contemplated under section 11C;
- (v)** In any view of the matter, if there is a contradiction in the time limit specified in section 11C and section 11B, the time limit contemplated under section 11B would be applicable; and
- (vi)** To support the contention of the respondent that the burden of excise duty had not been passed to the buyers, a certificate issued by the chartered accountant was enclosed. This conclusively proves that the burden had not been passed. The department is, therefore, not justified in asserting

5. **1999 (107) E.L.T. 467 (Tribunal)**
6. **2014 (35) S.T.R. 577 (Tri.-Ahmd.)**

that the respondent had failed to prove that the burden of duty had not been passed.

13. The submissions advanced by the learned authorised representative appearing for the department and the learned counsel appearing for the respondent have been considered.

14. In order to appreciate the contentions, it would be appropriate to reproduce the relevant provisions of section 11B and section 11C.

15. Section 11B deals with refund of duty and interest and is as follows:

"Section 11B. Claim for refund of duty and interest, if any, paid on such duty.—

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty **may make an application for refund of such duty and interest,** if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise **before the expiry of one year from the relevant date** in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

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(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the

amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

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(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

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Explanation.—For the purposes of this section,—

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(A) “refund” includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) “**relevant date**” means,—

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(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;

(emphasis supplied)

16. Section 11C deals with a situation where duty of excise not levied or short-levied as a result of general practice is not to be recovered and it is as follows:

Section 11C. Power not to recover duty of excise not levied or short-levied as a result of general practice.- (1) Notwithstanding anything contained in this Act, if the Central Government is satisfied—

- (a) that a practice was, or is, generally prevalent regarding levy of duty of excise including non-levy thereof on any excisable goods; and
- (b) that such goods were, or are, liable—
 - (i) to duty of excise, in cases where according to the said practice the duty was not, or is not being, levied, or
 - (ii) to a higher amount of duty of excise than what was, or is being, levied, according to the said practice,

then, **the Central Government may, by notification in the Official Gazette, direct that the whole of the duty of excise payable on such goods, or, as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short-levied, in accordance with the said practice.**

(2) Where any notification under sub-section (1) in respect of any goods has been issued, the whole of the duty of excise paid on such goods or, as the case may be, the duty of excise paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 11B:

Provided that the person claiming the refund of such duty or, as the case may be, excess duty, makes an application in this behalf to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, in the form referred to in sub-section (1) of section 11B, before the

**expiry of six months from the date of issue of the
said notification.**

(emphasis supplied)

17. The show cause notice dated 09.03.2018 that was issued to the respondent, after referring to the provisions of section 11C, mentions in paragraph 4 that it is because of the aforesaid Notification dated 24.04.2017 that the respondent claimed refund of central excise duty paid on Henna Powder and Henna Paste during the period from 01.01.2012 to 28.02.2014.

18. It is also not disputed by the learned counsel appearing for the respondent that the application for refund of excise duty was filed by the respondent under section 11C.

19. Section 11C (1) (b) provides that the Central Government may, by Notification in the Official Gazette direct that the whole of duty of excise payable on excisable goods shall not be required to be paid. Sub-section (2) of section 11C provides that where any Notification under sub-section (1) in respect of any goods has been issued, the whole of the duty of excise paid on such good which would not have been paid if the said Notification had been in force, shall be dealt with in accordance with the provisions of sub-section (2) of section 11B. The proviso, however, stipulates that the person claiming the refund of such duty should make an application in the form referred to in sub-section (1) of section 11B before the expiry of six months from the date of issue of the said Notification.

20. In terms of the provisions of section 11C (1), the Notification was issued by the Central Government and it is pursuant to the said Notification that the respondent claimed refund of central excise duty

paid on Henna Powder and Henna Paste during the period 01.04.2011 to 31.03.2013. The proviso to sub-section (2) of section 11C provides that the person claiming refund has to make an application in the form referred to in sub-section (1) of section 11B before the expiry of six months from the date of issue of the said Notification.

21. Sub-section (1) of section 11B provides that any person claiming refund of any duty of excise with interest may make an application for refund of such duty and interest before the expiry of one year from the relevant date **in such form and manner as may be prescribed.**

22. It is clear that the proviso to sub-section (2) of section 11C only refers to the form contemplated in sub-section (1) of section 11B and not to the time period prescribed in sub-section (1) of section 11B. The time limit for making the application is provided in the proviso to sub-section (2) of section 11C and it provides that the application for refund has to be made before the expiry of the six months from the date of issue of the Notification. It would, therefore, not be correct to even suggest that merely because the proviso to sub-section (2) of section 11C makes reference to the form prescribed in sub-section (1) of section 11B, the time limit of one year prescribed in sub-section (1) of section 11B would apply. There can be no manner of doubt that the application for refund, pursuant to a Notification issued under section 11C (1) has to be made within six months from the date of the issue of the Notification in the form referred to sub-section (1) of section 11B.

23. In the present case, admittedly the application was not made within six months from the date of issue of the Notification.

24. The Commissioner (Appeals) has, however, made a general observation that every refund claim filed under the Central Excise Laws

has to be governed by the provisions of section 11B of the Excise Act and though the Notification does provide that every claim has to be necessarily filed before the expiry of six months from the date of issue of the Notification, but in view of Explanation (B)(ec) to section 11B, the time limit of six months provided in section 11C would not be applicable if the duty becomes refundable as a consequence of a judgment, decree, order or direction of an Appellate Authority, Appellate Tribunal or any Court in view of the decision of the Tribunal in **Hyderabad Power Installations (P) Ltd. vs. C.C.E., C & ST, Hyderabad-II**⁷. To apply the aforesaid decision of the Tribunal to the facts of the case, the Commissioner (Appeals) observed that the matter relating to levy of central excise duty on Henna Powder and Henna Paste was sub-judice since the appeal of the appellant was pending before the Tribunal and it is only on 31.05.2017 that the appeal was allowed extending the benefit of the Notification issued under section 11C. Thus, according to the Commissioner (Appeals), Explanation (B)(ec) to section 11B would come to the aid of the respondent and since the refund claim was filed on 15.12.2017 within a period of one year contemplated under section 11B of the Excise Act, it would be maintainable.

25. Learned authorized representative appearing for the department submitted that not only was the application required to be filed within six months from the date of issue of the Notification, but even otherwise the refund claimed filed by the respondent was as a consequence of the issuance of the Notification issued by the Central Government and not because duty became refundable as a consequence of a judgment,

7. 2016 (45) STR 217 (Tri. – Hyd.)

decree, order or direction of the Appellate Authority or Appellate Tribunal or any Court.

26. Learned counsel for the respondent supported the view expressed by the Commissioner (Appeals) and submitted that in view of the aforesaid decision of the Tribunal in **Hyderabad Power Installations**, the Commissioner (Appeals) committed no error in holding that the application for refund should have been filed within one year.

27. The submission advanced by the learned authorized representative appearing for the department has force.

28. In the first instance, as is clear from the proviso to sub-section (2) of section 11C, the application for refund of duty has to be filed within six months from the date of issue of the said Notification. The only requirement is that it should be filed in the format prescribed in section 11B(1). As discussed above, the time limit of one year prescribed in section 11B(1) would not be applicable as the proviso to section 11 C(2) specifically provides that the application for refund has to be made before the expiry of six months from the date of issue of the Notification. When a time period is prescribed in section 11C, there is no requirement of referring to the time period prescribed in section 11B. The Commissioner (Appeals) has given no reason as to why the time period of one year prescribed in section 11B would be applicable in the present case except a bald observation that 'every refund claim filed under Central Excise Laws is governed by the provision of section 11B'. No reason has been given by the Commissioner (Appeals) for discarding the time limit of six months prescribed under the proviso to section 11C(2). Infact, the observation made by the Commissioner (Appeals)

would render the time limit prescribed under the proviso to section 11C (2) otiose.

29. Even otherwise, Explanation (B) (ec) to section 11B would not be applicable to the facts of the present case. The decision of the Tribunal, which has been relied by the learned counsel for the respondent and the Commissioner (Appeals), was rendered in an appeal filed by the appellant against the order dated 18.11.2013 confirming the demand of duty on Henna Powder and Henna Paste for the earlier period. It appears that during the pendency of the appeal, the Notification was issued by the Central Government exempting excise duty on Henna Powder and Henna Paste for the period commencing 01.01.2007 upto 01.03.2013. The Tribunal noticed that since the disputed period in the appeal that was pending was from 01.08.2008 to 01.11.2011, the dispute would be covered by the Notification and, therefore, the appeal was allowed.

30. The respondent claimed benefit of the Notification and not the decision dated 31.05.2017 of the Tribunal and in any case, the respondent could not have claimed benefit of the said decision for filing the refund claim because this decision does not decide the issue on merits but merely refers to the Notification for granting relief. The respondent had correctly filed the refund application as a consequence of issuance of the Notification and the said application was required to be filed within six months from the date of the issue of the Notification. Explanation (B)(ec) of section 11B cannot, therefore, come to the aid of the respondent. The Commissioner (Appeals) clearly committed an error in holding that because of Explanation (B)(ec) to section 11B, the respondent could file the application within a period of one year.

31. Learned counsel for the respondent also submitted that two Addendums issued to the two show cause notices contain substantial allegations that were not even part of the show cause notices and, therefore, should be ignored and if this be so, the contention of the department that the refund application should have been filed within six months from the date of issue of the Notification would not sustain since this was not even an allegation in the show cause notices. To support this contention, learned counsel for the respondent placed reliance upon the decisions of the Tribunal in **Wipro Information** and **JMC Projects**.

32. It is not possible to accept the contention advanced by the learned counsel for the respondent.

33. **Black's Law Dictionary, 9th Edition** defines Addendum to mean 'something to be added, esp. to a document; a supplement'.

34. **The Law Lexicon Dictionary, 3rd Edition** defines Addendum to mean 'a thing that is added or is to be added'.

35. It is true that the two show cause notices that were issued to the respondent did not state that the refund applications were liable to be rejected for the reason that they were not filed within six months from the date of issue of the notification, but the Addendums that were subsequently issued did specifically allege that the refund applications were time barred because they were filed after the expiry of six months from the date of issue of the Notification. The Addendum, as noticed above, was issued to add something to the already issued show cause notices. The show cause notices did mention the issuance of the Notification and also the date on which the refund applications were filed. The notices also specifically mention that it is because of the said Notification that the respondent claimed refund of central excise duty

paid on Henna Powder and Henna Paste. The Addendums are based on the facts mentioned in the show cause notices and had only called upon the respondent to show cause as to why the refund application should not be rejected as it was filed beyond the time prescribed under the proviso to section 11C (2).

36. Learned counsel for the respondent placed reliance upon paragraph 10 of the decision of the Tribunal in **Wipro Information**.

The said paragraph is reproduced below:

"10. On consideration of the submissions made, we are of the considered opinion that the appellants are required to succeed in the matter both on merits as well as on time bar in respect of demands raised beyond the period of six months. As can be noticed from the initial show cause notice issued on 10-7-1984, the demand was raised to the extent of Rs. 6,45,898.96 and in that it was clearly alleged that the appellants had effected clearance of peripherals valued at Rs. 43,65,993/- from their factory without bearing a separate gate pass and without paying central excise duty. By addendum, dated 7-3-1985 the department consciously gave up invocation of Rules 9, 49, 52A, 53 and 173F of the Central Excise Rules including the provisions of Rule 173Q. Initially demand was also raised to Rs. 7,90,757.04. This amended show cause notice raised fresh ground by which it was stated that the appellants had been manufacturing computer peripheral devices falling under Tariff Item 33DD and had supplied the main peripherals as add-ons to the computer systems manufactured and cleared by the appellants without including the value of these peripherals in the assessable value of computer and without paying relevant central excise duty thereon. From the terms of both the show cause notices it is clear that the department was fully aware of the fact of appellants clearing peripherals for the computer. The addendum to the show cause notice has given up invocation of various rules including the rule pertaining to imposition of penalty. Each show cause notice should comprise of one set of facts leading to the

controversy about one such clearance and demand made therein. By addendum, the department had chosen to give up invocation of the provisions of various rules, thus changing the colour and complexion of the allegation and adding new facts and amending the show cause notice. Therefore, it has to be held that amended show cause notice is not in the nature of mere addendum nor in the form of clarification. Addendum dated 7-3-1985 is therefore, a fresh show cause notice with new facts raised therein and therefore, the demands for the period from 1-3-1984 to 18-4-1984 covered by show cause notice dated 10-7-1984 is clearly beyond the period of six months and the same is hit by time bar. Further the department had full knowledge about the appellants clearing peripherals. Detailed floor plan showing the old and new buildings and the area earmarked for manufacturing activities were submitted to the department vide their letter dated 25/28 January 1984, which has been acknowledged by the Superintendent and the facts pertaining to clearance of peripherals had been indicated in this correspondence and the subsequent correspondence which is there on the record. Therefore, the facts relating to clearance of peripherals had been within the knowledge of the department and therefore, it cannot be said that there was suppression of facts in the matter on the part of the appellants."

37. It would be seen that what weighed with the Tribunal in the aforesaid decision was the fact that the Addendum changed the factual aspects contained in the show cause notice, namely that the appellant had been manufacturing computer peripheral devices falling under a particular tariff item without including the value of these peripherals in the assessable value of computer and without paying relevant central excise duty but by Addendum the department had chosen to give up the invocation of the provisions of various rules which changed the colour and complexion.

38. In **JMC Projects**, the Tribunal observed as follows:

"6.1 In view of the above clarification the view taken by the Adjudicating authority is not correct that appellant was not entitled to revise the classification to 'Works Contract Services'. The first show cause notice dated 22-10-2008 and its corrigendum dated 29-9-2009, were mainly targeted to deny the benefit of Composition Scheme to the appellant and to determine the taxable value as per Rule 2A of the Service Tax (Determination of Value) Rules, 2006 read with Section 67 of the Finance Act, 1994. The provisions of Rule 2A and Composition Scheme deal only with the Works Contract Service under Section 65(105)(zzzza). There was thus no doubt in the authority issuing show cause notice dated 22-10-2008 and its corrigendum dated 29-9-2009 that the classification of the services being dealt was 'Works Contract Services' with effect from 1-7-2006. This fact was confirmed by C.B.E. & C. by issuing circular dated 24-8-2010. Therefore, demanding a duty of Rs. 20,53,91.319 on 'Commercial or Industrial Construction Services'/'Construction of Complex Services' and denying the benefit of Notification No. 1/2006-S.T., dated 1-3-2006 is totally a new and different ground than what was being taken in the original show cause notice dated 22-10-2008, where classification of the service provided was not doubted at all. The judgments relied upon by the Revenue that the changes proposed were only mathematical corrections or facts available at the time of issue of show cause notice dated 22-10-2008, are thus not applicable to the facts of the present proceedings. The Addendum dated 29-9-2009 and its further corrigendum dated 17-5-2010, therefore, fails as the same has changed the entire basis of the first show cause notice dated 22-10-2008. Having said that it is further observed that Addendum dated 14-12-2009 has not been issued in suppression of the first show cause notice dated 22-10-2008, therefore the first show cause notice dated 22-10-2008 and its corrigendum dated 29-9-2009 survive."

39. This decision also does not support the case of the respondent for the reason that the dispute regarding classification of the service was raised in the Addendum which was not raised in the show cause notice.

40. As noticed above, in the present case the factual position had not changed and the Addendums had called upon the respondent to explain why the refund application should not be rejected as being barred by time on the facts stated in the show cause notice. The aforesaid two decisions rendered in **Wipro Information** and **JMC Projects** would, therefore, not help the respondent.

41. Even otherwise, the time limit provided in section 11C(2) of six months is mandatory in nature and no refund could have been allowed if the application was not filed within six months from the date of issue of the Notification. It has been found that the time limit of one year prescribed in section 11B would not be applicable in the present case. It was imperative for the respondent to have filed the application for refund within the time period prescribed in the proviso to section 11C (2). The Addendums merely call upon the respondent to show cause as to why the refund applications should not be rejected as they were not filed within the aforesaid time limit. The contention of the learned counsel for the respondent that the Addendums should be ignored, therefore, cannot be accepted.

42. The refund applications filed by the respondent on 15.12.2017 pursuant to the issuance of the Notification dated 24.04.2017 was, therefore, liable to be rejected for the reason that it was not filed within the period of six months from the date of issue of the Notification as specified in the proviso to sub-section (2) of section 11C. The

Commissioner (Appeals), therefore, committed an error in granting relief to the respondent.

43. In this view of the matter, it would not be necessary to examine whether the refund application was also hit by the bar of unjust enrichment.

44. Thus, for all the reasons stated above, the order dated 17.12.2018 passed by the Commissioner (Appeals) deserves to be set aside and is set aside. Excise Appeal No. 50419 of 2019 and Excise Appeal No. 50420 of 2019 filed by the department, therefore, deserve to be allowed and are allowed. The respondent would not be entitled to refund of the excise duty as the refund application was not filed within the time limit prescribed in the proviso to section 11C(2). The two Cross Objections filed by the respondent deserve to be rejected and are rejected. The stay applications filed by the appellant have been rendered infructuous and are rejected.

(Order Pronounced on **15.09.2023**)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(P.V. SUBBA RAO)
MEMBER (TECHNICAL)**