

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066**  
**SINGLE MEMBER APPEAL BRANCH**

Appeal No. E/435 /2007 – SM[BR]

Date 26/03/2009

Assistant Registrar  
C.E.S.T.A.T, New Delhi

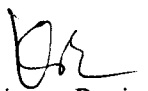
To :  
M/S SWASTIKA CON CAB (I) PVT. LTD.  
A-212 (A), RIICO INDL. AREA, BAGRU, EXTN.,  
BAGRU-JAIPUR  
M/S SWASTIKA CON CAB (I) PVT. LTD.

Appellant

Vs  
Respondent

C.C.E. JAIPUR-I

I am directed to transmit herewith a certified copy of **Final order No. 268 / 2009 –SM[BR]** dated 24.3.2009  
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

  
Assistant Registrar  
(SM Appeal Branch)

**Copy to :**

1. Respondent

C.C.E. JAIPUR-I

NCRB, STATUE CIRCLE, C-SCHEME, JAIPUR

2. Adv. / Consult

MR.V K AGGARWAL

B-82, LAJPAT NAGAR, PART-2, NEW DELHI-110024

3 S.D.R

4 ~~J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017

7 M/s Centax Publications (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3

8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 Nidheshak publications, I.P.Estate, new Delhi

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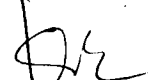
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thvagarava Road, T. Nagar, Chennai

13 Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kuni, New Delhi - 110070

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-1

15 Office Copy

16 Guard file

  
Assistant Registrar  
(SM Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL  
West Block No. 2, R.K. Puram, New Delhi – 110 066.  
Principal Bench, New Delhi**

**COURT NO. IV  
Excise Appeal No. 435 of 2007 (SM)**

[Arising out of the Order-in-Appeal No. 283 (GRM)/CE/JPR-I/2006 dated 07/12/2006 passed by The Commissioner, Central Excise (Appeals-I), Jaipur. ]

For Approval and signature :

**Hon'ble Shri Rakesh Kumar, Member (Technical)**

1. Whether Press Reporters may be allowed to see :  
the Order for publication as per Rule 27 of the  
CESTAT (Procedure) Rules, 1982?
2. Whether it would be released under Rule 27 of :  
the CESTAT (Procedure) Rules, 1982 for  
publication in any authoritative report or not?
3. Whether their Lordships wish to see the fair :  
copy of the order?
4. Whether order is to be circulated to the :  
Department Authorities?

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M/s Swastika Concab (I) Pvt. Ltd. Appellant

Versus

CCE, Jaipur – I

Respondent

**Appearance**

Shri V. K. Agarwal, Advocate – for the appellant.

Shri S. Gautam, Authorized Representative (DR) – for the  
Respondent.

**CORAM : Hon'ble Shri Rakesh Kumar, Member (Technical)**

**DATE OF HEARING : 29/01/2009.**  
**DATE OF DECISION: 24-03-09 .**

Final Order No. 268/09-sm(BA) Dated : 24.3.09

**Per. Rakesh Kumar :-**

The facts of the case, in brief, giving rise to this appeal are that the appellant, a manufacturer of various types of conductors, entered into contracts with Ajmer Vidyut Vitran Nigam Limited and Jaipur Vidyut Vitran Nigam Limited for supply of ACSR conductors. There was a price variation clause in the supply contracts. As per Clause 4 of the supply order dated 31/5/05 issued by Ajmer Vidyut Vitran Nigam Limited (AVVNL), the price of the conductor, as mentioned in Clause 2 of the supply order, was variable, based on the average price of ex-prime producers of EC Grade Aluminium Wire Rods and High Tensile Galvanized Steel Wire. There was a similar clause in the supply order dated 08/07/05 issued by Jaipur Vidyut Vitran Nigam Limited (JVVNL). The price variation could be positive or negative. The supply of conductor was made during the period from June 2005 to

August 2005 and during this period, the goods were cleared by the Appellant on payment of duty, at the prices mentioned in the contract. However, subsequent to the supply of the goods the, buyer- AVVNL and JVVNL decreased the price and adjusted the excess amount paid from the payment for the subsequent supplies. The Appellant filed a refund claim on 22/06/06 for refund of amount of excess paid duty of Rs. 75,526/- and the Assistant Commissioner vide Order-in-Original dated 20<sup>th</sup> September 2006 rejected the refund claim for an amount of Rs. 38,745/- as time barred and sanctioned the claim for the balance amount of Rs. 36,192/- but credited the same to the consumer welfare fund in terms of the provisions of Section 11B (2) of Central Excise Act on the ground that this amount is hit by unjust enrichment. The Appeal filed by the Appellant before the Commissioner (Appeals) was dismissed vide the impugned order-in-appeal No. 283/GRM/CE/JPR-I/2006 dated 28/11/06. It is against this order that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri V.K. Agarwal, Advocate, the learned counsel for the Appellant made the following submissions :-

(1) The Assistant Commissioner has wrongly rejected the refund claim for an amount of Rs. 38,345/- as time barred as in view of the price variation clause in the supply orders placed by AVVNL and JVVNL, the Central Excise Duty assessment have to be treated as provisional assessment, even if there was no formal request by the Appellant in this regard and there was no formal order passed by the Assistant Commissioner ordering provisional assessment. In this regard, he placed reliance on Tribunal judgments in the case of **Telephone Cables Limited vs. CCE** reported in **2003 (154) E.L.T. 237 (Tribunal)**, the Government's SLP against which has been dismissed by the Hon'ble Supreme Court vide judgment reported in **2004 (163) E.L.T. A117 (S.C.)**, and also the Tribunal's judgments in the cases of **Rajasthan Electronics & Instruments Ltd. vs. CCE, Jaipur** reported in **2006 (200) E.L.T. 324 (Trib. – Del.)** and **CCE, Tirupati vs. Kurool Cylinders Pvt. Ltd.** reported in **2007 (78) R.L.T. 616**

(CESTAT – Bang.). In these judgments, it has been held that when the sale contract has price variation clause, the assessments have to be treated as provisional even though Rule 9B procedure was not followed. In this case, in the supply orders placed by AVVNL and JVVNL on the Appellant, there is price variation clause providing for variation in the price of ACSR conductors based on the price of AC Grade Aluminium Wire Rods and High <sup>Tensile</sup> Steel Galvanized Steel Wire.

(2) As regards crediting the amount of Rs. 36,191/- to the Consumer Welfare Fund instead of being refunded to the Appellant, there is no unjust enrichment in this case, as the excess amount alongwith duty, due to negative price variation, was recovered from the Appellant by AVVNL and JVVNL by deducting the same from the payment against subsequent supplies and thus, the Central Excise Duty reimbursement was based on the reduced price only. This is clear from the letter dated 22/12/08 at Ajmer Vidyut Vitran Nigam Limited and letter dated 23/12/08 at Jaipur Vidyut Vitran Nigam Limited to the Appellant wherein the buyers have

confirmed that the Appellant was reimbursed the Central Excise Duties after considering the negative price variation and not as per the original sales bills of the Appellant and that on account of negative price variation, short payment to the appellant vis-à-vis the billed amount was Rs. 5,59,457/- which included the Excise Duty of Rs. 75,474/-. Both these letters confirmed that the Appellant's firm was paid after considering the negative price variation and not as per the original sale bills. In view of this, since the incidence of excess duty paid has not been passed on by the Appellant to AVVNL and JVVNL, the Assistant Commissioner's order crediting the amount of Rs. 36,171/- to Consumer Welfare Fund on the ground of unjust enrichment is incorrect. In this regard, the judgment from Hon'ble Rajasthan High Court in case of **Union of India vs. A.K. Spintex Ltd.** reported in 2009 (234) E.L.T. 41 (Raj.) was cited, wherein it was held once the debit note is issued by the purchaser and corresponding credit note has been issued by the seller, the price of the goods stands reduced to the extent of

debit note/credit note and the price of the goods charged by the seller by the purchaser becomes the price initially billed minus the amount of debit note/credit note issued and in such a situation, it cannot be assumed that the incidence of the burden of Excise Duty has been passed on to the purchaser [page 7 of 8]. Judgment of Tribunal in the case of **Ideal Industrial Explosives Ltd. vs. CCE, Hyderabad** reported in **2008 (231) E.L.T. 485 (Trib. – Bang.)**, wherein the Tribunal held that when the Appellant received the price of the goods only at later date after reducing the original rate, in these circumstances there cannot be any unjust enrichment at all and three more judgments of the Tribunal in the cases of **CCE, Chandigarh vs. HFCL** reported in **2008 (231) E.L.T. 307 (Trib. – Del.)**; **CCE, Chandigarh vs. HIM Cylinders Pvt. Ltd.** reported in **2007 (207) E.L.T. 681** and **CCE, Tirupati vs. Kurool Cylinders Pvt. Ltd.** reported in **2007 (78) R.L.T. 616 (CESTAT – Bang.)** were cited, wherein the Tribunal held that when there was downward revision of the price and the manufacturer collected only the appropriate duty and

not higher duty from the customer, the unjust enrichment will not apply.

2.2 Shri S. Gautam, the learned Senior Departmental Representative made the following submissions :-

(1) On the question of rejection of an amount of Rs. 38,745/- as time barred, he pleaded that this is not a case of provisional assessment as neither there was a request for provisional assessment by the appellant nor any such order has been passed by the Assistant Commissioner/Deputy Commissioner and, therefore, the amount of Rs. 38,745/- pertaining to the period prior to 23/06/05 has been rightly rejected as time barred. The judgments of Hon'ble Supreme Court in the case of **CCE, Calcutta vs. Hindustan National Glass and Industries Ltd.** reported in **2005 (182) E.L.T. 12 (S.C.)** was cited, wherein it was held by Hon'ble Supreme Court that to establish as to whether the clearances were on provisional basis, an order under Rule 9B of the Erstwhile Central Excise Rules, 1944 and payment of duty on provisional basis are essential. Judgment of

Tribunal in the case of **Indian LPG Cylinders vs. CCE, Meerut – I** reported in 2007 (207) E.L.T. 442 (Tri. – Del.) was cited, wherein it was held that even if the fact that the price was provisional mentioned in the purchase order issued by the Oil Company, and there was downward price revision of the price of LPG Cylinders in pursuance of price variation clause, in absence of request made by the assessee to the proper officer seeking any direction for provisional assessment and in absence of any order of Assistant Commissioner regarding provisional assessments, the assessments cannot be treated as provisional assessments under Rule 9B of Erstwhile Central Excise Rules or Rule 7 of Central Excise Rules 2002 and accordingly the limitation period for claiming refund under Section 11B would apply. Besides this, the judgments of the Tribunal in the case of **CCE, Meerut – II vs. J.C.L. International** reported in 2002 (150) E.L.T. 261 (Tri. – Del.) and **CCE, Nagpur vs. Maharashtra Cylinder Ltd.** reported in 2003 (157) E.L.T. 688 (Tri. – Bom.) were cited, wherein it was held by the Tribunal that in

absence of any formal order under Rule 9B of the Central Excise Rules, the assessment cannot be treated as provisional assessment, even if there is price variation clause in the supply order against which the clearances of the goods have been made.

(2) On the point of unjust enrichment, it was pleaded that once the incidence of duty has been passed by an assessee to his customer, subsequent issue of debit note by the Customer and credit note by the assessee would not make any difference and that the refund claim would be hit by the principle of unjust enrichment. In this regard, reliance was placed on Tribunal's judgment in the case of **Sangam Processors (Bhilwara) Ltd. vs. CCE, Jaipur** reported in 1994 (71) E.L.T. 989 (Tri. – Del.), the Civil Appeal against which was dismissed by the Hon'ble Supreme Court vide judgment reported in 1994 (70) E.L.T. A-182. As per the Larger Bench judgment of the Tribunal in the case of **S. Kumar's Ltd. vs. CCE, Indore** reported in 2003 (153) E.L.T. 217 (Tri. – LB) when a Civil Appeal is dismissed, even though without assigning reasons, it will have an effect

of binding precedent unlike in the case of dismissal of Special leave petition. Besides this, the judgments of the Tribunal in the cases of **CCE, Madras vs. Addison & Company** reported in 1997 (93) E.L.T. 429 (Tri. – Mad.) and **Ballarpur Industries Ltd. vs. CCE, Bhubneshwar** reported in 2005 (184) E.L.T. 67 (Tri. – Del.) were cited wherein it was held that once the incidence of duty burden has been passed on by the assessee at the time of clearance of the goods, subsequent issue of credit note to the buyer is immaterial and the principle of unjust enrichment would apply.

(3) It was also emphasized that <sup>He-1</sup> a Larger Bench of the Tribunal in the case of **S. Kumar's Ltd. vs. CCE, Indore** (supra) relying upon the Hon'ble Supreme Court judgment in the case of **Sangam Processors (Bhilwara) Ltd. vs. CCE, Jaipur** (supra) had held that once the incidence of duty is passed on by an assessee at the time of clearance, post clearance adjustment like issue of credit note or cheque by the assessee who is claiming refund, to the buyer of the goods, taking back the burden

of duty would not help the assessee to get over the bar of unjust enrichment under Section 11B of the Central Excise Act.

3. I have carefully considered the submissions from both the sides and perused the records.

4. The first point of dispute in this case is as to whether because of price variation clause in the supply orders placed by JVVNL and AVVNL on the Appellant company, the assessment of duty on the goods cleared by the Appellant against these supply orders is to be treated as provisional. There is no dispute about the fact that neither the appellant had written to the Jurisdictional Assistant Commissioner for provisional assessment nor any such order in this regard has been passed by the Jurisdictional Assistant Commissioner. The appellant in support of the plea that the assessments have to be treated as provisional, rely upon the judgments of the Tribunal in the cases of Telephone Cables Ltd. vs. CCE, Chandigarh (supra), the Government's SLP which has been dismissed by the Hon'ble Supreme Court and also the judgments of the Tribunal in the cases of CCE, Tirupati vs.

Kurool Cylinders Pvt. Ltd. (supra) and Rajasthan Electronics & Instruments Ltd. vs. CCE, Jaipur (supra). In all these cases, the Tribunal has held that when a sale contract has price variation clause, the assessment in respect of clearances made against such sale contracts are to be treated as provisional even though procedure prescribed under Rule 9B of Central Excise Rule 1944 was not followed. Though against the Tribunal's judgment in the case of Telephone Cables Ltd. vs. CCE, Chandigarh (supra), the Union of India filed an SLP before Hon'ble Supreme Court, it is seen that SLP was dismissed as withdrawn and thus, the dismissal of the SLP by Hon'ble Supreme Court was not on merit or by a detailed order. As against this, Hon'ble Supreme Court in the case of CCE, Calcutta vs. Hindustan National Glass and Industries Ltd. (supra) has held that to establish that the clearances were on provisional basis an order under Rule 9B of the Erstwhile Central Excise Rules, 1944 and the payment of duty on provisional basis is necessary. I find that this decision of the Hon'ble Supreme Court is based on its earlier decision in the cases of **Metal Forgings vs. Union of India** reported in **2002 (146) E.L.T. 241 (S.C.)** and **Coastal Gases and Chemicals**

**Pvt. Ltd. vs. Asstt. CCE, Visakhapatnam** reported in 1997 (92) E.L.T. 460 (S.C.). The decision of Hon'ble Supreme Court, in view of the provisions of Article 141 of the Constitution is binding on the Courts and Tribunals. In view of the settled legal position on this issue, following the Hon'ble Supreme Court's judgments, I hold that since in this case, there was neither any application from the Appellant for provisional assessment nor any such order under Rule 7 of the Central Excise Rules, 2002, [corresponding to Rule 9B of the Erstwhile Central Excise Rules, 1944] had been passed by the Assistant Commissioner, the assessments cannot be treated as provisional, even though the supplies were against the contract containing price variation clause and, therefore, the refund claim would be subject to the limitation period prescribed under Section 11B of the Act. The rejection of refund claim of Rs. 38,345/- on the ground of time bar is therefore upheld.

5. The second point of dispute is as to whether refund of balance amount of Rs. 36,191/- is hit by the bar of unjust enrichment in terms of the provisions of Section 11B (2) of the Central Excise Act. In this regard, the contention of the

Appellant is that wherever on the basis of the price variation clause, there was negative price variation, the amount determined by the AVVNL and JVNL as excess payment including Excise Duty, used to be deducted from the payment for the subsequent supplies and that in this regard two certificates dated 22/12/08 from AVVNL dated 23/12/08 from JVNL have been produced. It has been pleaded that since the appellant received payment at the reduced rate and Central Excise Duty reimbursement was on such reduced value only, they have not passed on the incidence of the duty whose refund have been claimed and, therefore, the claim is not hit by the bar of unjust enrichment. The appellant in this regard ~~are~~ rely upon the judgments of the Tribunal in the case of CCE, Chandigarh vs. HFCL (supra) and also in the case of Ideal Industrial Explosives Ltd. vs. CCE, Hyderabad (supra), wherein it was held that when the price of the goods was received at later date only, after reducing the original rate and the appellant did not receive the higher price alongwith the duty paid by them, the appellant have not enriched unjudicially and the bar of unjust enrichment would not apply. The appellant have also cited the judgment of Hon'ble

Rajasthan High Court in the case of U.O.I. vs. A.K. Spintex Ltd. (supra), wherein Hon'ble High Court has held that the bar of unjust enrichment would not apply even when initially the incidence of higher duty has been passed on, if subsequent to the clearance, the customers have raised debit notes and the corresponding credit notes has been raised by the assessee. Hon'ble Rajasthan High Court in this case has emphasized that while Section 12B of the Central Excise Act places the burden of proving that the incidence of duty has not been passed on to the customers, on the assessee, the burden placed on the assessee by this Section is a rebuttable one and if the assessee leads the evidence of rebuttal by the issuance of debit notes by the customers and credit notes by him or refund of the excess amount of duty in cash etc. to the customer, the burden would shift on the Revenue, who in such a situation would be required to prove either that the theory projected by the assessee is fake and false or that the burden had actually been passed on. The Revenue on the other hand relies on the Tribunal's judgment in the case of Sangam Processors (Bhilwara) Ltd. vs. CCE, Jaipur (supra), the Civil Appeal against which was dismissed by the Hon'ble Supreme Court

and also this Tribunal judgment in the case of S. Kumar's Ltd. vs. CCE, Indore (supra) emphasizing that dismissal of Civil Appeal by Hon'ble Supreme Court even if without assigning reasons would have the effect of binding precedent unlike dismissal of SLP.

5.1 On carefully going through the judgment of the Tribunal in the case of Sangam Processors (Bhilwara) Ltd. vs. CCE, Jaipur and also the facts of this case, I find that there is a fundamental difference between the two in the case of Sangam Processors (Bhilwara) Ltd. vs. CCE, Jaipur (supra) duty had been paid on the clearances of fabrics at higher rate during period from 12/04/86 to 23/04/86 and the refund claim had been filed on 15/10/86. The refund claim was filed in view of a Notification having been issued under Section 11C waiving the requirement of payment higher duty for the period from 01/03/86 to 12/05/86, because as a general practice, duty at lower rate had been collected during that period. Initially, the claim was rejected by the Assistant Commissioner vide order dated 13/01/89 on the ground that Section 11C Notification only waived the requirement of payment of higher duty during the relevant period and the

duty already paid at the time of clearance was not required to be refunded. However, on appeal, the Commissioner (Appeal) remanded this matter to consider the refund on the basis of sub-Section 2 of Section 11C which provided for refund of duty, if the incidence of such duty has not been passed on to any person. It is at denovo adjudication stage that the assessee claimed that credit notes had been issued to the customers and that incidence of duty had not been passed on and on this basis, the Assistant Commissioner allowed the refund. The Assistant Commissioner's order was taken up for review by filing a review appeal before Commissioner (Appeal) and the Commissioner (Appeal) held that in such a situation M/s Sangam Processors (Bhilwara) Ltd. could not be said to have complied with the provisions of sub-Section 2 of Section 11C because they had collected duty from the Customers at the time of clearance and issue of credit notes would not bring them within the ambit of sub-Section 2 of Section 11C. It is this order of the Commissioner (Appeal) which was upheld by the Tribunal and the Civil Appeal against this order of the Tribunal was dismissed by the Hon'ble Supreme Court. Thus in the case of M/s Sangam Processors (Bhilwara) Ltd., other

than their claim of having issued credit notes to the customers, made at a much later stage, there was no evidence that they had actually not passed on the incidence of duty whose refund~~ed~~ was being claimed, while under Section 12B, the burden of proving this was on them. Hon'ble Supreme Court's judgment has to be seen in this background. However, in the present case, because of price variation in the clause in the supply order, though after sale of the goods payments on provisional basis were made, subsequently when the final prices were decided, in case of negative price variation, the excess amount was deducted while making payment against supplies for subsequent period and thus in effect, the Appellant have received the payment for the goods at the reduced rate and also reimbursement of Central Excise Duty on such reduced price. It has not been disputed by the Department that in case of negative price variation, the Central Excise Duty reimbursement was not reduced. In this case, on account of price variation clause in the supply orders, the prices mentioned in the invoices issued at the time of clearance of the goods to AVVNL and JVVNL on which duty was paid were not final prices. The prices were finalized

subsequently and in case of negative price variation, at the time of final settlement of the appellant's bills, the excess amount paid alongwith Central Excise Duty on this amount was deducted from the payments made to the appellant for the subsequent supplies and in this regard both JVNL and AVVNL have certified that they have not paid the excess amount of duty to the appellant. Thus the Appellant can be said to have discharged the burden of proof <sup>cost</sup> ~~cost~~ on them under Section 12B. In view of this, the ratio of the judgment of the Hon'ble Supreme Court in the case of Sangam Processors (Bhilwara) Ltd. vs. CCE, Jaipur (supra) and the other judgment of the Tribunal's based on this judgment of the Hon'ble Supreme Court would not be applicable to the facts of this case and the appellant cannot be said to have passed on the incidence of the duty whose refund is claimed by them. In this case, in my view, it is the judgment of the Tribunal in the cases of CCE, Chandigarh vs. HFCL (supra) and Ideal Industrial Explosives Ltd. vs. CCE, Hyderabad (supra) which is applicable. Tribunal in another case of **Universal Cylinders Ltd. vs. CCE, Jaipur** – I reported in **2004 (178) E.L.T. 898** has held that when contract entered

between Assessee and the customer had a price variation clause but the customer refusing the enhanced price deducted the differential amount including duty from the payment made to the Assessee, the Revenue cannot claim that incidence of duty was borne by the customers. Beside this, I also find that Hon'ble Rajasthan High Court, which is the Jurisdictional High Court for this case for the appellant, in the case of Union of India vs. A.K. Spintex Ltd. (supra), on issue as to whether the bar of unjust enrichment would be applicable when subsequent to the clearances of the goods on payment of higher amount of duty and passing on the incidence of the duty, debit notes by the customers and the corresponding credit notes by the assessee are raised reducing the price alongwith the duty paid for the goods, in para 9,10,11,12,13 and 14 of the judgment has held as under :-

“9. On the face of the things itself, it is clear that once the goods are supplied, the property in the goods passes to the purchaser, and seller becomes entitled to the price, and once the debit note is issued by the purchaser, and corresponding credit note is issued by the seller, the price of the goods stands reduced to the extent of debit note and credit note, meaning thereby, that after

issuance of debit note and credit note, the price of goods charged by the seller from the purchaser is the price initially billed minus the amount of the debit note, and credit note, and therefore, when the debit notes and credit notes are issued and effected, which are not disputed, it cannot be assumed, that incidence of burden of excise duty has been passed on to the purchaser.

10. So far as Section 12B is concerned, it only places burden of proof on the assessee, by enacting the presumption, against him, and does not do anything beyond it. The burden placed on the assessee, by Section 12B, obviously, is a rebuttable one, and the assessee may lead evidence in rebuttal, by proving issuance of debit note and credit note, likewise there may be cases, where purchaser may refund the amount to seller, in cash, or may issue some bank note, like Cheque, or Draft, for refund of the amount, or there may be case, where goods are sold on credit, and while making payment of price of the goods the purchaser may debit the amount, and thus, pay lesser amount to the seller, and if all those facts are shown and proved, the burden placed on the assessee, by Section 12B, would shift on the revenue, then, it is required for revenue, to prove, either that the theory projected by the assessee, is fake and false, or that the burden has actually been passed on. Once the assessee leads reliable evidence, about his having not passed burden on the

purchaser, and revenue fails to rebut that evidence, the presumption enacted by Section 12B, stands sufficiently rebutted, and cannot survive *ad infinitum*.

11. The proposition propounded by the Hon'ble Supreme Court in Mafatlal case being proposition No. 3, entitling only the ultimate person, bearing the burden, to be entitled to lay claim for the refund, is obviously, not open to any argument, and is duly respected.

12. The question, then arise is, the question of fact, as to who is an ultimate person, who has borne the burden. Obviously, if it is established by the assessee, that the burden has not been passed on, or has been appropriately reversed, the ultimate person, who has suffered the burden, would be assessee himself.

13. It is faced with this situation, that the submission made by the learned counsel for the revenue, was, that in the scheme of things, when the goods are sold or cleared for sale, it has to be assumed, that the burden has been passed on to the purchaser, and this process of issuance of debit note or credit note, cannot have the effect of reversal of passing of the burden, as it is only a paper transaction, to get undue benefit by the assessee.

14. In our view, the stand cannot be accepted. Passing on the burden of excise duty to the next purchaser, cannot be left in the realm of presumption. In cases,

where the assessee is able to show, that the burden is not passed on, or it has been reversed, the claim of refund cannot be denied.”

5.2 In this case, from the certificates issued by JVVNL and AVVNL, it is clear that the excess price alongwith the Central Excise Duty on the same had been deducted from the payments due to the appellants against subsequent supplies and thus, the appellant cannot be said to have passed on the incidence of duty whose refund is claimed by them. In view of this, I hold that the impugned order upholding the crediting of the refund amount of Rs. 36,191/- to Consumer Welfare Fund instead of being paid to the Appellant is not sustainable and the same is set aside.

6. In view of the above discussion, while the impugned order <sup>upholding the rejection of</sup> ~~rejecting the rejection of~~ the refund claim of Rs. 38,745/- on the ground of time bar is upheld, the order upholding the crediting of an amount of Rs. 36,191/- to the consumer welfare fund instead of being refunded to the appellant, is set aside and Department is directed to refund

this amount to the appellant. The appeal stands disposed of, as above.

(Pronounced in open court on 24/3/69)

**(Rakesh Kumar)**  
**Member (Technical)**

PK