



unjust enrichment. The undisputed facts are that the appellant had collected these amounts as service tax from the service recipients as follows:

S.No.	Particulars	Amount (Rs.)
1	Project CPWD, CAPT, Bhopal	1,01,06,901
2	Project DSIIDC, Delhi	27,69,995
3	NBCC Ltd. (CAPF, Greater Noida, UP)	4,37,515
	<b>Total</b>	<b>1,33,50,411</b>

### **Submissions of the appellant**

2. Learned counsel for the appellant made the following submissions:

- (i) The appellant was providing construction services to commercial and industrial buildings including Government buildings and had been paying service tax on the services.
- (ii) On 14<sup>th</sup> May 2016, section 102 was introduced in the Finance Act, 1994<sup>4</sup> with retrospective effect from 1 April 2015 exempting the construction of Government buildings for which contracts were entered into prior to 1 March 2015. The section further provided that if service tax was paid, notwithstanding anything contained in any other law, refund shall be made if the refund application is made within 6 months.
- (iii) The appellant made an application and the Assistant Commissioner had initially rejected the refund by order dated 15 January 2018. On appeal, the Commissioner (Appeals) remanded the matter in pursuance of which

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**4 Finance Act**

the Assistant Commissioner passed the OIO partly allowing the refund and partly rejecting it on the ground of unjust enrichment. On appeal, the Commissioner (Appeals) passed the impugned order upholding the OIO.

- (iv) The appellant had obtained NOC from the service recipients CPWD, DSIIDC and NBCC and filed refund claims on their behalf which should not have been rejected on grounds of unjust enrichment.
- (v) If the refund cannot be given to the appellant it may be credited directly to the accounts of the service recipients.
- (vi) No SCN was issued in the whole proceedings
- (vii) The OIA dated 31.3.2021 is beyond the scope of the deficiency memo issued to the appellant.
- (viii) Reliance is placed on the following decisions:
  - a. **S.No. Atwidekar vs Commissioner of CT and C Ex Belgaum 2019 (24) GSTL 247**
  - b. **Lakshmi Engineers vs Commissioner of C.Ex. and Central Tax, Mangalore<sup>5</sup>**
  - c. **M/s Ravindra Kumar Gupta & Sons vs Commissioner, CGST, Dehradun<sup>6</sup>**
  - d. **A P Enterprises vs Commissioner Central Excise & ST, Panchkula<sup>7</sup>**
  - e. **Shree Construction Company vs CCE &ST Ludhiana<sup>8</sup>**

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5 2022 (59) GSTL 105 (Tri-Bang.)

6 2022 (1) TMI 131-CESTAT, New Delhi

7 2019 (26) GSTL 236 (Tri-Chan.)

8 2019 (1) TMI 7 CESTAT Chandigarh

- f. **Federation of Andhra Pradesh Chamber of Commerce and Industry vs CCE, Cus & ST, Hyderabad**<sup>9</sup>
- g. **Ranjeet Singh Choudhary vs Union of India**<sup>10</sup>
- (ix) The appeal may be allowed and the appellant may be sanctioned the refund of the disputed amount.

### **Submissions on behalf of the Revenue**

3. Learned authorized representative for the Revenue made the following submissions.

- (i) The present dispute is confined to rejection of refund of Rs. 1,33,50,411/- which the appellant had paid as service tax but which it had collected from three service recipients.
- (ii) In Project CPWD, CAPT, Bhopal, the appellant paid service tax and passed it on to CPWD. CPWD did not recover the amount paid as service tax from the appellant nor did it adjust this amount against any dues to the appellant.
- (iii) Section 102 of the Act provided for refund of service tax paid during the period 1.4.2015 to 29.2.2016 (both days inclusive) under a contract entered into before 1.3.2015 on which the appropriate stamp duty, where applicable, was paid before that date.
- (iv) The appellant's claim of refund is only based on a No Objection Certificate (NOC) issued by the CPWD. Any

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**9** 2017 (4) GSTL 193 (Tri-Hyderabad)  
**10** 2018 (15) GSTL 192 (Guj.)

NOC issued by CPWD cannot replace the statutory provision to avoid unjust enrichment.

- (v) Similar is the case with Project DSIIDC, Delhi and NBCC Ltd.
- (vi) Therefore, there is no force in the appeal which may be dismissed and the impugned order may be upheld.

### **Findings**

4. We have considered the submissions advanced by both sides and perused the records. Section 102 of the Finance Act reads as follows:

**"SECTION 102.Special provision for exemption in certain cases relating to construction of Government buildings.**

(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of--

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;

(b) a structure meant predominantly for use as--

(i) an educational establishment;

(ii) a clinical establishment; or

(iii) an art or cultural establishment;

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act, under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.

**(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.**

**(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months**

**from the date on which the Finance Bill, 2016 receives the assent of the President.”**

5. It is undisputed that the three contracts were covered by section 102. Unlike in Income Tax, refunds of Customs, Excise and Service Tax are not automatic. One has to apply for refund. The reason is simple. While in income tax, the person who pays the tax also bears its burden, in indirect taxes such as central excise and service tax while the assessee pays the tax, it's burden is borne by someone else (such as the buyer of goods or the service recipient). Section 11B of the Central Excise Act, 1944 which is made applicable to the service tax through section 83 of the Finance Act, 1994 is the provision for filing refund claims of service tax. This reads 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 :

**Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :

**Provided** further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

**(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 sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) 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) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

**(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;**

**(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;**

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

**Provided** further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of <sup>2</sup>[duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or 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).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only

in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

**Explanation.** - For the purposes of this section, -

(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, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(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;

(f) in any other case, the date of payment of duty.”

6. Usually, all applications for refund of service tax have to be filed under and dealt with as per section 11B of the Central Excise Act. This section provides for a limitation of one year to file the refund claim. Further, it says that if the amount is liable to be refunded, it shall be credited to the consumer welfare fund unless the claimant produces evidence that it has not been passed on to anyone else. Further, if the buyer had borne the duty, he can claim refund if he had not passed on the burden to anyone else. When made applicable to service tax, the service recipient must be treated as the buyer.

7. As far as the refunds under section 102 of the Finance Act are concerned, a special provision has been made that refund applications can be made within six months from the date on which the Finance Bill 2016 received assent of the President of India. No other changes were made to the refund proceedings under section 11B including any changes to the provisions of unjust enrichment.

8. But for the special limitation prescribed under section 102, all provisions of section 11B would apply to refunds under section 102 of Finance Act also. These include the provision relating to unjust enrichment. In a nutshell, if a manufacturer pays excess excise duty or a service provider pays excess service tax, passes it on to the buyer of goods or the service recipient and claims a refund afterwards, he will end up getting unjustly enriched. A

mechanism has been built into section 11B of the Central Excise Act which makes a rebuttable presumption that all duties have been passed on to the buyer. Therefore, any refund sanctioned must be credited to the Consumer Welfare Fund instead of being paid to the claimant. However, if the manufacturer had not passed on the excise duty to the buyer, he should be paid the refund amount. The same provisions also apply to Service Tax.

**When the provisions of unjust enrichment were introduced, they were challenged before the Supreme Court. A nine-member Constitution Bench of Supreme Court upheld the provisions of unjust enrichment in Mafatlal Industries Ltd. vs UOI<sup>11</sup>.** Therefore, the provisions of unjust enrichment in refunds are sacrosanct and they cannot be violated.

9. It is perfectly possible for one to devise many methods of avoiding unjust enrichment but any such endeavours are of no consequence since the Parliament has laid down a law on how to avoid unjust enrichment- through a rebuttable presumption that all duties and taxes have been passed on and crediting the refund amounts to Consumer Welfare Fund. If the claimant establishes that he had not passed on the burden to the buyer, he shall be paid the refund amount. Even the buyer of the goods (or the recipient of the service) can claim refund if he had not further passed on the burden to someone else.

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**11 1997 (89) E.L.T. 247 (S.C.)**

10. The provisions of unjust enrichment also apply to refunds under section 102 of the Finance Act because there is no contrary stipulation in Section 102. In this case, it is undisputed that the appellant had passed on the amounts claimed as refund to CPWD, DSIIDC and to NBCC. The Assistant Commissioner should have, therefore, sanctioned the refund and credited it to the Consumer Welfare Fund. He should not have rejected it because section 11B does not provide for rejection of refund on grounds of unjust enrichment.

11. If CPWD, DSIIDC or NBCC wanted, they could have filed refund applications and claimed refund. The appellant's contention is that these organisations had given the appellant NOC indicating that they have no objection if the refund was sanctioned to the appellant and therefore, the refund should have been paid to the appellant.

12. Thus, we have, on the one hand, NOCs issued by officers of CPWD, DSIIDC or NBCC and on the other hand, we have the law passed by the Parliament (Section 11B) upheld by a nine-member Constitutional Bench of Supreme Court in **Mafatlal Industries Ltd.** Needless to say that any NOC issued by the officers cannot prevail over the law passed by the Parliament. In fact, the NOCs issued by the officers have no relevance in the law.

13. Learned counsel for the appellant relied on the orders passed by a learned Single Member in **S N Atiwadkar** and similar orders passed by other Single Member Benches in

**Lakshmi Engineers, , M/s. Ravindra Kumar Gupta, AP Enterprises, Shree Construction Company and Federation of Andhra Pradesh Chamber of Commerce and Industry.**

14. We respectfully disagree with these decisions. All these decisions having been passed by learned Single Members do not bind this Division Bench. It is our considered view that Tribunal, being a creation of law, cannot go beyond the law itself. When the Parliament prescribed a procedure under Section 11B to avoid unjust enrichment, it is not open to anyone including this Tribunal to create an alternative mechanism of avoiding unjust enrichment. It is even more so, considering that this provision of the Act made by the Parliament was examined and upheld by a nine-member Constitution Bench of Supreme Court in **Mafatlal Industries Ltd.** This decision of the Supreme Court was not considered in these orders of the Tribunal and hence they are *per incuriam*.

15. Learned counsel also relied on the judgment of the Gujarat High Court in **Ranjeet Singh Choudhary** in a Writ Petition under Article 226 of the Constitution. In that case, the petitioner had rendered the services to CPWD covered by section 102 of the Finance Act. The Assistant Commissioner sanctioned the refund and credited it to Consumer Welfare Fund and on the other hand, CPWD withheld equivalent payments from the amounts due to the petitioner. After considering all relevant legal provisions and the judgment in **Mafatlal Industries Ltd.**, the High Court passed the order directing the CPWD to release all payments to

the Petitioner and remanding the matter back to the Assistant Commissioner and enabling the CPWD to join as a co-applicant and pursue the refund claim. The High Court also made it clear that the CPWD and not the Petitioner can pursue the refund claim. The relevant portion of the judgment is reproduced below:

**"20.** In the result, petition is disposed of with the following directions:

(1) The order passed by the respondent No. 4 - Assistant Commissioner of Central Excise & Service Tax, Central Excise & Service Tax Division, Ajmer to the extent it holds that it is a case of unjust enrichment, and therefore, directs depositing of the said sum of Rs. 59,81,343/- to be credited in the Consumer Welfare Fund is declared to be illegal. The order is quashed, however, without disturbing the findings and observations on the allowability of the refund claim. The proceedings are placed back before the Assistant Commissioner of Central Excise & Service Tax, Central Excise & Service Tax Division, Ajmer (Rajasthan). It would be open for the CPWD to join in the said application as a co-applicant. If so done by 30th June, 2018, the Competent Authority shall decide such application on merits. **We also hold that not the petitioner, but the CPWD can pursue the refund claim.**

(2) CPWD shall release the amounts already adjusted from the petitioner's running bills of the present contract and the security deposit with simple interest @ 7.5% per annum commencing from, after three months of the completion of the execution of the contract till actual payment. It is further directed that the CPWD shall not seek any recovery from the petitioner in respect of service tax component from the petitioner's bills of other contracts."

16. In this case, the Assistant Commissioner had incorrectly rejected the refund on grounds of unjust enrichment when, in fact, he should have credited it to the Consumer Welfare Fund. However, following the ratio of **Ranjeet Singh Choudhary**, we are of the opinion that CPWD, DSIIDC and NBCC should be given an opportunity to join as co-applicants and pursue the refund claims since those organisations had borne the service tax.

17. We, therefore, remand the matter to the Assistant Commissioner. If CPWD, DSIIDC and NBCC join as co-applicants within 3 months from today, he shall pass an order sanctioning the refunds to them. Else, he shall credit the amounts to the Consumer Welfare Fund.

18. The impugned order is set aside and the matter is remanded to the Assistant Commissioner as above.

[Order pronounced on **28/11/2025**]

**(BINU TAMTA)**  
**MEMBER ( JUDICIAL )**

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

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