IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No. 75314-75315 of 2014

(Arising out of Order-in-Original No.4/COMMR/CH-44/ADJ/DIB/06 dated 31.07.2006 passed by the Commissioner of Central Excise, Dibrugarh & No.3 DIV/JOR/CEX/REF/06/2008 15.02.2008 passed by Deputy Commissioner, Central Excise, BJorhat Division)

M/s Jayshree Timber Products

(C/o Jayashree Tea and Industries Limited, Industry House,
10, Camac Street, Kolkata-700 017)

Appellant

VERSUS

Commr. of CGST & Central Excise, Dibrugarh

(Central Excise, Jorhat Division, Assam, Station Godown Road, Jorhat-785 001)

Respondent

APPEARANCE

Ms.Sweta Mukherjee, Advocate, for the appellant
Mr. Mihir Ranjan, Special Counsel, for the respondent

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. -76695-76696/2025

Date of Hearing : 17.06.2025
Date of Decision : 03.07.2025

Per : RAJEEV TANDON:

The present case has its genesis in the year 1981, when the appellant vide a communication intimated the jurisdictional authorities about the manufacture of a bonding agent as solution of urea and phenol with formalin (UF/PF resin) at their works. For the purpose of present adjudication it may not be required at this juncture to go into the protracted litigation of history of over 44 years. However, the fact of the matter is that pursuant thereto sometimes in 1982 the appellant filed a fresh classification list and stopped making payment of duty on the solution of UF/PF resin produced. Further, thereto the appellant had filed 3 refund claims for the duty paid on UF/PF resin under tariff item 15 A (1) of the earstwhile tariff, in respect of such goods captively consumed during the period 01.10.1977 to 15.09.1982. The total claim of refund was for an amount of Rs.51,33,004.71.The said refund claims were rejected by the authority on 20.08.1983. The tortuous appellate history of the matter thus runs therefrom and has reportedly traversed up and down on multiple occasions, right upto the Hon'ble High Court, Guwahati over the years.

2. A writ Appeal No. 211 of 1996 came to be disposed with the Hon'ble High Court holding inter alia that the issue in dispute regarding the applicability of principle of unjust enrichment concerning UF/PF resin solution prepared and used captively by the appellant had not been gone into and it would be open for the appellant to make such application which was required to be examined as per law. In the meanwhile, the original writ bearing Civil Rule No. 3499 of 1991 which was filed by the appellant before the Hon'ble High Court, Guwahati, pursuant to the Order in Appeal dated 17.9.83 passed by the Commissioner (Appeal) directing drawal of fresh samples, by the CRCL, was disposed of by the Hon'ble High Court with specific directions to the jurisdictional authority in the matter. As a consequence of the said directions, the refund claims of the appellant, were rejected. The appellant filed yet another writ petition bearing Civil Rule No.343 of 1992, challenging the said order dated 12.11.91, whereby the refund claim filed by the appellant was rejected. It was therein held by the Hon'ble High Court that

i) UF/ PF solution made and captively consumed by the appellant in its factory at Mariani is not dutiable &

ii) the appellant was not entitled to refund as the same would amount to unjust enrichment (Reference order dated 27.07.1995).

3. Against the said order dated 27.07.1995 passed in Civil Rule No.343 of 1992, the appellant had preferred a fresh writ appeal bearing no.211 of 1996, referred supra, in pursuance of which the Hon'ble High Court had admitted the refund claim filed by the appellant and were allowed by the concerned authority. However, upon review of the said order that came to be litigated before the Appellate Authorities and a demand Show Cause Notice proposing recovery of erroneous refund for an amount of Rs.51,33,004.71, was issued to the appellant on 07.01.2005. In pursuance thereof, the department initiated measures for recovery of an amount of Rs.50,04,562/- after adjusting an amount of Rs.12,84,43/- that was earlier found payable to the appellant. Subsequently, the appellant preferred appeal under Section 35G of the Central Excise Act, 1944 before the Hon'ble High Court, Guwahati, against the said order of the lower authority dated 03.09.2008. This appeal was, however, dismissed by the Hon'ble High Court pointing out that the amended provision of Section 11B of the Central Excise Act, 1944, would be applicable in the case, as the refund claim filed had not reached finality even after issuance of the order dated 30.07.1991 passed by the Hon'ble High Court, Guwahati, in Civil Rule No.3499 of 1991. SLP filed against the said order bearing no. SLP(C) No.34357 of 2010 before the Hon'ble apex court, was also dismissed. In the

meanwhile, another writ petition bearing No.WP(C) No.5174 of 2008 and WP(C) No.5175 of 2008, was filed by the appellant inter alia praying liberty to raise all the points in appeal before the Appellate Tribunal. Thus, the present appeal challenging the adjudication order dated 30.07.2006 passed by the Ld. Commissioner of Central Excise, Dibrugarh.

4. To recap for sake of gravity and ease of understanding, it be stated that the Show Cause Notice dated 07.01.2005 culminated into an adjudication order dated 31.07.2006. The appellant has in the matter contended that the said Show Cause Notice was hit by principles of *res judicata* in as much as order dated 20.08.2003 was appealed by the department and therefore any further action on a void act would in itself be voidable.

5. In addition to the above, the appellant has contended that even otherwise the refund was sanctioned vide order dated 20.08.2003, while the impugned Show Cause Notice was issued on 07.01.2005 and was therefore hit by limitation (one year being the timeline to issue notice, at the relevant point in time). In order to buttress their claim, the appellant also submits that they had filed their classification list on 27.02.1982 and therefore it would not be correct for the department to invoke extended period of limitation, as they were all along aware of the facts in question.

6. On the aspect of unjust enrichment, the appellant submits that the refund claims concerned were pertaining to the period 01.10.1977 to 15.09.1982 which initially were disposed vide Order-In-Original dated 27.02.1987 and would therefore be concerned with the provisions of Section 11B as stood at the relevant point in time. Relevant extract of Section 11B as regards the aspect of limitation at the time of the impugned period is as below:

> *11. Claim for refund of duty-*
>
> *(1) Any person claiming a refund of any duty paid by him may make an application for a refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty.*
>
> *Provided that the limitation of six months shall not apply where any duty has been paid under protest.*
>
> *Explanation- Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall be computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.*

The said provision was amended w.e.f. 20.09.1991 vide Section 3 of the Central Excise & Customs (Amendment) Act, 1991 and as on date reads as under:

> *11B.Claim for refund of duty –(1) Any person claiming a efund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months 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 he amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of 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, 1919, 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 six months shall not apply where any duty has been paid under protest.*

7. In support of their proposition, the appellant has also relied upon the decision of the Hon'ble High Court of Bombay in the case of Arochem Industries v. Union of India[1991(56) ELT 505(Bom.), to submit that the refund claim for the period prior to the amendment in Section 11B carried out by Section 3 of Central Excise & Customs (Amendment) Act 1991, was not required to be considered while allowing the refund to the appellant. The appellant also submits that the law does not authorize the denial of relief on the score of unjust enrichment. The appellant, therefore, prayed for setting aside the adjudication order dated 31.07.2006 passed by Commissioner of Central Excise, Dibrugarh and allowing consequential relief in favour of the appellants.

8. The learned Special Counsel Shri Mihir Ranjan submits that the appellant was a manufacturer of plywood falling under erstwhile Tariff Item 16B of the First Schedule to the Central Excise and Salt Act, 1944. During the process of manufacture of finished goods, the appellant prepared an intermediate product – solution of urea or phenol with formalin (UF or PF Solution) that was consumed captively and used as a bonding agent in the manufacture of plywood. This was, however, assessed to Central Excise duty under Tariff Item 15A of this said Tariff which read as:

> *"Artificial or Synthetic resin and plastic materials and Articles thereof –(1) Artificial or synthetic resin and plastic materials I any form, whether solid, liquid or pasty or a powder, granules or flakes, or in the form of moulding powder, the following namely:-*

(i) Condensation, poly-condensation and poly-addition products, whether or not modified or polymerized, including phenoplasts, Aminoplasts, alkyds, polyurethane, polyally esters and other unsaturated polymers."

The learned Special Counsel further submits that in a similar case of Indian Plastic and Chemical Pvt. Limited vs Union of India and others [1981(8) ELT 108 Delhi] it was held that the aqua solution of Phenolic resin (UF/PF resin) cannot be regarded as artificial or synthetic resin in liquid form. It can at best be described as "Solution of resin" which is not liable to Excise Duty under Tariff Item 15A.

9. A list of chronological events leading to the present status of the case can be depicted as under: -

Sl. No.	Date	Particular
1.	11.04.1981	(1) The Appellant vide letter no MXN/Duty/Exem/resin/161 dated 11.04.1981 addressed to the Assistant Collector of Central Excise, Jorhat Division, submitted that the collection and levy of duty on the solution in question from the assessee was illegal and unauthorized as it was not excisable goods. Were the solution held to be excisable, in that case, it would be classifiable under Tariff Item 68 of the erstwhile tariff and was wholly exempt from duty by Notification No 118/75/-CE dated 30.04.1975 for exclusive captive use in the manufacture of plywood.
2.	22.07.1982	The Appellant filed a fresh classification list on 22.07.1982 (effective 01.08 1982) and stopped paying duty on the UF/PF Resin.
3.	20.11.1982	The Appellant filed three refund claims for Rs 51,33.004.71/ (the total duty paid on UF/PF Resin from 01.10.1977 to 19.09.1982).
4.	20.08.1983	(i) The Assistant Collector, Customs & Central Excise, Jorhat, vide his order in original no DIV/JOR/1/CE/Adj/83 dated 20.08.1983, rejected the assessee's refund claims. (ii) Classified the solution as a synthetic resin falling under Tariff Item 15A(1) of the erstwhile tariff. (iii) Confirmed the duty demanded on the solution prepared and captively consumed by the Appellant.
5.	17.08.1983	The Appellant filed an appeal before the Collector(Appeals), Central Excise, Calcutta, who, vide his Order-in-Appeal, No. 276/ASM/83 dated 17.09.1983, set aside the order of the Assistant Collector, Customs & Central Excise, Jorhat, and remanded the matter for a fresh determination, per law after drawing the samples of the goods in question.

6.	11.08 1986	The Chief Chemist, CRCL New Delhi, vide Test Report dated 11.08.1986 held that the Sample Solutions merits classification (i) under Tariff Item no 15(A)(1) of the erstwhile tariff and (ii) Chapter Sub-heading nos. 3909.10 and 3909.51 of Schedule I of the Central Excise Tariff 1985 (new tariff).
7.	11.11.1986	Show-cause notice dated 11.11.86 proposing a classification of the solution under item 15A(1) of the erstwhile tariff issued. It also proposed to reject the refund claim dated 12.11.1982 for an amount of Rs.51.33.004.71.
8.	19.11.1986	The Department issued another show cause notice proposing the solution's classification under Sub-Heading No.3909.10/3909.51 of the New Tariff.
9.	27.02.1987	The Assistant Collector, Customs & Central Excise, Jorhat, vide a common order-in-original no. DIV/JOR/4/CE/CL/87 dated 27.02.1987 in respect of both the show cause notices dated 11.11.86 and 19.11.86, classified the solution in question under Tariff item No. 15A(1) of erstwhile tariff and under Heading No.39.09, sub-heading 3009.10/3909.51 of the Central Excise Tariff Act 1986, while dismissing the Appellant's refund claims.
10.	22.07.1987	Against the OIO dated 27.02. 1987, the assessee filed an appeal before the Collector (Appeals), Central Excise, Calcutta, who vide OIA no.91/92-SH/81 dated 22.7.1987 set aside the Assistant Collector's impugned OIO dated 27.02.1987 with a direction for a fresh decision after re-testing the samples and communicating the test results to the assessee.
11.	05.11.1987	The departmental authorities drew fresh samples of the goods for retesting.
12	29.02.1988	Vide letter dated 29.02.1988, the assessee disputes the findings of the Chemical Examiner.
13.	14.02.1990	Departmental Authorities draw samples once again for re-testing by CRCL.
14.	In the meantime, the duty liability of the like goods of the other assessee came up for judicial consideration before different courts, including the Guwahati High Court. The Courts consistently held that the U.F. and P.F. solutions manufactured for captive consumption do not attract duty and are not dutiable items.	
15.	The Appellant, thus, before receipt of CRCL's test report, filed a writ application being Civil Rule No. 3499/1991 before the Hon'ble Guwahati High Court, praying for a direction to the Central Excise Department to classify the solutions in question under the appropriate Tariff Item, as per the judgment of the Courts in an identical matter and to grant necessary refund of the amount collected by the Department as the said goods were not liable for payment of Central Excise Duty.	

16.	13.07.1991	The Hon'ble Guwahati High Court disposed of the writ Civil Rule no. 3499 of 1991, holding that the solution of U.F/P.F. resin was non-dutiable and passed direction, to the Assistant Collector, Customs & Central Excise, Jorhat to finally dispose of the refund claims of the assessee and pass an order for refund as claimed within 3(three) months.
17.	20.09.1991	Section 11 B of the Central Excise Act 1944 was amended to incorporate the doctrine of unjust enrichment.
18.	12.11.1991	Following the judgment dated 13.07 1991, the Assistant Collector, Customs & Central Excise, Jorhat, passed an order on 12.11.1991 vide which it was observed that though the products were captively consumed, duty paid on the same products had been realized from the ultimate consumers. Thus, a refund of the duty paid by the assessee would amount to unjust enrichment. Therefore, the assessee was not entitled to get the refund of duty paid in the light of the Central Excise & Customs Law (Amendment) Act, 1991 (No. 40 of 1991) and rejected the refund claims amounting to Rs. 51.33,004.71.
19.	27.07.1995	Being aggrieved with the Order dated 12.11.1991, the appellant filed Civil Writ No. 343/92 before the Guwahati High Court challenging the legality and validity of the Oder dated 12.11.1991, passed by the Assistant Collector, Customs & Central Excise, Jorhat. The Hon'ble High Court vide order dated 27.07.1995, held that the U.F/P.F solution captively consumed by the assessee was not a dutiable item, and the petitioner is not entitled to a refund, as the same would amount to unjust enrichment.
20.	Meanwhile the appellant filed another writ, Appeal No 211/96, before the Division Bench against the High Court's order dated 27.07.1995 on whether the principle of unjust enrichment will apply to the present case.	
21.	02.05.2000	Hon'ble Guwahati High Court vide order dated 02.05.2000, while disposing of the writ appeal vide order dated 02.05.2000, held that it would be open for the assessee to make an application before the Assistant Commissioner to raise all the questions, including the question of limitation and refund application, which the Assistant Commissioner should decide as per law.
22.	26.06.2000	The Assessee applied to the Assistant Commissioner of Central Excise, Jorhat, for sanction of the refund amount.

23.	20.08.2003	Assistant Commissioner, Central Excise, Jorhat, sanctioned the refund and observed that the provisions of the First proviso to sub-section (1) of Section 11B would not apply in cases where an application for refund had been made before the commencement of the Central Excise & Customs Law (Amendment) Act, 1991 (No. 40 of 1991). The Assistant Commissioner, Central Excise, Jorhat, also observed that the assessee filed the refund claims on 20.11.1982. The Hon'ble Guwahati High Court finally decided the matter vide its order dated 13.07.1991, and the Department did not file an appeal against the said Final Order. The Assistant Commissioner held that the assessee's refund claims, which the Hon'ble Guwahati High Court finally decided vide order dated 13.07.1991, were not hit by the amendment brought w.e.f. 20.09.1991. The Assistant Commissioner, Central Excise, Jorhat, sanctioned the refund for an amount of Rs. 51,33.004.71/- vide his Order dated 20.08.2003.
24.	31.08.2004	Revenue filed an appeal against the Order-in-Original No. V(18)ACJ/REF/1737-38 dated 20.08.2003 before the Commissioner (Appeals), Central Excise, Guwahati. The Commissioner (Appeals), vide Order-in-Appeal No. 81/CE(A)/GHY/04 dated 31.08.2004, held that the Assistant Commissioner was not correct in sanctioning the refund claim without examining the issue of unjust enrichment. He, therefore, set aside the Assistant Commissioner's order dated 20.08.2003.
25.	04.01.2005	The Appellant preferred an appeal before the Tribunal bearing Excise Appeal no. EDM-16/05 against the order of Commissioner (Appeal), Guwahati, dated 31.08.2004. The Appellant however did not apply for a stay of the order dated 31.08.2004 of Commissioner (Appeal).
26.	07.01.2005	The Assistant Commissioner, Central Excise, Jorhat issued a demand cum SCN vide C.No.V(18)48/ACJ/REF/4550 dated 07.01.2005 alleging that a claim for refund amounting to Rs. 51,33,004.71 was erroneously made and required the Appellant to show cause to the Assistant Commissioner, Central Excise, Jorhat, as to why Rs. 51,33.004.71, should not be demanded and recovered under Section 11A of the Central Excise Act 1944.

27.	31.07.2006	The Commissioner, Central Excise, Dibrugarh, vide Order-in-Original No.4/COMMR/CH-44/ADJ/DIB/06 dated 31.07.2006, confirmed the demand of Rs.51,33,004.71 under Section 11 A (2) of the Central Excise Act 1944, along with interest under Section 11 AB of the said Act.
28.	15.02.2008	Deputy Commissioner, Central Excise vide Adjudication Order No. DIV/JOR/CEX/REF/06/2008 dated 15.02.2008 adjusted an amount of Rs.1,28,443/- from the revenue arrears payable to the assessee.
29.	10.03.2014	Being aggrieved by the Order-in-Original No.4/COMMR/CH-44/ADJ/DIB/06 dated 31.07.2006, the assessee has filed the present appeal No.E-75314/2014 before this Tribunal.
30.	10.03.2014	Being aggrieved by Order DIV-JOR-CEX-REF-06/2008 dated 15.02.2008 passed by the Deputy Commissioner, the assessee filed the present appeal No.E-75315/2014 before the Hon'ble CESTAT, Kolkata

10. The learned Special Counsel further submitted that the Hon'ble Tribunal vide order dated 02.09.2009 had dismissed the appeal filed by the appellant bearing no.EDM-16/2005 and had held that the appellant's contention that proceedings concluded before the introduction of the provisions of unjust enrichment in the Central Excise statute in the year 1991 was not correct and therefore the ratio of the Hon'ble Apex Court's[2007(207) ELT 324 SC] decision in the case of Triveni Chemicals Limited v. UOI would not apply to the facts of the present case. His contention was that the appeal filed against the said order of the Hon'ble Tribunal by the appellant was dismissed by the Hon'ble Guwahati High Court in [2011(272)ELT 15 GAU]. Responding to the appellant's plea on time bar, he submitted that the Hon'ble Tribunal vide its Order No. A-847/KOL/2008 dated 02.09.2008 in Appeal No.E/EDM-16/2005[2009(245)ELT172TRI KOL] had dismissed the appellant's contention that proceedings came to an end before introduction of the principle of unjust enrichment, in the statute in the year 1991. This was, however, reaffirmed by the Hon'ble Guwahati High Court in [2011(272)ELT 15(GAU)] and therefore the principle of unjust enrichment in the matter would squarely be applicable and the refund payable would be required to be credited to the Consumer Welfare Fund. He therefore submits that under such circumstances, the appellant was not entitled to the sanctioned refund of Rs.51,33,004.71 and that the department was obliged to credit it to the Consumer Welfare Fund. The learned Special Counsel further submitted that

the recovery of the refunded amount as ordered by the Commissioner of Central Excise vide Order-In-Original No.4/COMMR/CH-44/ADJ/DIB/06 dated 31.07.2006 was required to be upheld and such amount would be required to be paid to the Consumer Welfare Fund in terms of Section 12C of the Central Excise Act.

11. At this juncture, Ms.Sweta Mukherjee, Counsel for the appellants, fairly concedes that the said matter has been held against the appellants by the Hon'ble Guwahati High Court. Referring to the Hon'ble Apex Court's decision in the case of Commissioner of Central Excise, Mumbai - 1 vs Morarjee Gokul Das Spinning & Weaving Co.Ltd.[2023 (384)ELT 487(SC)], the learned Special Counsel for the Revenue pointed out that no separate show cause notice under Section 11A was required to be issued, once the refund order was set aside, as both Section 35E and Section 11A of the Central Excise Act, operate in different fields and were meant to be invoked for different purposes. It was therefore his contention that the time limit for demand under Section 11 of the Act would not be applicable, to the case at hand. To buttress his case, the learned Special Counsel also invited reference to CBIC's circular no.423/56/98-CX dated 22.09.1998, pointing out that in view of the Hon'ble Apex Court's decision referred therein, the question pertaining to issue of notice under Section 11A and its time limit would become inconsequential. He also referred to certain other decisions in this regard.

12. Inviting reference to appeal No.E/75315/2014, the learned Special Counsel submitted that the same was not maintainable before the Tribunal as the impugned order in the said appeal was that of the Deputy Commissioner and no appeal against the said order would lie before this Tribunal in terms of Section 35 of the Act. We are in agreement with this proposition of the Revenue. There is no short cut to justice. Merely, because an appeal is pending consideration before this Tribunal against an order passed by the Commissioner, would not mean that appeal against an order in a like case passed by an authority lower in rank than a Commissioner could automatically be heard by this Tribunal.

13. Needless, to state that in case of captive consumption of goods the law stands settled by the apex court’s ruling in the case of **UOI v Solar Pesticides (P) Ltd. [2000(116) ELT-401 SC]**. Further, apart from the Hon’ble Calcutta High Court’s decision in the present matter, cited supra, the Hon’ble Apex Court in the case of **UOI v Jain Spinners Ltd. [1992(61) ELT 321 SC**], had upheld the retrospective applicability of the amended provisions

of Section 11B pertaining to unjust enrichment and would be applicable to all earlier orders and directions given by the authority/Court.

14. From the chronology of events, as laid out in foregoing paras, it is evident that the question of applicability of unjust enrichment in the facts of the present matter have attained finality in view of the judgement of the Hon'ble Guwahati High Court as referred to in pre-paras. In view thereof, we find no anomaly in the impugned Order No.4/COMMR/CH-44/ADJ/DIB/06 dated 31.07.2006 (& No.3 DIV/JOR/CEX/REF/06/2008 dated 15.02.2008) passed by the learned Commissioner, confirming the impugned demand for the reason that the refund claim in question was sanctioned erroneously without being able to establish the burden of transference of duty not having been passed on to another person. The said order of the Commissioner is thus upheld and the Revenue directed to take appropriate action in law in the matter. The amount so realized towards payment of erroneous refund, if any, would be required to be credited to Consumer Welfare Fund in terms of Section 12C of the Central Excise Act. For records, we would like to make it clear that indeed the appellant is entitled to the refund amount of Rs.51,33,004.71, however, being hit by the provisions of unjust enrichment, the said refund amount is required to be credited to Consumer Welfare Fund, as discussed in foregoing paras. Appeal No.E/75315 of 2014, being hit at its very threshold on account of its ineligibility to be filed before us is liable for dismissal.

15. Under the circumstances, for the foregoing reasons, the order passed by the learned Commissioner, Central Excise, Dibrugarh, is upheld. The impugned Appeals are dismissed for reasons as discussed above.

(Order pronounced in open court on 03.07.2025)

Sd/-
(Rajeev Tandon)
Member (Technical)

Sd/-
(R. Muralidhar)
Member (Judicial)

SB