

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL, MUMBAI  
REGIONAL BENCH  
Single Member Bench**

**Service Tax Appeal No. 86151 of 2019**

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/488/18-19 dated 12.02.2019 passed by the Commissioner of Central Excise & GST (Appeals), Nagpur)

**M/s. Excel Controlinkage Pvt. Ltd.**

**Appellant**

W-67, 68B, W-69 & W-70, MIDC,  
Hingna Road, Nagpur 440 016.

Vs.

**Commissioner of CGST, Nagpur**

**Respondent**

P.O. Box No.81, GST Bhavan, Civil Lines,  
Telangkhedi Road, Nagpur 440 001.

Appearance:

Shri Mohit Raval, Advocate, for the Appellant

Shri Nitin Ranjan, Deputy Commissioner, Authorised Representative  
for the Respondent

**CORAM:**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

Date of Hearing: 15.09.2022

Date of Decision: 28.09.2022

**FINAL ORDER NO. A/85905/2022**

This appeal is directed against order in appeal No NGP/EXCUS/000/APPL/488/18-19 dated 12.02.2019 of the Commissioner of Central Excise and CGST (Appeals), Nagpur. By the impugned order, Commissioner (Appeals) has upheld the order in original of Assistant Commissioner rejecting the refund claim filed by the appellant holding the same to be time barred.

2.1 The Appellant had provided design and development services to Donovan Marine Inc. vide Invoice no. XL/DR/15-16/01 dated 04.07.2015 for USD 25,000. The said consideration was received on 19.09.2015.

2.2 As per the Appellant the services provided to Donovan Marine Inc. qualified as export of service on which no service tax was payable. However, under mistake of law, the then excise manager of the Appellant deposited service tax of Rs. 2,22,530 on the said services vide Challan no. 02047 dated 05.08.2015.

Since, the Appellant had deposited the said service tax, they took the credit of the same. An audit was conducted by audit party in the month of August 2016, pursuant to which the Appellant reversed the said credit under the debit entry dated 12.08.2016 in RG-23 Part II register and also paid the interest of Rs. 17.08.2016 in cash of Rs 48,176.

2.3 In spite of the above, show cause notice dated 19.07.2018 was issued to the Appellant seeking to deny the credit of Rs. 2,22,530 and seek recovery thereof under Section 73 of the Finance Act, 1994 ("Act") along with interest under Section 75 of the Act and the penalty under Section 78 of the Act.

2.4 The said show cause notice has been adjudicated and is now subject matter of appeal no. E/86170/2019 for the penalty of Rs. 2,22,530 was filed before this Hon'ble Tribunal.

2.5 Separate show cause notice dated 26.09.2018 was issued inter-asking the Appellant to show cause as to why the refund claim should not be rejected as being time barred. Vide Order-in-Original dated 02.11.2018, the said refund claims were rejected as time barred. The said Order-in-Original was upheld by the Order-in-Appeal dated 12.02.2018.

3.1 I have heard Shri Mohit Raval, Advocate for the appellant and Shri Nitin Ranjan, Deputy Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant, learned counsel submits

- It is submitted that the Appellant is entitled to avail Cenvat credit of erroneously paid service tax, the said payment being made in cash tantamounts to credit in the PLA. Once, the department has accepted the payment of tax which was not required to be paid, the Appellant is entitled to credit of the same and in the alternative, they are entitled to refund of the said amount.
- It is a settled position in law that provisions of Section 11B of the Act are not applicable in case service tax is paid under mistake of law.
- Reliance in this regard, is placed on the judgment in case of Union of India vs ITC Ltd 1993 (67) ELT 3 (SC). The judgment in case of ITC (supra) is squarely applicable to the facts of the present case to the extent it is held that

limitation shall not apply for refund of the amount paid under mistake of law.

- Reliance is further placed on the following judgments:
  - (i) 3E Infotech 2018 (7) TMI 276 (Mad.)
  - Hindustan Cocoa Products [1994 (74) ELT 525 (Bom.)]
  - Parijat Construction [2018 (359) ELT 113 (Bom)]
  - SGR Infratech Ltd, CEA no. 26 of 2014 - Order dated 28.10.2015 Bombay High Court
  - National Institute of Public Finance & Policy [2019 (20) GSTL 330 (Del.)]
  - Hitachi Metals (1) Put. Ltd. [2019 (25) GSTL 573 (Tri - Chan.)]
- Further it is submitted that any judgment or order which is not referred in the judgment in case of Mafatlal (supra) cannot be said to be not applicable merely on the ground that the said judgment was pronounced prior to the judgment in the case of Mafatlal.
- Accordingly, it is submitted that the judgment in case of Hindustan Cocoa, Parijat Constructions and SGR Infratech (supra) cannot be held to be inapplicable. The said judgments are squarely applicable to facts of present case in as much as the Hon'ble High Court has clearly held that limitation shall not be applicable to case where tax/duty is paid under mistake of law.
- Without prejudice to the above, it is submitted that the service tax paid erroneously is in the nature of deposit. It is submitted that show cause notice proposing the appropriation is issued on 19.07.2018 and the refund claim has been within a year of the same. It is submitted that the time period under Section 11B of the Central Excise Act, 1944, should be applicable from the date of the issuance of the show cause notice proposing the appropriation.
- Without prejudice to the above, in the event this Hon'ble Tribunal holds that the Appellant is entitled to credit, the Appellant cannot avail and utilize the said credit now since the Appellant has migrated to the GST Regime. Accordingly in terms of Section 142 of the CGST Act, 2017 the credit

so admissible to the Appellant now shall be refundable to the Appellant in cash. Thus, even on this count the Appellant is entitled to the refund.

- Appeal should be allowed.

3.3 Arguing for revenue learned authorized representative submits:

- Since the amounts were deposited on 12.08.2016 and 13.08.2016 with the refund claim was filed on 09.09.2018, the claim has been clearly filled beyond the time limit of one year provided in Section 11B of the Central Excise Act which has been made applicable to Service Tax cases as per Section 83 of the Finance Act, 1994.
- The law related to time limit to apply such a refund application has been settled in the cases of:
  - Casa Grande Co-Operative Housing [(2019 (29) G.S.T.L. 349 (Tri. - Mumbai)]
  - Mafatlal Industries Ltd. [1997 (89) E.L.T. 247 (S.C.)]
  - Anam Electrical Manufacturing Co. – 1997 (90) E.L.T. 260 (S.C.)]
  - Veer Overseas Ltd. [2018 (15) G.S.T.L. 59 (Tri. - LB)]
  - V.Uniroyal Marine Exports Ltd. [2021 (54) G.S.T.L. 156 (Ker.)]
- Some of the cases relied by the Appellant are that of deposit of duty under protest and hence would not be applicable in this case.

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Issue involved in the present case is in very narrow compass, and the only issue to be decided in the matter is whether in the facts of the present case the refund claim can be held to be barred by limitation as provided under Section 11B of the Central Excise Act, 1944.

4.3 Appellant claims that they had paid certain amount of service tax in respect of the services which was exported by them. On realizing their mistake they suo motto took the credit of the amount so paid. On being pointed out by the audit they reversed the credit taken along with the interest. After reversal

of the credit with interest they filed this claim for refund which has been held to be barred by limitation by the impugned order. The refund application has to be filed in the manner as prescribed by Section 11 B of the Central Excise Act, 1994, which has been made applicable for refund of service tax as per Section 83 of the Finance Act, 1994. Section 11 B provides for filing of the refund claim within one year from the relevant date. The relevant date has been defined as "date of payment of duty/tax". Hence the claim of appellant that the relevant date should be taken as date of appropriation of irregularly availed credit do not stand to the test of law.

4.4 In the present case appellant have claimed that they have paid this duty under mistake of law and hence the refund claim filed by them would not be hit by limitation as provided by section 11B of the Central Excise Act, 1944. In support of their contention they have relied upon various case law. They place specific reliance on the decision of the Hon'ble Apex Court in case of ITC and decisions of Hon'ble Bombay High Court in the case of Hindustan Cocoa Products, Parijat Constructions and SGR Infratech Ltd.

4.5 I am not in agreement with the contentions raised by the appellant. It is not the case where in the services provided were not subject to levy of service tax. These services were subjected to levy of service tax. However in terms of Rule 6 of the Service tax Rules, 1994, for the conditions prescribed therein, these services are considered to be export of services. Further under the scheme of service tax, appellant themselves self assess the liability of the tax on the service provided and deposit the taxes due.

4.5 In the case of ITC referred to by the appellant following has been held:-

*"7. In Shri Vallabh Glass Works Ltd. and Anr. v. Union of India & Ors., 1984 (16) E.L.T. 171 ( S.C.), this Court, while examining the question as to what is the point of time from which the limitation should be deemed to commence, observed that relief in respect of payments made beyond the period of three years may not be granted from the date of filing of the petition, taking into consideration the date when the mistake came to be known*

*to the party concerned. Just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law cannot be permitted to retain the amount, merely because the tax payer was not aware at that time that the recovery being made was without any authority of law. In such cases, there is an obligation on the part of the authority to refund the excess tax recovered to the party, subject of course to the statutory provisions dealing with the refund.*

*We are, therefore, of the opinion that the High Court, while disposing of the writ petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collector Central Excise (Appeals) to deny them the refund for the period 1-9-1970 to 28-5-1971 and 1-6-1971 to 19-2-1972 was not proper as admittedly the respondent had approached the Assistant Collector of Central Excise soon after coming to know of the judgment in Voltas case (supra) and the assessee was not guilty of any laches to claim refund. (emphasis supplied)”*

4.6 The matter of Limitation as per Section 11B of the CEA in cases of deposit of duty under mistake of law was also considered by the Larger Bench of the Hon'ble Tribunal in the matter of Veer Overseas. Larger bench of tribunal held as follows:

*"8. Here it is relevant to note that in various cases the High Courts and the Apex Court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex Court are mainly by exercising powers under the Constitution, in writ jurisdiction. It is clear that neither the jurisdictional service tax authority nor the Tribunal has such constitutional powers for allowing refund beyond the statutory time-limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the jurisdictional tax authorities and necessarily such tax authorities are bound by the law governing the*

collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in *Mafatlal Industries Ltd. (supra)* categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex Court further observed that the only exception is where the provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy, in so far as the present dispute is concerned, held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. We hold that the decision of the Tribunal in *Monnet International Ltd. (supra)* has no application to decide the dispute in the present referred case. We take note of the decision of the Tribunal in *XL Telecom Ltd. (supra)*. It had examined the legal implication with reference to the limitation applicable under Section 11B. We also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in *Miles India Limited v. Assistant Collector of Customs - 1987 (30) E.L.T. 641 (S.C.)*. The Apex Court upheld the decision of the Tribunal to the effect that the jurisdictional customs authorities are right in disallowing the refund claim in terms of limitation provided under Section 27(1) of the Customs Act, 1962. We also note that in *Assistant Collector of Customs v. Anam Electrical Manufacturing Co. - 1997 (90) E.L.T. 260 (S.C.)* referred to in the decision of the Tribunal in *XL Telecom Ltd. (supra)*, the Hon'ble Supreme Court held that the claim filed beyond the statutory time limit cannot be entertained.

9. The Apex Court in *Mafatlal Industries Ltd. (supra)* observed that the Central Excise Act and the Rules made thereunder including Section 11B too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are

*exclusive in their nature no claim for refund is maintainable except and in accordance therewith. The Apex Court emphasized that "the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said Article".*

4.8 In this decision the decision larger bench, larger bench had considered the decision of Hon'ble Bombay High Court in case of Parijat Constructions referred to by the counsel for appellant. Though minority view was in favour of following the said decision, majority view decided the reference in accordance with law laid down by the Hon'ble Apex Court in the case of Mafatal Industries.

4.9 Hon'ble Supreme Court (Nine Judges bench) has in the case of Mafatal Industries {1997 (89) ELT 247 (SC)] considered the subject issue and has held as follows:

*"67.The first question that has to be answered herein is whether Kanhaiyalal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act; (2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or reopening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable; and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.*

68. Re. : (I) : Hereinbefore, we have referred to the provisions relating to refund obtaining from time to time under the Central Excises and Salt Act. Whether it is Rule 11 (as it stood from time to time) or Section 11B (as it obtained before 1991 or

subsequent thereto), they invariably purported to be exhaustive on the question of refund. Rule 11, as in force prior to August 6, 1977, stated that "no duties and charges which have been paid or have been adjusted....shall be refunded unless the claimant makes an application for such refund under his signature and lodges it to the proper officers within three months from the date of such payment or adjustment, as the case may be". Rule 11, as in force between August 6, 1977 and November 17, 1980 contained sub-rule (4) which expressly declared: "(4) Save as otherwise provided by or under this rule, no claim of refund of any duty shall be entertained". Section 11B, as in force prior to April, 1991 contained sub-section (4) in identical words. It said : "(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained". Sub-section (5) was more specific and emphatic. It said : "Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim." It started with a non-obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of Section 11B, as it now stands, is to the same effect - indeed, more comprehensive and all-encompassing. It says, "(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 in any law for the time being in force, no refund shall be made except as provided in sub-section".

The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in

*Para 14, and has to be respected so long as it stands. The validity of these provisions has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended Section 11B is questioned, no specific reasons have been assigned why a provision of the nature of sub-section (3) of Section 11B (amended) is unconstitutional. Applying the propositions enunciated by a seven-Judge Bench of this Court in Kamala Mills, it must be held that Section 11B [both before and after amendment] is valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of Section 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation of delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of Section 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond challenge. To repeat - and it is necessary to do so - so long as Section 11B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11A and 11B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. Sections 11 and 11B are complimentary to each other.*

*To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz., where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available - except to the limited extent pointed out therein. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The Jurisdiction of a civil court is expressly barred - vide sub-section (5) of Section 11B, prior to its amendment in 1991, and sub-section (3) of Section 11B, as amended in 1991. It is relevant to notice that the Act provides for more than one appeal against the orders made under Section 11B/Rule 11. Since 1981, an appeal is provided to this Court also from the orders of the Tribunal. While Tribunal is not a departmental organ, this court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Article 265.*

*In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provision, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11B. For this reason, a suit for refund would also not lie.*

*Taking any other view would amount to nullifying the provisions in Rule 11/Section 11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act. So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction of this court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.*

*69. There is, however, one exception to the above proposition, i.e., where a provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. The Act does not contemplate any of its provisions being declared unconstitutional and therefore it does not provide for its consequences. Rule 11/Section 11B are premised upon the supposition that the provisions of the Act are good and valid. But where any provision under which duty is levied is found to be unconstitutional, Article 265 steps in. In other words, the person who paid the tax is entitled to claim refund and such a claim cannot be governed by the provisions in Rule 11/Section 11B. The very collection and/or retention of tax without the authority of law entitles the person, from whom it is collected, to claim its refund. A corresponding obligation upon the State to refund it can also be said to flow from it. This can be called the right to refund arising under and by virtue of the Constitutional provisions, viz., Article 265. But, it does not follow from this that refund follows automatically. Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice envisaged in the Preamble and the guiding principles of State Policy adumbrated in Articles 38 and 39 - an aspect dealt with at some length at a later stage. The very concept of economic justice means and demands that unless the*

*claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no just claim for refund. It would be a parody of economic justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have actually borne its burden - that would be economic justice. Conferring an unwarranted and unmerited monetary benefit upon an individual is the very anti-thesis of the concept of economic justice and the principles underlying Articles 38 and 39. Now, the right to refund arising as a result of declaration of unconstitutionality of a provision of the enactment can also be looked at as a statutory right of restitution. It can be said in such a case that the tax paid has been paid under a mistake of law which mistake of law was discovered by the manufacturer/assessee on the declaration of invalidity of the provision by the court. Section 72 of the Contract Act may be attracted to such a case and a claim for refund of tax on this score can be maintained with reference to Section 72. This too, however, does not mean that the taxes paid under an unconstitutional provision of law are automatically refundable under Section 72. Section 72 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule - an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same - there is no automatic or unconditional right to refund.*

*70. Re : (II) :We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person*

*holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law.*

*So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year*

*back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law : The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/Assessees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for the reason that the Central Excise Act and the Rules made thereunder including Section 11B/Rule 11 too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a mis-interpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11A and 11B. As held by a seven - Judge Bench in Kamala Mills, following the principles enunciated in Firm & Illuri Subbaiya Chetty, the words "any assessment made under this Act" are*

*wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words "an assessment made" cannot mean an assessment properly and correctly made. It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article.*

*In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of*

*a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith.*

*71. Re. : (III) :For the purpose of this discussion, we take the situation arising from the declaration of invalidity of a provision of the Act under which duty has been paid or collected, as the basis, inasmuch as that is the only situation surviving in view of our holding on (I) and (II). In such cases, the claim for refund is maintainable by virtue of the declaration contained in Article 265 as also under Section 72 of the Contract Act as explained hereinbefore, subject to one exception : where a person approaches the High Court or Supreme Court challenging the*

*constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it. In such cases, the plaintiff may also invoke Section 17(1)(c) of the Limitation Act for the purpose of determining the period of limitation for filing a suit. It may also be permissible to adopt a similar rule of limitation in the case of writ petitions seeking refund in such cases. But whether the right to refund or restitution, as it is called, is treated as a constitutional right flowing from Article 265 or a statutory right arising from Section 72 of the Contract Act, it is neither automatic nor unconditional. The position arising under Article 265 is dealt with later in Paras 75 to 77. Here we shall deal with the position under Section 72. Section 72 is a rule of equity. This is not disputed by Sri F.S. Nariman or any of the other counsel appearing for the appellants-petitioners. Once it is a rule of equity, it is understandable how can it be said that equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is, in our respectful opinion, a contradiction in terms. Indeed, in Kanhaiyalal, the Court accepts that the right to recover the taxes - or the obligation of the State to refund such taxes - under Section 72 of the Contract Act is subject to "questions of estoppel, waiver, limitation or the like", but at the same time, the decision holds that equitable considerations cannot be imported because of the clear and unambiguous language of Section 72. With great respect, we think that a certain amount of inconsistency is involved in the aforesaid two propositions. "Estoppel, waiver....or the like", though rules of evidence, are yet based upon rules of equity and good conscience. So is Section 72. We are, therefore, of the opinion that equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72. Now, one of*

*the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be recompensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty.*

*Where such a claim is made, it would be wholly permissible for the court to call upon the petitioner/plaintiff to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in I.T C. In this connection, it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within the exclusive knowledge of the manufacturer. He has the relevant evidence - best evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming the refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is an equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rule of equity but also because both the Central Excise duties and the Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these duties are indirect taxes, meant to be passed on, is statutorily recognised by Section 64A of the Sale of Goods Act, 1930 [which was introduced by Indian Sale of Goods (Amendment) Act, 1940 and substituted later by Act 33 of 1963]. As originally introduced, Section 64A read :*

*"64A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the*

*sale of such goods duty-paid where duty was chargeable at that time -*

*(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition; and*

*(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of, such deduction."*

*72.As substituted in 1963, and as it stands today, Section 64A reads thus :*

*"64A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. — (1) Unless different intention appears from the terms of the contract in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax paid where tax was chargeable at that time, —*

*(a) if such imposition or increase so takes effect that the decreased tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and sue for and recover such addition, and*

*(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.*

(2) *The provisions of sub-section (1) apply to the following taxes, namely :*

- (a) *any duty of customs or excise on goods;*
- (b) *any tax on the sale or purchase of goods."*

73. *Sub-section (2), it may be noted, expressly makes the said provision applicable to duty of customs and duties of excise on goods. This fact was also recognised by the Federal Court in The Province of Madras v. M/s. Boddu Paidanna & Sons [1942 F.C.R. 90] and by this Court in R.C. Jall v. Union of India [1962 Suppl. S.C.R. 436]. In such a situation, it would be legitimate for the court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption of fact which a court is entitled to draw under Section 114 of the Indian Evidence Act. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies upon the person who claims the refund (plaintiff/petitioner) and it is for him to allege and establish that as a fact he has not passed on the duty and, therefore, equity demands that his claim for refund be allowed. This is the position de hors 1991 (Amendment) Act - and as we shall point out later, the said Amendment Act has done no more than to give statutory recognition to the above concepts. This is the position whether the refund is claimed by way of a suit or by way of a writ petition. It needs to be stated and stated in clear terms that the claim for refund by a person who has passed on the burden of tax to another has nothing to commend itself; not law, not equity and certainly not a shred of justice or morality. In the case of a writ petition under Article 226, it may be noted, there is an additional factor : the power under Article 226 is a discretionary one and will be exercised only in furtherance of interests of justice. This factor too obliges the High Court to enquire and find out whether the petitioner has in fact suffered any loss or prejudice or whether he has passed on the burden. In the latter event, the court will be perfectly justified in refusing to grant relief. The power cannot be exercised to unjustly enrich a person.*

74. *Re : (IV) : We are also of the respectful opinion that Kanhaiyalal is not right in saying that the defence of spending away the amount of tax collected under an unconstitutional law*

*is not a good defence to a claim for refund. We think it is, subject to this rider : where the petitioner-plaintiff alleges and establishes that he has not passed on the burden of the duty to others, his claim for refund may not be refused. In other words, if he is not able to allege and establish that he has not passed on the burden to others, his claim for refund will be rejected whether such a claim is made in a suit or a writ petition. It is a case of balancing public interest vis-a-vis private interest. Where the petitioner-plaintiff has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes. The money really belongs to a third party - neither to the petitioner/plaintiff nor to the State - and to such third party it must go. But where it cannot be so done, it is better that it is retained by the State. By any standard of reasonableness, it is difficult to prefer the petitioner-plaintiff over the State. Taxes are necessary for running the State and for various public purposes and this is the view taken in all jurisdictions. It has also been emphasised by this Court In D. Cawasji wherein Mathew, J. not only pointed out the irrational and unjust consequences flowing from the holding in Bhailal Bhai and Aluminium Industries but also pointed out the adverse impact on public interest resulting from the holding that expending the taxes collected by the State is not a valid defence. (see Paras 39 and 40). This would not be a case of unjust enrichment of the State, as suggested by the petitioners-appellants. The very idea of "unjust enrichment" is inappropriate in the case of the State, which is in position of parens patrea, as held in Charan Lal Sahu v. Union of India [1990 (1) S.C.C. 613 at 649]. And even if such a concept is tenable, even then, it should be noticed that the State is not being enriched at the expense of the petitioner-plaintiff but at someone else's expense who is not the petitioner-plaintiff. As rightly explained by Saikia, J. in Mahabir Kishore & Ors. v. State of Madhya Pradesh [1989 (43) E.L.T. 205 (SC) = 1989 (3) S.C.R. 596], "the principle of unjust enrichment requires - first that the defendant has been*

*'enriched' by the receipt of a 'benefit'; secondly, that this enrichment is 'at the expense of the plaintiff'; and thirdly, that the retention of the enrichment be just. This justifies restitution."* We agree with the holding in *Air Canada* (quoting Professor George C. Palmer) that in such a case, "it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the propose of shifting the same enrichment to the tax-payer". The Canadian Supreme Court has further emphasised - and, in our opinion, rightly - the "fiscal chaos that would result if the general rule favoured recovery, particularly where the long standing taxation measure is involved". In this connection, the majority decision refers to what happened in United States. In *United States v. Butler* [(1936) 80 L. Ed. 477] the Agricultural Adjustment Act was held unconstitutional, the result of which was refund of almost one billion dollars collected under the said statute. In such a situation, it is pointed out, the Congress passed an Act which provided that no refunds shall be allowed unless the claimant establishes that he himself bore the burden of tax. Similar provision was also made in another enactment, viz., Section 424 of the Revenue Act, 1928, the validity of which has been upheld by the United States Supreme Court in *Jefferson* (supra).

75. In this connection, Sri K. Parasaran has rightly emphasised the distinction between the constitutional values obtaining in countries like United States of America, Canada and Australia - or for that matter, United Kingdom - and the values obtaining under our Constitution. Unlike the economically neutral - if not pro-capitalist - Constitutions governing those countries, the Indian Constitution has set before itself the goal of "Justice, Social, Economic and Political" - a total re-structuring of our society - the goal being what is set out in Part IV of the Constitution and, in particular, in Articles 38 and 39. Indeed, the aforesaid words in the preamble constitute the motto of our Constitution, if we can call it one. Article 38 enjoins upon the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life". Article 39 lays down the principles of policy to be followed by the State. It says that the

*State shall, in particular, direct its policy towards securing "(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". Refunding the duty paid by a manufacturer/assessee in situations where he himself has not suffered any loss or prejudice (i.e., where he has passed on the burden to others) is no economic justice; it is the very negation of economic justice. By doing so, the State would be conferring an unearned and unjustifiable windfall upon the manufacturing community thereby contributing to concentration of wealth in a small class of persons which may not be consistent with the common good. The preamble and the aforesaid articles do demand that where a duty cannot be refunded to the real persons who have bore the burden, for one or the other reason, it is but appropriate that the said amounts are retained by the State for being used for public good (See Amar Nath Om Prakash). Indeed, even in an economically neutral Constitution, like that of United States of America, such a course has been adapted by the State and upheld by the Courts. It would be rather curious - nay, ridiculous - if such a course were held to be bad under our Constitution which speaks of economic and distributive justice, opposes concentration of wealth in a few hands and when the Forty-Second (Amendment) Act describes our Republic as a Socialist Republic.*

*76. It is true that some of the concepts now affirmed by us, e.g., effect of passing on and the relevance of our Constitutional values in the matter of judging the legitimacy of a claim for refund were not presented to the Bench which decided Kanhaiyalal but that can be no ground for not entertaining or accepting those concepts. As observed by Thomas Jefferson, as far back as 1816, "laws and institutions must go hand-in-hand with the progress of the human mind.... as new discoveries are made, new truths are discovered and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the time.....". The very same thought was expressed by Krishna Iyer, J. in State of Karnataka*

*v. Ranganath Reddy [1978 (1) S.C.R. 641] with particular reference to our Constitutional philosophy and values :*

*"Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality.... It is right that the rule of law enshrined in our Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels of feudal roots, invades our lives and fashions our destiny."*

*The learned Judge quoted Granville Austin, saying :*

*"The Judiciary was to be the arm of the social revolution upholding the quality that Indians had longed for in colonial days.... the courts were also idealised because, as guardians of the Constitution, they would be the expression of a new law created by Indians for Indians,"*

*77. That "the material resources of the community" are not confined to public resources but include all resources, natural and man-made, public and private owned" is repeatedly affirmed by this Court. [See Ranganatha Reddy, Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal [1983 (1) S.C.R. 1000] and State of Tamil Nadu etc. etc. v. L. Abu Kavur Bai & Ors. etc. [1984 (1) S.C.R. 725]. We are of the considered opinion that Sri Parasaran is right in saying that the philosophy and the core values of our Constitution must be kept in mind while understanding and applying the provisions of Article 265 of the Constitution of India and Section 72 of the Contract Act (containing as it does an equitable principle) - for that matter, in construing any other provision of the Constitution and the laws. Accordingly, we hold that even looked at from the constitutional angle, the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position even if Article 265 can be invoked - we have held, it cannot be - for claiming refund of taxes collected by misinterpretation or misapplication of a provision of law, rules, notifications or regulation."*

4.8 The case of ITC referred to by the counsel for the applicant was before the Supreme Court in case of Mafatlal, as is evident

from the order and in para 70, Hon'ble Supreme Court has specifically stated that all its decisions contrary to the view expressed by them in this decision have been wrongly decided and hence over-ruled. Hon'ble Madras High Court has in the case of 3E Infotech referred by the appellant, relied on the decision of the Hon'ble Apex Court in case of ITC without taking the note of the decision of Mafatlal. Similarly the decision of Delhi High Court in the case of National Institute of Public Finance & Policy referred by the appellant also has been passed without noticing the observation of Hon'ble Apex Court in case of Mafatlal.

4.9 Appellant has heavily relied upon the decision of the Hon'ble Bombay High Court in the case of Hindustan Cocoa Products. However in case of Orkay Silk Mills Ltd [1998 (98) ELT 310 (Bom)], Hon'ble Bombay High Court following the decision of Mafatlal stated as follows:

*"2. In view of the decision of the Supreme Court reported in 1997 (89) E.L.T. 247 (S.C.) as per Section 27, application claiming refund as such, should be presented within a period of six months as envisaged. In the present case, the claim is barred by limitation.*

*3. The learned Counsel for Petitioner vehemently urged before us, that since the levying of duty itself was without any authority of tariff, Section 27 as such has no application. In the submission of learned Counsel normal period of limitation for recovery as described is 3 years. The submission is that the application of refund presented on 22-2-1987 (sic) was within the period of limitation of 3 years from the date of payment of duty and as such, it is not barred, in view of the period of limitation.*

*4. The Limitation Act provides a period of limitation for initiating the proceedings for any recovery of claim in the Court of law. Making of such application for refund of customs duty would not be such a proceeding as envisaged of Limitation Act. As such, the period prescribed under the said Act has no application. Alternatively, the learned Counsel urged before us that the instant petition is within the period of limitation.*

*5. Proceedings under Article 226 are not envisaged by the Limitation Act. The period of limitation prescribed under*

*Limitation Act has no application to the extra ordinary jurisdiction of this Court exercisable under Article 226 of the Constitution of India writ of this Court. The submissions in this behalf are devoid of any merit. Even otherwise, the Authorities under the Customs Act duly empowered to collect the duty, could make a mistake or error in exercise of their power. However, it cannot be successfully argued that erroneous act to which the Petitioner has questioned is without any jurisdiction. Even in view of this matter, the provisions of Section 27 of the Act has application as laid down by the Supreme Court in the case cited supra. Since application is beyond the period of limitation, the same cannot be entertained."*

4.10 Again in case of Kirloskar Pneumatic Co Ltd. [1999 (105) ELT 277 (Bom)], Hon'ble High Court again stated as follows:

"2. In view of the decision laid down by the Supreme Court in case of Mafatlal Industries Ltd. v. Union of India - 1997 (89) E.L.T. 247 (S.C.), petition cannot be entertained as the claim was not preferred within the statutory period as envisaged by Section 27 of the Act.

3. Our attention is particularly invited to observation recorded in para 100 of the report of the judgment. The Supreme Court to mitigate the situation, owing to law as declared, observed that Petitioner who filed Writ Petition or suit is at liberty to present claim for refund within 60 days from the date of the judgment i.e., 19th December, 1996. However, the Petitioners have not availed the opportunity as such and therefore cannot now take the advantage.

4. Another decision referred to us is reported in the case of Assistant Collector of Customs v. Anam Electrical Manufacturing Co. - 1997 (90) E.L.T. 260 (S.C.) wherein it is observed that even if the claim is not instituted within a stipulated period but petition or suit filed within the period prescribed, the parties according to law are entitled to the relief of refund. Even this observation is of no avail since the instant Petition is filed beyond the period of limitation as envisaged by Section 27.

5. The learned Counsel Mr. Nankani then urged that observation of the Supreme Court needs to be interpreted liberally. Even acceding to the submission, the words which are

*deployed are plain, unambiguous and cannot be stretched beyond what they convey in common parlance. The Supreme Court as discussed has stated that 60 days from the date of the judgment "(To-day)"; this phraseology by no stretch of imagination cannot be interpreted to convey something else."*

4.11 Uniroyal Marine Exports Ltd (Supra), the Hon'ble Kerala High Court has held as follows:

*"5. The Learned Standing Counsel, however, relied on the Constitution Bench decision of the Hon'ble Supreme Court reported in Mafatlal Industries Ltd. v. Union of India [(1997) 5 SCC 536 = 1997 (89) E.L.T. 247 (S.C.)] and a decision of this Court reported in Southern Surface Finishers and Another v. Assistant Commissioner of Central Excise [2019 KHC 47 = 2019 (28) G.S.T.L. 202 (Ker.)].*

*6. This Court in Southern Surface Finishers considered the Constitution Bench decision and found that the mistake if committed by the assessee, whether it be on law or facts; the remedy would be only under the statute. If that be so, the questions of law have to be answered in favour of the Revenue and against the assessee. ...".*

4.12 Authorized representative also relied upon the decision of Mumbai Bench in case of Casa Grande Co-Operative Housing wherein following has been held:

**"6.1** *In view of the above settled principles of law and in view of the fact that the refund applications were filed and decided under Section 11B ibid, the time-limit prescribed thereunder was strictly applicable for deciding such issue. Since, the authorities below have rejected the refund applications on the ground of limitation, I do not find infirmity in such orders, as the same are in conformity with the statutory provisions.*

**6.2** *The ratio of the judgment delivered by the constitutional Bench of Hon'ble Supreme Court in the case of Mafatlal Industries (supra) will not support the case of the appellant inasmuch as, when any provision in the statute has been held to be unconstitutional, refund of tax under such statute will be outside the scope and purview of such enactment and under such circumstances, refund can be claimed by way of a suit or by way of a writ petition. The Hon'ble Apex Court have ruled that*

*where the tax levy is struck down as unconstitutional for transgressing the constitutional limitations, a refund claim in such a situation, cannot be governed under such taxing statute; and such claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. It was further held that in such cases, period of limitation would be calculated as per the provisions contained in clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. In the case in hand, since the refund applications were filed by the appellant under Section 11B ibid and entertained by the authorities under the said provisions, as per the ratio laid down by the Hon'ble Supreme Court, the refund claim in such cases (unconstitutional levy) will fall outside the scope and purview of the Central Excise Act, 1944. Hence, rejection of refund benefit cannot be faulted with. Therefore, the judgment relied upon by the appellant squarely covers the case in favour of Revenue for rejection of the refund application"*

4.13 In view of the above settled law I do not find any merits in the appeal.

5.1 Appeal is dismissed.

(Order pronounced in the open court on 28.09.2022)

**(Sanjiv Srivastava)**  
**Member (Technical)**

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