

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

Excise Appeal No. 86570 of 2017

(Arising out of Order-in-Appeal No. SK/115/LTU/MUM/2016-2017 dated 28.03.2017 passed by the Commissioner of Central Excise (Appeals), LTU Mumbai-I)

Commissioner of CE & ST (LTU), Mumbai

Appellant

8th Floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Vs.

M/s. Asian Paints Ltd.

Respondent

P.B. No. 7318, LBS Marg,
Bhandup (W), Mumbai 400 078.

WITH

Excise Appeal No. 86002 of 2019

(Arising out of Order-in-Appeal No. MKK/423/RGD APPL/2018 dated 16.01.2019 passed by the Commissioner of Central Tax (Appeals), Raigad)

M/s. Asian Paints Ltd.

Appellant

6A, Shantinagar,
Santacruz (E), Mumbai 400 055.

Vs.

Commissioner of CGST, Navi Mumbai

Respondent

10th Floor, Satra Plaza, Palm Beach Road,
Sector 19D, Vashi, Navi Mumbai 400 705.

WITH

Excise Appeal No. 86137 of 2020

(Arising out of Order-in-Appeal No. AJV/106/RGD APP/2020-21 dated 25.08.2020 passed by the Commissioner of Central Tax (Appeals), Raigad)

M/s. Asian Paints Ltd.

Appellant

6A, Shantinagar,
Santacruz (E), Mumbai 400 055.

Vs.

Commissioner of CGST, Navi Mumbai

Respondent

10th Floor, Satra Plaza, Palm Beach Road,
Sector 19D, Vashi, Navi Mumbai 400 705.

AND

Excise Appeal No. 85290 of 2021

(Arising out of Order-in-Appeal No. AJV/106/RGD APP/2020-21 dated 25.08.2020 passed by the Commissioner of Central Tax (Appeals), Raigad)

Commissioner of CE & ST, Navi Mumbai
10th Floor, Satra Plaza, Palm Beach Road,
Sector 19D, Vashi, Navi Mumbai 400 705.

Appellant

Vs.

M/s. Asian Paints Ltd.
6A, Shantinagar,
Santacruz (E), Mumbai 400 055.

Respondent

Appearance:

Shri Gajendra Jain with Shri Rajesh Ostwal, Advocates, for the Appellant/Assessee
Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative, for the Revenue

CORAM:

HON’BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON’BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 06.01.2023

Date of Decision: 11.04.2023

FINAL ORDER NO. A/85541-85544/2023

PER: SANJIV SRIVASTAVA

The four appeals as detailed in the table below are taken up for consideration. These four appeals are in respect of a single refund claim which is in dispute, and hence taken up simultaneously.

<i>Appeal No</i>	<i>Impugned OIA date</i>	<i>Appellant</i>	<i>Relief Claimed</i>
<i>E/86570/2017</i>	<i>28.03.2017</i>	<i>Revenue</i>	<i>Refund claim is barred by limitation</i>
<i>E/86002/2019</i>	<i>16.01.2019</i>	<i>Assessee</i>	<i>Relevant date for grant of interest cannot be submission of documents</i>
<i>E/86137/2020</i>	<i>25.08.2020</i>	<i>Assessee</i>	<i>Incorrectly denies the interest for the period 2002 to November 2010</i>
<i>E/85290/2021</i>	<i>25.08.2020</i>	<i>Revenue</i>	<i>Incorrectly granted interest for the interest for the period 30.11.2010 to October 2017</i>

2.1 On the issues under challenge in the four appeals the observations made in the impugned order are reproduced below:

Order in Appeal No SK/115/LTU/MUM/2016-17 dated 28.03.2017

The details are as given below:

<i>Particulars</i>	<i>Amount in Rs</i>
<i>(a) Amount Originally claimed as Refund</i>	<i>5,53,97,108</i>
<i>(b) Less: Amount disallowed on the ground of unjust enrichment</i>	<i>1,17,93,761</i>
<i>(c) Less: Amount disallowed on the ground of unjust enrichment</i>	<i>38,19,911</i>
<i>(d) Less: Refund in respect of Universal Stainer disallowed for payment of duty</i>	<i>16,08,942</i>
<i>(e) Less: Adjustment of refund already sanctioned to the appellants (includes Rs.38,19,911 in (c) above)</i>	<i>45,22,894</i>
<i>(f) Balance Refund Claim admissible</i>	<i>3,36,51,600</i>

The Commissioner (Appeals), Large Taxpayer Unit, Mumbai vide Order-in-Appeal dated 30.1.2012 upheld the Order-in-Original dated 6.2.2009 and rejected the appeal filed by the appellant. Being aggrieved the appellant filed an appeal before Hon'ble Cestat and in the Final Order dated 16.1.2015, the Hon'ble Cestat has remanded the matter to decide the case afresh with all issues kept open & directed the Assistant Commissioner to decide the matter within three months from the date of receipt of the order. The adjudicating authority vide the impugned order dated 21.10.2015 rejected the entire refund of Rs.5,53,97,108/- being hit by bar of unjust enrichment and limitation of time.

9. Further, I observe that that out of the total claim of Rs.5,53,97,109/- filed for all the three periods, i.e., from Dec.1978 to Aug. 1997, the appellant submitted and accepted that out of the total refund claim filed by them, net refund amount due for the third period i.e., from July 1988 to August 1997 is Rs.3,35,57,086/- only and they are not pressing of the refund of the balance amount. Further, they stated that the claim for the third period is not hit by Section 11B and therefore not barred by limitation. This claim has to be granted as a consequential relief giving effect to the orders passed in finalization proceedings. They had deposited excess duty pursuant to the orders passed in course of finalization of

provisional assessment by various authorities. When the finalization had attained legal conclusion, they filed a reminder to intimate the department for refund of the excess excise duty which has been paid by them, as a matter of consequential relief.

10. From scrutiny of records, I observe that the assessment despite so many orders of the Asstt. Commr. and Commr(Appeals) deciding the parameters of finalisation continued to remain provisional. There is no order for demanding or refund exact amount of duty subsequent to these Orders-in-Appeal which has attained finality from the Range Superintendent who is the proper officer for assessment, or of any superior officer.

11. I further find that in this case, the undisputed facts are that

- (i) In r/o the 3rd period, consequent to the Asstt. Commr. vide his Order dated 11.9.1997 the appellant had paid Rs. 3,77,41,176/- in PLA 'under protest' and department invoked Bank Guarantee of Rs. 2,11,99,960/- for the period July 1988 to June 1997. The appellant's appeals filed against the same were decided by the Commr(A) vide OIA dated 31.12.2001 mostly in favour of the appellant. Against this OIA dated 31.12.2001, the department had not filed any appeal. Thus it has become final*
- (ii) The Commr (A)'s OIA dated 31.12.2001 was subsequently relied upon in the Commr (A) OIA dated 30.9.2002 (in r/o 1st period) which attained finality by the Hon'ble High Court Order dated 21.2.2006. Finality of the OIA dated 31.12.2001 has thus been reinforced.*
- (iii) Pursuant to the OIA dated 31.12.2001, the appellant had vide their letter dated 29.7.2002 addressed to the Superintendent for quantification of the differential duty/refund. It is reproduced as under*
"However, as was done consequent to the Assistant Commissioner's orders of September 1997, we request you to calculate the differential duty on final assessment and allow us to take the credit of excess duty paid in terms of

Order- in-Appeal dated 7.1.2002 passed by the Hon'ble Commissioner(Appeals)."

(iv) Based on above order of the Commr(A) and the Asstt. Commr. Order dated 11.9.1997 ordering for finalizing the provisional assessment, the assessing officer i.e. Superintendent, the proper officer for assessment (or any senior officer), has not passed any assessment order to finalise the provisional assessment to quantify the demand or refund of duty despite the appellant's letter dated 29.7.2002.

12. As the provisional assessment was not finalised the question of limitation of refund application under Section 11B of CEA cannot arise. Further finalisation of provisional assessment no application is required to be made and there is no limitation under the Central Excise law. Once parameters of finalisation of provisional assessment. have been done there should have been consequent order of demand or refund of duty without waiting for application from the appellant. This has not been done though application was made on 29.07.2002. The respondent has rejected this application dated 29.7.2002 terming it as it is not a proper application of refund and that it was not in proper format and submitted before the Superintendent who is not a proper authority for filing refund application. Furthermore, it was also stated that it is not a complete application. As discussed above as the provisional assessment was not finalized the question of filing of refund application shall not arise. For refund under Section 11B the relevant date for refund is the date of finalisation of refund under Section 11B. This Section has no relevance w.r.t. grant on refund in case of provisional assessment.

13. Even otherwise I observe from find that TR-6 Challans by which they paid Central Excise duty shows that the payment was made 'under protest'. As the appellant paid amount under protest the question of limitation shall not arise. The parameters of finalising the provisional assessment of all the three periods of provisional assessment attained finality by the Hon'ble High Court Order dated 21.2.2006. The appellant then vide their letter dated 9.11.2006 (filed on 14.11.2006) addressed to the

Asstt. Commr. of Central Excise had filed application for refund of the Excise duty. It was not a time bar application. As per Section 11B of the CEA, refund claim is to be filed within one year from the relevant date. However,

(i) as per second proviso to Section 11B(1)

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

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

the limitation of one year shall not apply where any duty has been paid under protest.

14. Even otherwise that for provisional assessment was finalised during year 2001, the refund cannot be denied as the duty was paid under protest. The fact of duty payment by protest is not disputed. I thus find that the appellant had paid duty under protest hence the limitation of one year shall not apply. Hence I find the rejection of refund claim on the ground of limitation is incorrect as the Hon'ble High Court Order dated 21.2.2006 attaining finality, the appellant had filed the refund application dated 14.11.2006 correctly and it cannot be rejected as time barred. In this I rely in the case of M/s Arya Exports and Industries [2005 (192) ELT 89 (Del.)]

"Refund Limitation Refund claim not to be denied merely on ground that same was not filed in prescribed form - If refund claim not filed in proper form or without necessary documents,

department can direct appellant to file the same in proper form along with supporting documents - Date of filing claim is the date on which claim was filed initially in form not prescribed or without documents - Section 118 of Central Excise Act, 1944- Rule 57F(4) of erstwhile Central Excise Rules, 1944. [para 4]"

Furthermore the refund of duty is basically consequent to order of Commr(Appeals) for which there was no requirement to file refund application. The requirement to file refund application under Section 11B has been inserted w.e.f 17.11.1980 vide Notification No. 182/80-CE dated 15.11.1980. This view is supported in the case law of Collector of Central Excise Vs Madras Vs Ashok Leyland Ltd, Madras [1987 (29 ELT 530 (Tribunal)]

"Refund - Duty paid under protest - High Court decision in favour of assessee regarding assessable value - Appeal filed by Department against High Court decision and higher duty paid by assessee under protest Refund claim filed beyond six months from relevant date, after Supreme Court Judgement confirming High Court decision not time- barred - Section 11B of the Central Excise and Salt Act, 1944 [para 8(3)]"

16. Further, I find that the appellant had submitted a Chartered Accountant's certificate dated 8.9.2008 certifying that the excess Excise duty paid is not recovered/ collected from the customers and the Additional Commissioner, LTU, Mumbai had verified the records and submitted his verification report dated 30.11.2010 wherein the balance refund claim of Rs.3,36,51,600/- is stated to be admissible to the appellant. In view the above, I find that the refund is not hit by bar of unjust enrichment and the appellant is entitled to refund of Rs.3,35,57,086/- In this I rely in the case of M/s Mafatlal Industries Ltd Vs UOI [1997 (89) ELT 247 (SC)]

"Refunds of Central Excise and Customs Duties - All claims for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to third party - No civil suit for refund of duty maintainable - Writ jurisdiction of High Courts under Article 226

and of Supreme Court under Article 32 unaffected by said Section 118 or Section 27 but writ court to have due regard to the provisions of Central Excise and Customs Act and to refuse grant of relief in automatic refund and claimant to prove burden of duty not passed on to third party."

In the impugned order there is mention of the appellant's contention on the basis of the above CA certificate as well as that this amount was deposited much later on and in one go. The order also mentioned about appellant's narration of this certificate vis-a vis their profit and loss account but there is no discussions on the unjust enrichment. The refund was rejected on time bar aspect. The order is silent on this. As this amount was deposited much later on in one go and there is certification of C.A. certificate. I have no hesitation to hold that the same is not hit by unjust enrichment.

Order in Appeal No MKK/423/RGD APPL/2018 dated 16.01.2019

"5.4 In accordance the above position of law, I find that appellant is entitled to interest on delayed refund. However, it needs to be examined, from which date the interest is to be calculated in the instant case. In this connection, I find that in case of M/s Malwa Cotton Spinning Mills Ltd. Vs. CCE Ludhiana, Hon'ble Tribunal as reported in [2013 (2) ECS 86 (Tri-Del)] decided as under:

In view of the above judgement I find that the date on which refund application filed by the appellant became fit in accordance with Section 11B of the Central excise Act, 1944 shall be taken as date of filing the refund application for the purpose of interest calculation in case refund is delayed and accordingly, adjudicating authority needs to examine such date and proceed to sanction interest on delayed refund in accordance with law."

Order in Appeal No AJV/106/RGD APP/2020-21 dated 25.08.2020

9. After rejection of refund claim by the Assistant Commissioner Mumbai-III vide Order No. 48/R/08-09 dated 06.02.2009, issue further went ahead to the Additional Commissioner (Appeals) who directed LTU for re-verification of

entire refund claim. Commissioner of Central Excise, LTU vide letter dated 30.11.2010 submitted that Rs. 3,36,51,600/- can be refunded to the appellant. Further, Commissioner (Appeals), LTU, Mumbai vide OIA dt. 30.01.2012 upheld the OIO dated 06.02.2009 and rejected the appeal filed by the appellant on multiple grounds like not filing of proper documents, hit by doctrine of unjust enrichment and limitation clause. However, issue ultimately came in favour of the appellant, as detailed in para 4 above. Appellant's one of the contention is that if 29.07.2002 and 14.11.2006 are not considered as relevant date for filing refund application, then at least 30.11.2010 should be taken as relevant date for the purpose of calculation of interest on delayed refund because on this date department (LTU) finally concluded that Rs. 3,36,51,600/- can be refunded to the appellant. Ultimately refund amounting to Rs 3,35,57,086/- was sanctioned to the appellant vide Order No. 58/Ref/Gy/2017-18 dated 27.07.2018. I find force in this argument of the appellant because department could not have concluded with this eligible refund claim amount without having entire relevant documents essential for calculation of refund amount. I, therefore, find that the date 30.11.2010 should be considered as relevant date for the purpose of calculation of interest since department was having all the relevant documents and also since department concluded refundable amount on 30.11.2010. This goes in line with the decision of the Commissioner (Appeals) OIA No. MKK/423/RGD APP/ 2018 dated 16.01.2019 and the judgment of Hon'ble Tribunal in case of M/s Malwa Cotton Spinning Mills Ltd. Vs CCE, Ludhiana, as reported in 2013 (2) ECS (86) (Tri - Del).

10. I find that adjudicating authority vide impugned order decided that interest is admissible from 30.10.2017 because application with all required documents for processing of fresh refund claim was filed by the assessee on 31.07.2017 as mentioned in the OIO No. 58/Ref/Gy/2017-18 dated 27.07.2018. However, I have seen the letter dated 31.07.2017 of the appellant addressed to the department and I find that this letter only requests department to remit the refund amount alongwith interest, consequent to the Commissioner (A)'s OIA No. SK/115/LTU/MUM/2016-17 dated 28.03.2017. Further, I find

that at para 8 of the OIO No. 58/Ref/Gy/2017-18 dated 27.07.2018, it is mentioned that "as per directions of Commissioner (A) [i.e OIA No. SK/115/LTU/MUM/2016-17 dated 28.03.2017] the assessee filed the refund claim on 31.07.2017. I have gone through this judgment of Commissioner (A) and I do not find that Commissioner (A) has directed appellant to file fresh refund application. Even if such directions were given then also it would have been for procedural requirement only because fact remains that department was in the position to calculate refund amount as narrated in above para 10. On the contrary I find that at para 16 of the Commissioner (A)'s OIA No. SK/115/LTU/MUM/2016-17 dated 28.03.2017, it is mentioned that the Additional Commissioner, LTU, Mumbai had verified refund claim and found that amount of Rs 3,36,51,600/- is admissible to the appellant. As narrated at Para 10 above, department had already calculated the eligible refund amount on 30.11.2010 and this in itself shows that department was having all the documents required to calculate refund amount.

Accordingly, therefore, I do not agree with the adjudicating authority's observation that 30.10.2017 should be relevant date for the purpose of calculation of interest.

2.2 The first of the impugned order dated 28.03.2017 subject matter of first appeal in the table in para 1 above has been challenged by the revenue on the ground that same is barred by limitation. Taking the note of the Board Circular No 572/9/2001 dated 22.02.2001 at paragraph 3 and 4, Assistant Commissioner vide order in original No 58/Ref/GY/2017-18 dated 27.07.2018, allowed the refund of Rs 3,35,57,086/- to the appellant assessee, without any interest for the delay in filing of the refund.

2.3 The order of Assistant Commissioner was challenged by the appellant assessee, before the Commissioner (Appeals). Commissioner (Appeals) vide the impugned order dated 16.01.2019, allowed the appeal of the appellant and directed the assistant Commissioner to decide the issue of interest in accordance with law, taking the date of submission of the documents as the date of filing the refund application. Appellant Assessee challenged this order in appeal before the tribunal and

is subject matter of the second appeal in the table in para 1 above.

2.4 As directed by the Commissioner (Appeals) vide order dated 16.01.2019, the issue was again considered by the Assistant Commissioner, who vide his order in original number dated held as follows:

"17. In compliance with and in accordance with the findings of Commissioner (Appeals) Order in Appeal No MKK/423/RGD APPL/2018 dated 16.01.2019 and having mindfully determined the date of commencement of interest on 29.10.2017, I hereby sanction interest amounting to Rs 14,94,899/- (Rs Fourteen Lakhs Ninety Four Thousand Eight Hundred and Ninety Nine Only) to M/s Asian Paints Limited situated at Asian Paints House, 6A Shanti Nagar, Santacruz (E), Mumbai 400055."

2.5 This order was challenged by the appellant assessee before the Commissioner (Appeals). The appeal was disposed off by the Commissioner (Appeals) vide impugned order dated 25.08.2020 which is subject matter of the third and fourth appeal in table in para 1 above, one filed by the revenue and other by the appellant assessee.

3.1 We have heard Shri Gajendra Jain along with Shri Rajesh Ostwal, Advocates for the appellant assessee and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorized representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:

- Commissioner appeal has in the order dated 28.03.2017 has given specific finding that the duty was paid under protest and therefore the time limit provided under section 11B will not apply in the present case. There is no counter to the said finding of the order of Commissioner (Appeal). The appeal of revenue needs to be dismissed placing reliance on the decisions as follows:
 - Hindustan trust Ltd. [1998 (97) ELT 361 (T)]
 - Indofil Chemical Co [2001 (45) RLT 1068 (T)]
 - Mahindra and Mahindra Ltd. [2001 (43) RLT 514 (T)]

- Saharia Krishi Van Prathistan [2003 (58) RLT 308 (T)]
- Spade Elektro (P) Ltd. [2004 (175) ELT 319 (T)]
- The time limit should start from the date of staking the claim i.e. 29.07.2002. Proper form for claiming the refund is totally irrelevant.
 - Arya Export Industries [2005 (192) ELT 89 (Del)]
 - P S Tech Com [2013 (296) ELT 468 (T)]
 - Bhandiguri Tea Estate [2001 (134) ELT 116 (T)]
 - Agniplast [2010 (19) STR 838 (T)]
 - Amrit Paper Mill [1991 (54) ELT 293 (T)]
 - Hindustan Bobbin Industries [1987 (30) ELT 293 (T)]
 - GTC [1989 (42) ELT 29 (T)] Affirmed at [1997 (96) ELT A223 (SC)]
 - IPG Engineers Pvt Ltd. [2008 (232) ELT 481 (T)]
 - Duraline India Pvt Ltd [2009 (237) ELT 689 (T)]
 - Repro India Ltd. [2016 (43) STR 203 (T)]
 - TVS whirlpool Ltd. [1994 (74) ELT 496 (Mad)]
 - Balmer Lawrie & co Ltd. [2015 (315) ELT 100 (T)]
 - Hindustan Sanitaryware & Industries Ltd. [2004 (168) ELT 243 (T)]
 - Arunodaya Mills Ltd [2003 (156) ELT 790 (T)]
 - Rubberwood India (P) Ltd [2006 (206) ELT 536 (T)]
- Claim filed on 14.11.2006 is only a continuation/ reminder of original claim filed on 29.07.2002. The claim filed on 14.11.2006 was filed as sequel to the decision of the Hon'ble Bombay high Court, dismissing the appeal filed by revenue vide order dated 21.02.2006. In view of the decision in the case of West Coast Paper Mills Ltd [2004 (166) ELT 290 (SC)] the revenue appeal needs to be dismissed.
- Scheme relating to payment of interest by Government is contained in Section 11BB. Broadly speaking, it provides for payment of interest from expiry of three month from the date of application till the date of actual refund. Such liability to pay interest is automatic, without any need for application for claiming payment of interest.

- Explanation to section 11BB provides that the Order of the Appellate authority/ Court will be deemed to be an order of Assistant Commissioner passed under Section 11B(2). By insertion of the said explanation it is evident that intention of the legislature was to provide for payment of interest on the refunds not paid within three months from the date of receipt of refund application, initially rejected by the Assistant Commissioner, but later on allowed by the appellate authority. Reliance is placed on the following decisions:
 - Ranbaxy Laboratories [2012 (27) STR 193 (SC)]
 - Hamdard wakf Laboratories [2005 (188) ELT 476 (ALL)] affirmed at [2017 (51) STR 214 (SC)]
 - IVRCL Infrastructures & Projects Ltd. [2010 (257) ELT 33 (Bom)]
 - Reliance Industries Ltd. [2015 (317) ELT 621 (T)]
- Once the taxing statute contains the provision relating to interest then payment of interest is automatic to the extent provided in statute.
 - Kanhai ram Thekedar [2005 (185) ELT 3 (SC)]
 - Qureshi Crucible Centre [1993 Supp (3) SCC 495]
- All the necessary documents were available with the department in 2002 itself. Revenue had challenged the order of finalization of assessment on merits and not for the reason of non submission of documents.
- No provision in Section 11BB corresponding to Explanation to section 244 A (2) and 243 (1) of Income Tax Act, 1961 or Section 44A of the Bombay sales Tax Act, 1959.
- No counter has been made to finding of fact recorded by the Commissioner (Appeals) that all the documents were submitted by the appellant assessee and verified by the department on 30.11.2010. The appeal filed by the revenue on this account need to be dismissed.
- As all the documents and the refund claim was made on 29.07.2002 and hence interest should be granted taking the same as base date.

3.3 Learned Authorized representative reiterates the submissions made in the revenue appeals and also the findings

recorded by the Commissioner (Appeals) in the appeals filed by the appellant.

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

4.2 Undisputed facts as recorded by the Commissioner (Appeals) in the impugned order dated 28.03.2017, by referring to the appeal filed by the appellant before him are reproduced below:

"This appeal has been filed by appellant against the impugned order passed by the Asstt. Commissioner, Central Excise & Service Tax, LTU, Mumbai wherein the refund claim dated 14.11.2006 of Rs.5,53,97,108/- was rejected being hit by bar of unjust enrichment and limitation of time in terms of Section 11B of the Central Excise Act, 1944 (herein after as 'CEA').

2. Briefly the appellant is registered with LTU, Mumbai and are engaged in manufacture of excisable goods viz. Paints, Varnishes, Resin, etc. falling under Chapter 27, 32 and 38 of Central Excise Tariff Act, 1985. The goods viz. paints and varnishes manufactured are chargeable to ad-valorem rates of excise duty.

2.1 The appellant had filed a refund claim on 14.11.2006 for Rs.5,53,97,108/- for the period Dec. 1978 to Aug. 1997 with the office of the Asstt. Commissioner of Central Excise, Bhandup. Dn. Mumbai-II Commissionerate on the following grounds (as mentioned in Annexure A to the application dated 14.11.2006 for the refund claim):

"Since the Commissioner (Appeals) order dated 31.12.2001 attained finality in view of the departmental appeal being dismissed by the Hon'ble Tribunal, Mumbai and the Hon'ble High Court of Judicature at Bombay, we are legally become entitled for the refund of excess duty paid by us during the relevant period and hence such a refund claim is filed by us.

It should be noted that the excess duty was paid by us after the goods were cleared to the customer during the period from December 1978 to August 1997. Since the duty burden has been borne by us, there is not unjust enrichment involved in the

present case. Hence the excess duty paid by us during the relevant period should be refunded by the department along with the interest calculated from the date of payment of duty till the date of refund to be made by the department.

2.2 The said claim was rejected by the Asstt. Commr. C.Ex. vide 48/R/08-09 dated 6.2.2009 on the grounds of limitation, unjust enrichment and non availability of documents.

2.3 The appellant then filed an Appeal No. 49/09/P against the above O-in-O with the Commr(A). The Commr(A) directed LTU for re-verification of entire refund claim from 1978 to 1997. The same was submitted by the Addl. Commr, LTU, Mumbai vide letter dated 30.11.2010 arriving at Rs. 3,36,51,000/- as the new refundable amount.

2.4 The Commr(A), LTU, Mumbai vide O-in-A dated 30.1.2012 upheld the O-in-O dated 6.2.2009 and reject the appeal filed by the appellant on the grounds of not filing of proper documents, hit by doctrine or unjust enrichment and by the limitation clause. The appellant then filed appeal with the Cestat Mumbai.

2.5 The Cestat, Mumbai vide Order No. A/115 /15/EB dated 16.1.2015, has allowed the appellant's appeal by way of remand. The order part is quoted as given below:

"11. Accordingly we remand the matter to the adjudicating authority to decide the case afresh after affording an opportunity of personal hearing to the appellant. We may point out that on some issues, we have given our observations on merits. However, in our considered view, noting the history of the case, it deserved to be addressed again on the issues keeping in view the integrity of the matter. Being a very old case, in the interest of justice, we direct the Assistant Commissioner to decide the matter within three months of the receipt of this order. All issues kept open."

As per the direction of the Hon'ble Cestat a Personal Hearing was held on 30.9.2015 which culminated into the impugned order.

3. Being aggrieved with the impugned orders, appellant filed the appeal on the grounds:

3.1 that the portion of the impugned Order-in-Original dated 21.10.2015 passed by the adjudicating authority which is against

the appellants, is incorrect in law as well as on facts. The adjudicating authority has passed the order without considering any submission made by the appellants. Therefore the same is liable to be set aside on this ground itself.

3.2 that out of the total claim of Rs.5,53,97,109/- filed for all the three periods, i.e., from Dec.1978 to Aug.1997, refund of Rs. 2,18,40,023/- (i.e., Rs.1,00,46,262 + Rs. 1,17,93,761/-) is not admissible to them on account of portion of the refund claim is time barred or some amount of refund has been already sanctioned. Accordingly, the appellants submitted & accepted that out of the total refund claim filed by them, net refund amount due for the third period i.e., from July 1988 to August 1997 is Rs.3,35,57,086/- only. The appellants are not pressing of the refund of the balance amount. The adjudicating authority has incorrectly rejected the balance refund & aforesaid amount of Rs.3,35,57,086/- is correctly refundable to them.

3.3 that the claim for Rs.3,73,02,659/- for the third period is not hit by Section 11B and therefore not barred by limitation. This claim has to be granted as a consequential relief giving effect to the orders passed in finalization proceedings. In the impugned Order-in-Original dated 21.10.2015, reminder application for the refund of the excess duty paid by the appellant has been rejected by the Assistant Commissioner by holding that it is hit by time limit set by Section 11B of the Central Excise Act, 1944.

3.4 that aforesaid contention raised in the impugned Order 21.10.2015 is incorrect & perverse. They have deposited excess duty pursuant to the orders passed in course of finalization of provisional assessment by various authorities. When the finalization had attained legal conclusion, the appellant filed a reminder to intimate the department for refund of the excess excise duty which has been paid by them, as a matter of consequential relief.

3.5 that treating the reminder letter dated 14.11.2006 as independent refund claim under Section 11B of the Central Excise Act, 1944 and applying time limit of one year, is incorrect & perverse. Vide their letter dated 14.11.2006, they have claimed consequential relief pursuant to finalization proceedings coming to an end. There is no need for filing any formal refund

claim. The finalization proceedings come to end only when effect/ adjustment is undertaken in terms of the appellate orders passed by higher authorities. In the present case, the adjustment or order giving effect to appellate orders has not been passed. Hence, there is no claim in law in terms of Section 11B. The adjudicating authority has committed a fundamental error here.

3.6 that say for example the appellants paid Rs.100 as per the adjudicating authority's order finalizing provisional assessment. On appeal filed by the appellant, the Commissioner (Appeals) reduced the amount payable on finalization of provisional assessment by allowing deduction of certain discounts which were originally disallowed in the Orders finalizing provisional assessment. In the above example, the Commissioner(Appeals) held that the amount payable on finalization of provisional assessment is Rs.80/- instead of Rs. 100/- paid by the appellants.

3.7 that when the Order finalizing provisional assessment was modified by the Commissioner(Appeals) by allowing certain additional deductions, the Revenue is obliged to make refund of excess amount deposited by the appellants against Orders finalizing provisional assessment. The Revenue is bound in law to restitute the amounts of such refund to them. Further, the provisions of Section 11B will not apply to the said amount refundable to the appellants. In this they relied on few case laws as under:

- i) CCE Vs. Woodcraft Products 2002 (143) ELT 247 (SC) &*
- ii) CCE Vs. Vikas Testing & Developments Lab 2009 (238) ELT 790 (T) Approved in 2010 (257) ELT A17 (Bom).*

3.8 that in view of the above, Section 11B is not applicable to the refund claims filed for the 3rd period since it cannot be properly called as refund claim in first place. They placed reliance on the decision of the Hon'ble Tribunal in B. J. Singh Vs. CC — 1990 (45) ELT 474 (T), where the Tribunal held that the provisions of Section 27 of the Customs Act, 1962 which is similar to Section 11B of the Central Excise Act, 1944 is not applicable when the appeal is being filed against the assessment order.

3.9 that in view of the above, rejection of the reminder filed by the appellant for refund of the excess duty paid by them on the ground of limitation is illogical & perverse. Hence, impugned Order-in-Original dated 21.10.2015 is liable to be set aside.

3.10 that they had paid excise duty under protest which became refundable consequence to the Bombay High Court's Order dated 21.2.2006. The appellants filed refund claim within one year from the date of this Order dated 21.2.2006. Therefore, the refund claim is filed within time limit prescribed under Section 11B of the Central Excise Act, 1944.

3.11 that even if the reminder application submitted by them for refund of the excess duty paid them is considered as refund claim in terms of Section 11B of the Central Excise Act, 1944, even then entire refund of the excess duty paid by them is admissible to them in view of the following submission.

- i) As per the impugned Order dated 21.10.2015, the refund application dated 14.11.2006 filed by them with respect to refund of the duty paid by them in third period, i.e., from July 1988 to August 1997 is time barred. The adjudicating authority held that since the issue with respect to the aforesaid period has attained finality by the Order-in-Appeal dated 31.12.2001 (issued on 7.1.2002), therefore refund claim filed on 14.11.2006 cannot be considered as refund claim filed within statutory time limit of one year prescribed under Section 11B of the Central Excise Act, 1944. Accordingly, the adjudicating authority rejected the refund application as time barred. The contention of the adjudicating authority is incorrect & not sustainable under law.
- ii) The position as to allowance and disallowance of deduction of various discounts/deduction given by them for the 3rd period from July 1988 to August 1997 attained finality by the Commissioner of Central Excise (Appeals), Mumbai- II. O-in-A No. RJB/M-11/380-384/2001 dated 31.12.2001 (issued on 7.1.2002). However, this O-in-A dt. 31.12.2001 was relied in another O-in-A of Commissioner(Appeals) dated 30.9.2002 against which the department filed appeal before CESTAT and then Bombay High Court. In case the

Tribunal or High Court had set aside the Order dated 30.9.2002, the department would have reviewed the Order dated 31.12.2001 (relying on which the Order dated 30.9.2002) and filed appeal. Therefore, the O-in-A dated 31.12.2001 attained finality only after the Bombay High Court's Order dated 21.2.2006 upholding O- in-A dated 30.9.2002. Hence, the refund for the third period also arises consequence to the Order dated 21.2.2006 passed by the Bombay High Court.

iii) They reproduced the last para of the Order dated 30.9.2002 which reads as under: "I uphold the appeal in respect of cash discount and bonus as discussed in the Order-in-Appeal No.380 to 384 dated 31.12.2001." Against Order dated 30.9.2002, an appeal was filed by the department before the Appellate Tribunal on the grounds that cash discount and bonus is not admissible as deduction from the 'Assessable Value' of goods cleared by them. The Tribunal vide its Order dated 1.7.2004 held as under: "We find that the Commissioner (Appeals) has relied upon his earlier order-in-appeal No.380-384 dated 31.12.2001 and does not give any independent reasoning in the present impugned order. We therefore see no reason to interfere with the order relating to cash discount, regarding the bonus also the order does not call for any interference"

iv) From the above, it is clear that the cash discount and bonus was allowed in the Order dated 30.9.2002 in view of Order dated 31.12.2001. However the department filed appeal before the Tribunal that allowance of cash discount and bonus is not correct. Since the department challenged the allowance of cash discount and bonus which is decided in favour of the appellants vide Order dated 31.12.2001, the Order dated 31.12.2001 cannot be said to have attained finality unless the appeal filed by the department is decided.

v) If any appeal to finalisation Order is admitted wholly or partially by the higher authority, the Order appealed against loses the status of finalisation order and the department is under the obligation to pass fresh

Finalisation Order giving effect to the Order-in-Appeal. In the absence of such denovo finalization, the assessment continues to be the provisional assessment. It is settled law that provisional assessment is provisional for all respect and therefore the time limit cannot start unless the assessment is finalized by the department.

vi) In view of the above, the refund amount due to them for the 3rd period attained finality by the Bombay High Court's Order dated 21.2.2006. In view of the aforesaid factual position, even if the appellants had filed the refund claim immediately before the decision of appellate authorities, the department would not have processed the refund claim in view of their pending appeal.

vii) Pursuant to the above Commissioner (Appeals) O-in-A dated 31.12.2001 they vide their application dated 29.7.2002 asked the department to quantify the differential duty/refund. However, the department did not give any formal reply to the said letter. This was despite being this application was filed within the stipulated period of one year of filing refund claim under Section 11B of the Central Excise Act, 1944. They were orally informed by the department that the appellants need to wait for the decision of the appellate authority in the appeals filed by the department for the earlier periods.

viii) At one side the department refused to work out refund amount consequence to Order dated 31.12.2001 on the ground that this Order dated 31.12.2001 was relied in Order dated 30.9.2002 against which the department's appeal is pending and on the other hand the department refused the refund claim to the appellants on the ground that the appellants did not file the refund claim immediately after the Order dated 31.12.2001, the department cannot blow hot and cold together.

ix) In view of the above, the finalization of provisional assessment for entire period involved in the present case attained finality by the Bombay High Court's Order dated 21.2.2006. In other words, the refund claim arose only consequence to the Order dated 21.2.2006 passed by the Hon'ble Bombay High Court. They had filed refund claim

dated 9.11.2006 on 14.11.2006, i.e. within one year from the date of Order dated 21.2.2006. Hence, the refund claim has been filed within the time limit prescribed under Section 11B of the Central Excise Act, 1944.

x) They paid excise duty 'under protest'. TR-6 Challan by which they paid Central Excise duty consequence to the direction of the department in finalisation of provisional assessment, clearly shows that the payment was made under protest. They had also written to the department, from time to time that they are making payment of duty under protest. These facts are not in dispute.

xi) Further, while making the payment of duty consequence to the Orders/Letter finalizing the provisional assessment, they had informed the department that they are not in agreement with the Orders/Letters the application of which is requiring they are required to pay duty and they have filed appeal before the Appellate Forum against these Orders/Letters. This fact is not in dispute. It is well settled that in case where the assessee challenges the assessment order, the duty paid by the assessee consequence to that assessment order is to be treated as paid under protest. In this they relied on the paras 86 & 107 of Mafatlal Industries Ltd. Vs. UOI [1997 (89) ELT 247 (SC)].

xii) As per Section 11B of the CEA, refund claim is to be filed within one year from the relevant date. However, as per second proviso to Section 11B(1), the limitation of one year shall not apply where any duty and interest has been paid under protest. In such cases, where the duty is paid under protest, the period of limitation is to be reckoned from the date of Order consequence to which the amount become refundable. In view of the above, the refund claim in the present case became refundable consequence to the Bombay High Court's Order dated 21.2.2006.

They had filed refund claim within one year from the said Bombay High Court's Order dated 21.2.2006. Therefore, the rejection of refund claim on the ground of limitation is incorrect.

3.12 that they placed reliance on the decision of Three Member Bench of Cestat in the case of CCE Vs. Ashok Leyland (1987 (29) ELT 530 (T)]. In this case,

- (i) all the clearances of the assessee were assessed on the price charged by the main dealers to sub-dealers on the ground that the main dealers are related persons. The assessee filed a writ petition before the High Court of Madras and sought the writ of certiorari contesting that the main dealers are not related persons. A learned Single Judge of the Madras High Court allowed the writ in favour of the respondents on 28-9-1981. However, the department filed an appeal before the Division Bench of the High Court. Therefore, the assessee to safeguard their interest kept on paying duty on the higher value under protest considering their main dealers related persons. The department's appeal was dismissed on 7-12-1982 [1983 E.L.T. 2168 (Mad)] by the Division Bench of Madras High Court. The Union of India filed a Special Leave Petition before the Supreme Court, which was also dismissed on 25-11-1983.
- (ii) The assessee filed refund claim of higher duty paid by them under protest. The department rejected the refund of higher duty paid during the period from 29-9-1981 to 2-2-1982 on the ground that the refund for this period is time barred under Section 11B since the Single Member Bench of the Madras High Court had already decided the case in the assessee's favour on 28-9-1981 that their main dealers were not related persons and therefore, the fact that the assessee during this period paid the higher duty under protest is meaningless. (iii) The Tribunal allowed the refund claim on the ground that though the Single Judge of the Madras High Court had decided their writ petition in the assessee's favour on 28-9-1981, that was not the end of the matter because the department did not accept the said

judgment and filed appeals first to the Division Bench and then to the Supreme Court. Therefore, the time limit under Section 11B is to be reckoned from the date of the Supreme Court's order dismissing the appeal of the department.

The aforesaid decision of the Tribunal in case of Ashok Leyland has been affirmed by the Supreme Court in 1996 (83) ELT 143 (SC) & 1997 (92) ELT A129 (SC).

3.13 that as per Section 11B of the CEA, the refund claim is to be filed within one year from the date of the relevant date. In view of Clause (ec) of Explanation B to Section 118, in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any Court, the relevant date is the date of such judgment, decree, order or direction.

3.14 that in the present case, they paid amount demanded in Orders finalizing provisional assessment under protest and filed appeals against these Orders. The department also filed appeal against the Orders finalizing provisional assessments. The Commissioner (Appeals) decided the appeals of the assessee and the department. Against the order of the Commissioner (Appeals) the department filed appeal before the f finalization of provisional assessment would attain finality only when the appeal filed by the department was disposed of by High Court vide Order dated 21.2.2006. Therefore, the limitation period for filing of refund claim would start from the date of High Court's Order dated 21.2.2006. Therefore, the rejection of refund claim on the ground of limitation is incorrect.

3.15 that in the present case, prior to High Court's Order dated 21.2.2006, there was no reason for them to presume that the refund is admissible to them consequence to the Commissioner (Appeals)'s Orders dated 31.12.2001. It is because the operation of Commissioner (Appeals)'s Orders dated 31.12.2001 was subject to the decree/order of the High Court.

3.16 that therefore, the cause for applying for refund would arise only after the department's appeal was rejected by the High Court vide Order dated 21.2.2006. Limitation will arise only after

such a final determination of refund claim by High Court's Order dated 21.2.2006. Till High Court's Order dated 21.2.2006, the question of filing any refund claim does not arise. Thus, the cause of action can only be on the date when Commissioner (Appeals)'s Orders dated 31.12.2001 attained finality by High Court's Order dated 21.2.2006.

3.17 that after an order is passed in the appeal, the order of the lower authority is merged in the order of the appellate authority and hence there being a single order only of the appellate authority. In the present case, the Commissioner (Appeals)'s order dated 30.9.2002 was challenged by the department. However, the said order of Commissioner (Appeals) was upheld by the Tribunal and the High Court. Therefore, the Commissioner (Appeals)'s order dated 30.9.2002 is merged in the order of the Tribunal and the Tribunal's order is merged in the order of the High Court dated 21.2.2006. Therefore, there is only a single order of the High Court dated 21.2.2006. Further, the Commissioner (Appeals)'s passed Order dated 30.9.2002 was passed applying another order of the Commissioner (Appeals) dated 31.12.2001. Therefore, Commissioner (Appeals)'s orders dated 31.12.2001 and 30.9.2002 were merged in the High Court's order dated 21.2.2006. In this for merger and "cause of action" they relied on below case laws.

- i) Union of India Vs. West Coast Paper Mills [2004 (164) ELT 375 (SC)].*
- ii) S. S. Rathore Vs. State of MP [1989 (43) ELT 790 (SC)].*
- iii) CCE Vs. Alagendran Finance [2007 (293) ITR 1 (SC)].*

3.18 that therefore, the refund claim filed by the appellants within a period of one year from the High Court's dated 21.2.2006 is not barred by limitation under Section 11B of the Central Excise Act, 1944. Hence, the refund claim rejected in the impugned Order- in-Original dated 21.10.2015 is not correct & same is not sustainable under law.

3.19 that in the impugned Order-in-Original dated 21.10.2015, the adjudicating authority has relied upon the finding given by the Tribunal in the remanding Final order dated 16.1.2015 & held that once the issue has reached finality, duty paid cannot be considered as under protest & therefore, time limit of one

year as provided in law will be applicable in such cases. The adjudicating authority held that since the provisional assessment with respect to third period has attained finality by the Order-in-Appeal dated 7.1.2002, hence, refund claim filed for the same on 14.11.2006 is time barred. The adjudicating authority has also placed reliance on decision of Dena Snuff (Petitioner) Ltd. Vs. CCE-2003 (157) ELT 500 (SC).

3.20 that in view of the detailed submission above, they have correctly filed the refund claim subsequent to the Hon'ble High Court order dated 21.2.2006. Therefore, aforesaid finding of the adjudicating authority is incorrect & perverse.

3.21 that reliance placed on the aforesaid decision of the adjudicating authority is also incorrect. The decision of the Supreme Court in Dena Snuff supra is in fact in favour of theirs. In this case,

- (i) the assessee classified its product under Sub-Heading 2404.60 of the Central Excise Act and paid duty on that basis till 27.7.1990. However, from 25.8.1990 onwards, on insistence of the department the assessee classified its product under Sub-Heading 2404.50 and paid higher rate of duty under protest. The classification list was approved in 1994 on the basis that the assessee's product was classifiable under Sub-Heading 2404.50. The assessee challenged the classification list. The appeal of the assessee was allowed holding that the product is classifiable under Sub-Heading 2404.60. The department however filed appeal before Tribunal.*
- (ii) Meantime, in the same year, on 18.2.1994, the Tribunal in similar case of Lachman Das Bihari Lal Vs. CCE [1994 (71) ELT 728 (T)] decided that the product as classifiable under Sub-Heading 2404.60. The department filed appeal against this decision of the Tribunal before the Hon'ble Supreme Court.*
- (iii) On the basis of the above decision of the Tribunal in Lachman Das Bihari Lal's case, the assessee filed an application for refund of the excess duty paid by it under protest on the basis of the classification of its*

product under Sub- Heading 2404.50 even though the department's appeal in their own case was pending before the Tribunal as mentioned in supra.

(iv) *The department denied refund claim on the ground of unjust enrichment. On appeal being filed by the assessee, the Tribunal dismissed the appeal on the preliminary ground that the refund application was not maintainable. The reasoning given by the Tribunal was that in the decision Mafatlal Industries Ltd and Ors. Vs. U01-1997 (5) SCC 536 [paragraph 108(iv)] had held that-the assessee could not rely upon the decision in another assessee's case for the purposes of applying for refund. The Tribunal held that the assessee would have to obtain a final order in its own proceedings where the department's appeal is pending (para J.3 supra). The assessee filed appeal against the order of Tribunal before the Supreme Court.*

(v) *The appeal filed by the department in assessee's own case was dismissed by the tribunal reported as CCE Vs Dena Snuff Pvt Ltd [2000 (115) ELT 642 (T)] relying on the decision of Lachman Das Bihari Lal's case. The department filed appeal against the decision of the Tribunal before Supreme Court. The Supreme Court vide Common Order dated 28.8.2003 reported as CCE Vs. Lachman Daas Behari Lal [2004 (163) ELT A115 (SC)] dismissed the appeals of the department filed in Lachman Daas Behari Lal's case and assessee's case. Thus, the legal position that the assessee's product is classifiable under Sub- Heading 2404.60 attained finality by the Supreme Court's order reported as 2004 (163) ELT A115 (SC) supra.*

(vi) *In case of appeal filed by the assessee before the Supreme Court against the order of the Tribunal denying refund claim, the assessee raised two issues:*

a. *The first is that the Tribunal had misconstrued paragraph 108(iv) of the decision of this Court in Mafatlal Industries (supra) and that paragraph did*

not in any way preclude an application for refund being made in respect of duties paid under protest.

b. The second submission is that in any event this Court in Sinkhai Synthetics & Chemicals Vs. CCE-2002 (9) SCC 416 has held that Sections 11A and 11B did not apply to duty paid under protest.

(vii) In respect of the aforesaid questions, the Supreme Court held as under:

a. as far as the first submission is concerned, we are of the view that the Tribunal's appreciation of the relevant paragraph in Mafatlal Industries' case was correct. The "cause of action" of the assessee would arise only after the final dispute regarding the classification list had been settled by this Court on 28.8.2003 reported as 2004 (163) ELT AI 15 (SC). The application for refund by the assessee was therefore premature.

b. In case of second submission of the assessee, the Supreme Court held-that we have noted the proviso to sub-section (1) of Section 11(B) which says that the period of limitation of one year prescribed under sub-section (1) will not apply in case duties are paid under protest. The question then is from which date will the period of limitation start to run? The Supreme Court then held that on the basis of the paragraph 108(iv) of Mafatlal Industries' decision which has been relied upon by the Tribunal it would have to be from the final decision in the assessee's own case, i.e. CCE Vs. Lachman Daas Behari Lal — 2004 (163) ELT AI 15 (SC).

(viii) It may be noted that the date of mentioned in para 3 of the Supreme Court's decision reported as Dena Snuff (P) Ltd. Vs. CCE 2003 (157) ELT 500 (SC) is 28.8.2003, i.e., the Order date of CCE Vs. Lachman Daas Behari Lal 2004 (163) ELT AI 15 (SC), instead of 28.8.1990 mentioned therein.

As can be seen from the above, the decision of the Supreme Court in Dena Snuff (P) Ltd. Vs. CCE - 2003 (157) ELY-500 (SC)

supports the submission of theirs in the present case that the period of limitation of one year is to be reckoned from the decision. of the Hon'ble High Court dated 21.2.2006. Therefore, the said decision is in fact in favour of the appellants. Hence, the impugned Order-in-Original dated 21.10.2015 is liable to be set aside.

3.23 that letter dated 29.7.2002 can be correctly considered as refund claim. Finding given by the adjudicating authority with regards to refund claim dated 29.7.2002 are incorrect & perverse. The adjudicating authority fails to consider submission made by the appellants. Pursuant to the Commissioner (Appeals)'s O-in-A dated 7.1.2002, vide their application dated 29.7.2002 asked the department to quantify the differential duty/refund. Accordingly, the refund application was in fact filed on 29.7.2002 itself, which is within the time period of one year from the relevant date, i.e. Commissioner (Appeals)'s Orders dated 30.9.2002 and 31.12.2001. The department has till date not responded to that letter or have re-determined the liability pursuant to that order.

3.24 that in the impugned order dated 21.10.2015, the adjudicating authority has raised certain doubts & given findings to say that that letter dated 29.7.2002 cannot be considered as refund claim as required in law. As per the adjudicating authority, the letter dated 29.7.2002 cannot be considered as proper rebate claim filed under Section 11AB for the following reasons:

- (i) that letter is part of the series of correspondence that they had with department with respect to quantification of demand consequent to Order-in-Appeal dated 31.12.2001;*
- (ii) that they had not submitted any working data as undertaken by them in the letter dated 29.7.2002;*
- (iii) that no reference of the aforesaid letter dated 29.7.2002 was made in the impugned refund claim dated 14.11.2006;*
- (iv) that in refund claim dated 14.11.2006 the appellants have specifically declared that 'no refund on this account has been claimed by us earlier'; &*

- (v) *that letter dated 29.7.2002 was not in pre-scribed format & it was not filed with proper authority & therefore it cannot be treated as refund claim under Section 11B of the Central Excise Act, 1944.*

3.25 that all the aforesaid findings/observation given by the adjudicating authority is incorrect & not sustainable under law. Out of the refund amount of Rs.4,90,96,420/- claimed for third period, they admit that the provisions of unjust enrichment would apply to refund of Rs.1,17,93,761/- as explained in Additional Commissioner, LTU's Verification Report dated 30.11.2010. Therefore, the appellants is not pressing for refund of Rs.1,17,93,761/-

3.26 that with respect to balance amount, pursuant to the Commissioner (Appeals)'s O-in-A dated 31.12.2001 (issued on 7.1.2002), they filed refund application vide their letter dated 29.7.2002. In this letter, they requested the department to quantify the differential duty/refund and that according to them they are entitled for refund of Rs.4.69 take credit of it. Accordingly, the refund application was in fact filed on 29.7.2002 itself, which is within the time period of one year from the relevant date, i.e. Commissioner (Appeals)'s Orders dated 31.12.2001.

3.27 that the department also acknowledged the above refund claim filed by them. As consequence to the said letter, the Superintendent vide his letters dated 5.8.2002 & 28.11.2002 sought clarifications. They vide their letter dated 6.1.2003 replied and gave clarifications. However, the department did not sanction the refund and give any formal reply to the said refund application till date. They were orally informed by the department that the appellants need to wait for the decision in the appeal filed by the department before the Tribunal and then before High Court against the Commissioner (Appeals)'s Order dated 30.9.2002 in which the said Order of the Commissioner (Appeals) dated 31.12.2001 was relied upon.

3.28 that finding of the adjudicating authority that letter dated 29.7.2002 is not a refund claim but a part of correspondence between them & the department is incorrect and baseless. The fact that the letter was part of correspondence going on between

them and department will not have any adverse effect of the correctness of the refund claim filed by the department. In the aforesaid as well they have requested the department to pay back the excess amount of the paid by them.

3.29 that w.e.f. 1.3.2002 no form for filing of refund claim has been prescribed under Central Excise Rules, 2002. Erstwhile Form 'R' was prescribed under Rule 1735 of the Central Excise Rules, 1944. However, no such form has been prescribed under Central Excise Rules, 2002. Therefore, the letter dated 29.7.2002 filed by the appellants for refund is a refund claim filed by the appellants and the said refund claim cannot be denied on the ground that it was not filed in the prescribed format. In view of above submissions, findings of the adjudicating authority given in the impugned Order-in- Original dated 21.10.2015 are not correct.

3.30 that even otherwise, the refund claim filed vide letter dated 29.7.2002 cannot be rejected on the ground that the refund claim was not filed in the appropriate format. If the refund claim has been insisted to be filed in some appropriate format, their refund claim vide letter dated 29.7.2002 should be treated as defective refund application and further claim for refund filed on 14.11.2006 is merely supporting their claim made vide letter 29.7.2002. They have not enhanced their claim for refund in refund claim filed on 14.11.2006. It is settled law that refund claim cannot be rejected on the ground that refund application was not filed in prescribed format in this they relied on few case laws.

3.31 that similarly, the finding of the adjudicating authority that the letter was not addressed to appropriate authority & therefore, it cannot be considered as refund claim is also not sustainable under law. The refund claim cannot be rejected for the procedural requirement. Further, the aforesaid objection that refund claim should be addressed to appropriate authority was never raised by the department when all correspondence was going on. The department ought to have directed them after filing letter dated 29.7.2002 only that they are required to address the issue of refund calculation to the appropriate authority. In this they relied on few case laws.

3.32 that the rejection of refund claim on the ground of limitation when earlier refund claim was not considered since it was not in prescribed format or addressed to correct authority is incorrect & not sustainable under law. In view of the above, the impugned Order dated 21.10.2015 is not correct & same is liable to be set aside on this ground itself.

3.33 that the refund has been sanctioned to them for similar refund claims filed in its own case of clearances from its Kasna and Ankleshwar units. They had filed similar refund claim for their other units at Kasna and Ankleshwar for the clearances made during the period from 22.3.1990 to 31.8.1997, 1981, 1982 and 1983, respectively. The refund claims filed by them were sanctioned by the Asstt. Commissioner vide following Orders:

(i) Order No. 147/N-V/08 dated 21.4.2008 and

(ii) Order No. 3/87 dated 14.10.1987.

Relying on the aforesaid Orders sanctioning the refund claims, the refund claim is admissible in the present case. Hence, the impugned Order dated 21.10.2015 is liable to be set aside.

3.34 that in the impugned Order, the adjudicating authority has not raised any objections with respect to unjust enrichment with respect to refund claim of Rs.3,36,51,600/- for which they are contesting now. It is assumed that the Assistant Commissioner is satisfied and in agreement with them for the same. They crave leave to produce & content other submission with respect to unjust enrichment if required later on.

3.35 that they prayed to set aside the impugned order and grant the refund as well as allow the appeal in full with consequential reliefs."

4.3 From the facts as recorded in the above order of the Commissioner appeal dated 28.03.2017 it is quite evident that issue before the Commissioner (Appeals) was in respect of the rejection of the refund claim filed by the Appellant assessee on 14.11.2006 consequent to the decision of Hon'ble High Court of Bombay dated 21.02.2006. Commissioner (Appeals) has held that the said refund claim is not barred by limitation. Though the appellant assessee had referred to the rejection of the refund

claim made by them vide the letter dated 29.07.2002, by the original authority, the arguments made against such rejection did not find any favourable finding from the Commissioner (Appeal). This order is under challenge by the Revenue in appeal No E/86570/2017. Apparently Appellant Assessee has not filed any appeal against this order challenging any part of the order, or cross objections in the matter. Hence the findings recorded by the Commissioner (Appeals) in para 14 of the impugned order in this appeal as far as it relates to appellant assessee attains finality.

4.4 We also do not find any merits in the appeal filed by the revenue challenging the finding recorded to the effect that the refund claim filed by the appellant assessee on 14.11.2006, is not barred by limitation. Hon'ble Apex Court has in case of Mafatlal industries [1997 (89) ELT 247 (SC)] wherein in para 95, in similar circumstances has held as follows:

"95. Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) re-agitating the issues already decided under Rule 9B - assuming

that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."

4.5 As per the above decision of the Hon'ble High Court, the provisional assessments in the case of the appellant assessee were finalized after the decision of the Hon'ble Bombay High Court on 21.02.2006, and accordingly the refund claim has to be filed within the time limit as prescribed taking the date of the order of High Court as the relevant date. In the impugned order, Commissioner (Appeals) have also recorded the finding that the "duty was paid under protest", that being so, the refund claim could have been never been held to be barred by limitation as per the proviso to Section 11B (1). Without any challenge to the above finding we do not find any merits in the appeal filed by the revenue. Thus the appeal no E/86570/2017 filed by revenue needs to be dismissed.

4.6 Appellant assessee has challenged the impugned order dated 16.01.2019, stating that date of submission of documents cannot be relevant date for computing the interest. After considering the provisions in law and the decision of Hon'ble Supreme Court in case of Ranbaxy laboratories [2012 (27) STR 193 (SC)], Ahmedabad Bench has in case of Bhilosa Industries Pvt Ltd [2022-TIOL-530-CESTAT-AHM] observed as follows:

"6. We have carefully considered the submissions made by both the sides and perused the records, we find that the limited issue involved is that from which date the appellant is entitled for interest on the sanctioned refund. As per the facts of the present case, we find that there is no dispute about the fact that the refund claim had been filed on 19.05.2005 and the same was sanctioned only vide order-in-original both dated 04.04.2016. We also noticed that in the present matter both the adjudicating authority considered the letter dated 23.11.2015 as refund claim application, whereas vide letter dated 23.11.2015 appellant only informed the Jurisdictional Deputy Commissioner that CESTAT has passed order in their favour and accordingly to sanction the refund amount along with interest.

7. The Section 11BB deals with interest on delayed refunds which reads as under :-

"11BB. Interest on delayed refunds. – If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate (not below five per cent) and not exceeding thirty per cent per annum as is for the time being fixed (by the Central Government, by notification in the Official Gazette) on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty.

Explanation. – Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any Court against an order of the Assistant Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal (National Tax Tribunal) or, as the case may be, by the Court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section."

This section clearly stipulates that if any duty is ordered to be refunded under sub-section (2) of Section 11B of the Act to the applicant and the same is not refunded within three months from the date of receipt of such application under sub-section (1) of Section 11B of the Act, then the applicant would be entitled to interest. This interest would be payable immediately after the expiry of three months from the date of receipt of such application till the date of refund of the duty. In a nutshell, what this section stipulates is that, once an application for refund has been made and the same is granted within a period of three months of receipt of such application, there would be no liability to pay interest. However, if the refund is granted after the expiry of the period of three months from the date of receipt of the application, then interest would also be payable on the amount of refund granted, from the date immediately after the expiry of three months from the date of receipt of such application, till the date of refund.

8. As per the statutory mandate of Section 11BB of the Act the department is under legal obligation to sanction the refund claim along with interest after the expiry of 3 months from the date of

filing of the refund claim. In the present matter the time limit for payment of the refund amount to the Appellant by the Central Excise authorities (without interest) expired on 19-08-2005. Since, claimed amount was finally paid to the Appellant on 04.04.2016, in our considered view, the Appellant is entitled for the statutory interest from 20-8-2005 to the date when the refund was eventually paid, i.e., 04-4-2016. Though, the refund amount was paid to the Appellant consequent upon the final order dated 08.05.2015 passed by the CESTAT, but the date of computation of the interest amount will commence from the date of cessation of three months of the original refund application, and not from the date, when the refund amount was finally paid.

9. We also observed that the issue in the present case regarding payment of interest on delayed refund amount is no more *res integra* in view of the judgment of Hon'ble Supreme Court delivered in the case of *M/s. Ranbaxy Laboratories Ltd. Union of India*, reported in 2011 (273) E.L.T. 3 (S.C.). The relevant paragraph of the said judgment is extracted herein below:-

"9..... Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below Proviso to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry

of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under sub-section (1) of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable.”

10. In view of the above discussion and findings which gets support from the statute, Board’s circulars and apex court’s judgment, the impugned order is not sustainable, hence the same is set aside and appeals filed by the appellant are allowed with consequential relief.”

4.7 Thus appeal No E/86002/2019 filed by the appellant assessee needs to be adjudged in their favour holding that the relevant date for computing the interest under Section 11BB would be the date of acknowledgement of the application for the refund made under Section 11B (1) and not the date of submission of the documents.

4.8 In view of our findings in the above appeals the issue involved in the remaining two appeals which are against the order dated 25.08.2020, is adjudged in the favour of appellant assessee and against revenue..

4.9 The appeal no E/85290/2021 filed by the revenue challenging the grant of interest for the period from 30.11.2010 to October 2017 is dismissed.

4.10 The appeal No E/86137/2020 filed by the appellant assessee is allowed to the extent that the relevant date for computing the interest payable under Section 11BB of the Central Excise Act, 1944, will be three month from the date of receipt/acknowledgement of the refund application which undisputedly as per the order of the Commissioner (Appeals) dated 28.03.2017 is 14.11.2006.

5.1 Appeal No E/86570/2017 is dismissed.

5.2 Appeal No E/86002/2019 is allowed.

5.3 Appeal No E/85290/2021 is dismissed.

5.4 Appeal No E/86137/2020 is allowed in the manner stated in para 4.10 above.

(Order pronounced in the open court on 11.04.2023)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu