

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

Excise Appeal No. 103 & 104 of 2010

(Arising out of Order-in-Appeal No. PII/PAP/193-195/2009 dated 14.09.2009 passed by Commissioner of Central Excise (Appeals)]

Commissioner of Central Excise-Kolhapur-I

Appellant

Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Vs.

M/s. Vilsons Roofing Product Pvt. Ltd.

Respondent

Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Appearance:

Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorized Representative
for the Respondent

Shri Mayur Shroff, Advocate along with Shri Prasad S. Tendulkar, Consultant,
for the Appellant

Excise Appeal No. 2181,689,690,691 & 692 of 2010

(Arising out of Order-in-Appeal No. PI/RSK/158-162/2010 dated 28.09.2010 passed by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd.

Appellant

Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I

Respondent

Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No. 275,687 & 688 of 2011

(Arising out of Order-in-Appeal No. PI/RSK/234-236/2010 dated 06.10.2010 passed by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd.

Appellant

Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I

Respondent

Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No. 458 of 2011

(Arising out of Order-in-Appeal No. PI/RSK/06/2011 dated 28.01.2011 passed by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd.

Appellant

Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I

Respondent

Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No. 459 of 2011

(Arising out of Order-in-Appeal No. PI/RSK/07/2011 dated 28.01.2011 passed by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd. **Appellant**
Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I **Respondent**
Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No. 559 of 2011

(Arising out of Order-in-Appeal No. PI/RSK/08/2011 dated 28.01.2011 passed by
Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd. **Appellant**
Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I **Respondent**
Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No. 587 & 588 of 2011

(Arising out of Order-in-Appeal No. PI/RSK/32-33/2011 dated 16.03.2011 passed by
Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd. **Appellant**
Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I **Respondent**
Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No.1502,1503,1504 & 1505 of 2011

(Arising out of Order-in-Appeal No. PII/VSGRAO/50-53/2011 dated 30.06.2011 passed
by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd. **Appellant**
Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I **Respondent**
Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No. 62 & 63 of 2012

(Arising out of Order-in-Appeal No. PII/VSGRAO/120-121/2011 dated 12.10.2011
passed by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd. **Appellant**
Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108

Vs.

Commissioner of Central Excise-Kolhapur-I **Respondent**
Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Excise Appeal No. 64 of 2012

(Arising out of Order-in-Appeal No. PII/VSGRAO/106/2011 dated 10.10.2011 passed
by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd.
Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108
Vs.

Appellant

Commissioner of Central Excise-Kolhapur-I
Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Respondent

Excise Appeal No. 1171,1172 & 1173 of 2012

(Arising out of Order-in-Appeal No. PII/RSK/151-153/2012 dated 15.05.2012 passed by Commissioner of Central Excise (Appeals)]

M/s. Vilsons Roofing Product Pvt. Ltd.
Plot No. C-2, Five Star MIDC, Kagal
Kolhapur-412108
Vs.

Appellant

Commissioner of Central Excise-Kolhapur-I
Ratikamal Complex, Opp. Basant Bahar Complex,
Kolhapur-416001.

Respondent

Appearance:

Shri Mayur Shroff, Advocate along with Shri Prasad S. Tendulkar, Consultant,
for the Appellant
Shri Sunil Kumar Katiyar, Assistant Commissioner,Authorized Representative
for the Respondent

CORAM:

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

Date of Hearing: 08.02.2023
Date of Decision: 25.04.2023

FINAL ORDER NO. 85589-85613/2023

PER: SANJIV SRIVASTAVA

The appeals listed in column 2 of table below have been filed against the order in appeals as indicated in the column 3. The appeals at S No 1 & 2 have been filed by the revenue while all the other appeals have been filed by the assessee. The common issue involved in all the appeals except for the appeal at Sr. No 20 is in relation to the refund claims filed by the appellant for the amounts as indicated in the Column 4 for the periods as indicated in Column 5.

S No	Appeal No.	Order-in-Appeal	Amount (Rs.)	Period
1	E/103/10	PII/PAP/193-195/09 dated 14-09-09	2,68,644/-	Aug. to Nov. 2007
2	E/104/10	PII/PAP/193-195/09 dated 14-09-09	11,45,919/-	Feb. To June 2008
3	E/2181/10	PI/RKS/158-162/10 dated 28-09-10	1,08,198/-	October 2008
4	E/689/11	PI/RKS/158-162/10 dated 28-09-10	1,10,607/-	November 2008
5	E/690/11	PI/RKS/158-162/10 dated 28-09-10	4,16,449/-	February 2009
6	E/691/11	PI/RKS/158-162/10 dated 28-09-10	95,213/-	December 2008
7	E/692/11	PI/RKS/158-162/10 dated 28-09-10	1,01,615/-	January 2009
8	E/275/11	PI/RKS/234-236/10 dated 16-11-10	2,06,333/-	April 2009
9	E/687/11	PI/RKS/234-236/10 dated 16-11-10	2,09,143/-	May 2009
10	E/688/11	PI/RKS/234-236/10 dated 16-11-10	2,02,934/-	June 2009
11	E/458/11	PI/RKS/06-08/11 dated 18-01-11	1,52,160/-	July 2009
12	E/459/11	PI/RKS/06-08/11 dated 18-01-11	1,72,079/-	August 2009
13	E/559/11	PI/RKS/06-08/11 dated 18-01-11	2,44,653/-	September 2009
14	E/587/11	PI/RKS/32-33/11 dated 16-03-11	3,04,047/-	October 2009
15	E/588/11	PI/RKS/32-33/11 dated 16-03-11	4,68,191/-	November 2009
16	E/62/12	PII/VSGRAO/120 & 121/2011dated 12-	8,02,887/-	July to Sept. 2010

		10-11		
17	E/63/12	PII/VSGRAO/120 & 121/2011dated 12-10-11	17,59,172/-	April to June 2010
18	E/1171/12	PII/RKS/151-153/12 dated 15-05-12	7,00,772/-	Oct. to Nov. 2010
19	E/1172/12	PII/RKS/151-153/12 dated 15-05-12	10,14,201/-	Dec. 2010 to Jan.2011
20	E/1173/12	PII/RKS/151-153/12 dated 15-05-12	4,97,592/-	Feb. to March 2011
21	E/1502/11	PII/VSGRAO/50-53/11 dated 30-06-11	7,21,431/-	March 2010
22	E/1503/11	PII/VSGRAO/50-53/11 dated 30-06-11	3,61,683/-	January 2010
23	E/1504/11	PII/VSGRAO/50-53/11 dated 30-06-11	4,88,517/-	February 2009
24	E/1505/11	PII/VSGRAO/50-53/11 dated 30-06-11	3,07,403	December 2009
25	E/64/12	PII/VSGRAO/106/11 dated 10-10-11	Vide the Order in appeal the appeal against order rejecting request of the Appellants for provisional assessment has been rejected.	

1.2 Appeals at S No 1 & 2 has been filed by the revenue whereby Commissioner appeal has allowed the appeal filed by the assessee against the rejection of the refund claim filed by them by the original authority.

1.3 Appeals at S No 3 to 7 are against common order in appeal indicated in table whereby the matter has been remanded back by the Commissioner (Appeal) to the original authority in the appeals filed by the revenue before him against the order of original authority allowing the refund claims.

1.4 Appeals at S No 8 to 20 are against the order in appeals as indicated in table whereby the Commissioner (Appeal) has dismissed the appeals filed by the assessee against the order of original authority rejecting the refund claims filed by them.

1.5 Appeals at S No 21 to 24 were dismissed by the tribunal vide Order No A/87821-87824/16/SMB dated 07.06.2016. However the matter was remanded back to the tribunal by Hon'ble High Court of Bombay vide its order dated 24.09.2018 in Central Excise Appeal No 49/2017 holding as follows:

2. *Ms. Patil, the learned counsel in support of the Appellant urges only following re-framed question of law for our consideration:-*

a. *Whether on the facts and in the circumstances of the case and in law as the Tribunal justified in rejecting the claim of refund on the ground of unjust enrichment without having considered the Appellants submissions with regard to the CA certificate in support of its claim?*

3. *The appeal is admitted on the above substantial question of law.*

4. *At the request of parties, the appeal is taken up for final disposal at this stage as the dispute is within a very narrow compass.*

5. *The only grievance of the Appellant before us is that the impugned order dated 7 June 2016 is that its claim for refund is rejected on account of unjust enrichment in breach of principles of natural justice. It is submitted that its submissions and reliance upon the Chartered*

Accountant certificate to establish that the burden of duty has not been passed on by the Appellant's to its customers, though recorded has not been dealt with. Ms. Patil very fairly states that mere passing of credit notes would not amount to discharge of burden to establish that the duty has not been passed on customers and invites our attention to the decision of the Supreme Court in the case of Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd.[2016 (339) ELT 177 SC.]. However, she points out while holding so, the Apex Court has observed in paragraph 35 and 36 of its order (in respect of one of the Appeal from a group of Appeals disposed of by the Common order) the Court observed that where the Chartered Accountant's certificate has been produced in support of a claim and its genuineness has been accepted by the Tribunal then in such a case, the burden of not having passed on duty stands discharged.

6. We note that as rightly contended, the impugned order does not deal with the Appellant's contention that the burden stands discharged by virtue of the Chartered Accountant's certificate. The impugned order of the Tribunal merely relied upon decisions of its coordinate benches to conclude that the Appellant has not discharged its burden of establishing that duty has not been passed on by the Appellant's to its customers. In none of the cases relied upon by the impugned order of the Tribunal was the claim to establish absence of unjust enrichment supported by a Chartered Accountant's certificate as in this case.

7. In the above view, the substantial question of law as formulated is answered in the negative i.e. in favour of the Appellant and' against the Respondent - Revenue.

8. The impugned order dated 7 June 2016 is set aside and the Appeal of the Appellant is restored to the Tribunal for fresh disposal in accordance with law.

9. Appeal allowed in above terms."

1.6 Appeals at S No 25 is against the order in appeal whereby Commissioner (Appeal) has rejected the appeals filed by the appellant against the orders of original authority rejecting the request for provisional assessment for the financial year 2011-12.

2.1 Appellants are manufacturer of Asbestos Cement Roofing Sheets. As per the appellant the prices of these goods fluctuate in market on account of the fluctuation of the prices of raw materials 9Fly Ash, Cement, Asbestos Fibre).

2.2 Subsequent to the clearance of the said goods on payment of duty, they issue credit notes to their dealers/ customers to the extent of the price variation (rate difference).

2.3 To claim the refund of excess duty paid, they filed refund claims as detailed in table in para 1.

2.4 These refund claims were dealt by the lower authorities in the manner as stated in para 1.2, 1.3 & 1.4.

2.5 Appeals filed by the appellant in respect of refund claims filed by the appellant at Sr. 21 to 24 were dismissed by the tribunal. Subsequently the Hon'ble Bombay High Court has set aside the order of the tribunal and remanded the matter back to the tribunal for reconsideration on the basis of Chartered Accountant Certificate.

3.1 We have heard Shri Mayur Shroff , Advocate for the Appellant Assessee and Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorized representative for the revenue.

3.2 Arguing for the appellant learned Counsel submits:

- *The Appellants had issued credit notes (which included the duty element) to their customers. Thus the duty element involved has been borne by the Appellants and not the customers. The Appellants have also shown the refund claimed as receivable in the books of account and not charged the same to profit and loss account. In the course of the proceedings before the lower authorities the Appellants have also produced Chartered Accountants certificate to that effect. It is thus manifest that there is no Unjust Enrichment of the Appellants.*
- *As per the prevalent legal position at the time the impugned orders were passed the evidence simpliciter in the form of issue of credit notes to the immediate buyer was sufficient to discharge the burden regarding not passing on of incidence of duty under Section 12B of the Act and it was also laid down by various decisions that the burden cannot survive against the assessee ad infinitum and once it was proved that the manufacturer had not passed on the incidence of duty to its buyers the amount was refundable to the manufacturer. The judgment of the Hon'ble Madras High Court in Addison & Co. Vs. Commissioner of C. Ex., Madras- 2001 (129) ELT 44 (Mad.) wherein the aforesaid view was taken was subsequently reversed by the Hon'ble Apex Court in Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd. - 2016 (339) E.L.T. 177 (S.C.). In the said decision it has been held that when the assessee*

had admitted that the incidence of duty was originally passed on to the buyer there was a statutory presumption under Section 12B of the Act that the duty has been passed on to the ultimate consumer unless it was shown that the buyer to whom the incidence of duty had been passed had not further passed it on to any other person. The Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched. The Appellants submit that the said decision was passed on the basis of the admission of the Appellants therein that the incidence of duty was originally passed on to the buyer. Furthermore; the Appellants are also selling their goods on credit to their customers. In terms Rule 8 of the Central Excise Rules, 2002 the duty is not to be paid at the time of clearances but on the 5th day of the month subsequent to the month in which the clearances are effected. Thus in a situation where the Appellants have issued credit notes before the due date of payment of duty or before the date of realization of the payment from the customers it could not be said that the incidence of duty was passed on to the buyers in the first place and in such a situation the doctrine of unjust enrichment would not apply. The said situation would apply to a substantial number of credit notes issued by the Appellants. The Appellants are also attaching a chart showing the necessary details in respect of few of the transactions during the relevant period (Copy enclosed and marked EXB. III). It can be seen from the chart that the credit notes have been issued before the due date of payment of duty for the relevant invoices; as per the provisions of Rule 8 of the Central Excise Rules 2002. Still further; even in Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd. - 2016 (339) E.L.T. 177 (S.C.) (Rel 3 & 3% of the said judgment), in one of the Appeal which has been disposed of by the common order, the Hon'ble Apex Court has observed that where the Chartered Acco's certificate has been produced in support of a claim and its genuineness has been accepted by the Tribunal then in such a case the burden of not having passed the duty stood discharged. The Hon'ble Bombay High Court, in its order EIB TIL dated 24th September 2018 (EXB.H) has relied on the same to answer the substantial question of law in favour of the Appellants and against the Revenue. The amount claimed as refund has also been shown as receivable in the books of accounts and not charged to profit and loss accounts and the Appellants have also produced Chartered Accountant's certificates before the lower authorities to the above

effect. As submitted in the previous submissions; the Appellants thus crave for an opportunity to establish that the incidence of duty has not been originally passed on to their customers and thus they would be entitled to the refund.

- The subject Show Cause Notices sought to reject the Appellants under Section 11B of the Act only on the ground of unjust enrichment. The rejection of the claims was also under Section 11B of the Act on the grounds of unjust enrichment.
- In some of the Appeals preferred by the Appellants a part of the refund claims in respect of the individual credit notes involved in the claims have been held to be time barred. The Appellants concede that they are not entitled to such refund which is time barred.
- Without prejudice to the above submissions it is submitted that the ground of unjust enrichment cannot be a ground for rejecting a refund claim under Section 11B of the Act. In the present case the refund has been straightway rejected on the ground of unjust enrichment. The refund has to be sanctioned in the first instance and if the claims are found to be hit by the doctrine of unjust enrichment the amount has to be credited to the Consumer Welfare Fund. The impugned orders of the lower authorities are thus unsustainable.
- As far as the Departmental Appeals against Order-in-Appeal No. PII/PAP/193-195/09 dated 14-9-2009 are concerned the Department has assailed the Order of the learned Commissioner (Appeals), inter-alia, on the ground that when the goods were cleared the Appellants correctly paid duty on the transaction value as it existed on the date of clearance and if the price of the goods was later reduced for any reason then such consequence cannot be the ground for giving a refund of Excise Duty. It is submitted that the aforesaid ground is extraneous to the Show Cause Notice and thus not sustainable. The only ground in the Show Cause Notice besides the proposal to deny refund claim on the ground of Unjust enrichment was that the Central Excise Duty and S&H Ed. & Ed. Cess elements were not included in the credit notes and thus the claim could not be treated as refund claim in terms of Section 11B of Central Excise Act, 1944. However; from the order of the adjudicating authority it is manifest that the claims were treated as refund claims and the refund was rejected only by invoking the provisions of Section 11B of the Central Excise Act. Furthermore; as manifest from Para 3 of the Order-in-Appeal of the learned Commissioner (Appeals) the respondents had produced the copies of original invoices and the credit notes to demonstrate that the excise duty (representing credit notes) had not

been passed on to the buyers. From the said para it is also manifest that the respondents had produced certificates from the customers certifying that they received credit notes representing excess excise duty. After considering the above evidence and after considering the Chartered Accountant's certificate produced by the Respondents the learned Commissioner (Appeals) has held in favour of the respondents. The facts noted in para 3 of the Order-in-Appeal and the findings based on factual evidence have not been assailed by the Department. The ground in the Departmental Appeal to the effect that the duty element is not mentioned in the credit notes and this indicates that the assessee has passed on the duty element to the buyers and accordingly the doctrine of unjust enrichment is applicable is thus not sustainable. The Departmental Appeals deserve to be dismissed on the ground of Government's litigation policy instruction F. No. 390/Misc/116/2017-JC, dated 22-8-2019 (Copy enclosed and marked EXB. IV) as the amounts involved are below 50 Lakhs. In fact, one of the Appeals against the aforesaid Order-in-Appeal No. PII/PAP/193-195/09 dated 14-9-2009, being Appeal No. 102/10 - Mum, has already been dismissed by the Hon'ble Tribunal vide its Order No. A/88553-88586/16/EB dated 11-7-16 (Copy enclosed and marked EXB. V) as the revenue implication was less than Rs. 10 Lakhs as per the litigation policy as prevalent at that time.

- *The Appeal No. E/64/12 is against Order-in-Appeal No. PII/VGSRAO/106/2011 dated 10/10/2011 rejecting the Appeal against Order- in-Original No. ADJ/33/ KOP-I/2011-12 dated 6-6-2011. Vide the said Order- in-Original the learned Assistant Commissioner had rejected the Appellants' request of assessing their finished product on provisional basis for the financial year 2011-12. The said Appeal has now become infructuous and may be treated as withdrawn.*
- *In view of the decision of the Hon'ble Bombay High Court vide order dated 24.09.2018 in Central Excise Appeal No 49/2017 matter deserves to be remanded to the adjudicating authority to decide the refund claim on the basis of the Chartered Accountants certificate and other relevant evidence after giving an opportunity to the Appellants to rebut the presumption under Section 12B of the Central Excise Act, 1944..*

3.3 Arguing for the revenue learned authorized representative, while reiterating the findings recorded in the impugned order submits:

- Short question involved in these appeals “whether the assessee is entitled for a refund and whether there would be unjust enrichment if the said refund is allowed?” has been answered by the Hon’ble Apex Court in the case of Addisson & co Ltd [2016 (339) ELT 177 (SC)] against the appellant.
- These refund applications have been filed prematurely before the order of assessment being varied. Therefore these claims are legally barred as assessment made has not been varied on its merits by any authority, as has been held in the following decisions.
 - Flock India Pvt Ltd. [2000 (120) ELT 285 (SC)]
 - Priya Blue Industries Ltd. [2004 (172) ELT 145 (SC)]
 - Maharashtra Cylinders Pvt Ltd. [2010 (259) ELT 369 (Bom)]
 - ITC Ltd. [2019 (368) ELT 216 (SC)]
- Appellant assessee has in their application claiming the refund filed in Form R specifically stated
 - We have paid the said amount of on sales invoices during the period from so and so to so and so.
 - The amount was originally paid vide Cenvat debit entry and PLA Entry No this and dated as the case may be.
- Appellants have paid such excise duty voluntarily on its own volition and assessment. In view of the decision of the Hon’ble Supreme Court in case of Priya Blue industries and Hon’ble Bombay High Court in case of Maharashtra Cylinders Pvt Ltd., the orders of assessment and refund cannot co-exist simultaneously, therefore for the refund claim to be filed and processed the assessment order needs to be varied.
- Following decisions are also relied upon:
 - JSW Dharamatar Port Pvt Ltd. [2019 (20) GSTL 721 (Bom)]
 - Mafatlal Industries Ltd. [1997 (89) ELT 247 (SC)]
 - ALD automotive Pvt Ltd. [2018 (364) ELT 3 (SC)]

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

4.2 It is submission of the appellant assessee that Appeal No. E/64/12 against Order-in-Appeal No. PII/VGSRAO/106/2011 dated 10/10/2011 rejecting the Appeal against Order- in-Original No. ADJ/33/ KOP-I/2011-12 dated 6-6-2011 has become infructuous hence the same is dismissed as infructuous.

4.3 On the issue whether the bar of unjust enrichment will not apply to refund claims filed by the manufacturer, if he issues the credit notes

subsequent to clearance of the goods from the place of clearance, refunding the excess duty recovered by him at the time of clearance of the goods, a three judges bench of Hon'ble Supreme Court has in the case of Addison & Co Ltd. [2016 (339) ELT 177 (SC)], observed as follows:

14. We have considered the submissions made by the Counsel carefully and examined the material on record. The questions that arise for consideration in this case are whether the Assessee is entitled for a refund and whether there would be unjust enrichment if the said refund is allowed. It was held by the Special Bench of CEGAT, New Delhi by its judgment dated 17-3-1994 in Collector of Central Excise, Madras v. Addison & Co. Ltd. [1994 (73) E.L.T. 331 (Tribunal)] that the turnover discount is not an admissible abatement on the ground that the quantum of discount was not known prior to the removal of the goods. In an appeal filed by the respondent-Assessee, this Court by its judgment dated 11-3-1997 in Addison & Co. Ltd. v. Collector of Central Excise, Madras (supra) held that the turnover discount is an admissible deduction. This Court approved the normal practice under which discounts are given and held that the discount is known to the dealer at the time of purchase. The Additional Solicitor General submitted that any credit note that was raised post clearance will not be taken into account for the purpose of a refund by the Department. We do not agree with the said submission as it was held by this Court in Union of India v. Bombay Tyre International (supra) that trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. It is the submission of the Assessee that the turnover discount is known to the dealer even at the time of clearance which has also been upheld by this Court. It is clear from the above that the Assessee is entitled for filing a claim for refund on the basis of credit notes raised by him towards turnover discount.

15. The following provisions of Central Excise Act, 1944 are relevant for appreciating the point of unjust enrichment :-

SECTION 11B. Claim for refund of duty. -

"(1) Any person claiming refund of any duty of excise may make an application for refund of 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 in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act :]

[Provided further that] the limitation of [one year] shall not apply where any duty has been paid under protest.

** * * **

(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty of excise as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

- (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;*
- (b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Commissioner of Central Excise];*
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;*
- (d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;*
- (e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;*

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

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty has not been passed on by the persons concerned to any other person.

3. *Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).*

4. *Every notification under proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.*

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

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

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

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

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

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

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

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

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

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

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

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

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

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

SECTION 12A. Price of goods to indicate the amount of duty paid thereon. -

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment,

sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

SECTION 12B. Presumption that the incidence of duty has been passed on to the buyer. -

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

SECTION 12C. Consumer Welfare Fund. -

(1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in sub-section (2) of section 11B or sub-section (2) of section 11C or sub-section (2) of section 11D;

(b) the amount of duty of customs referred to in sub-section (2) of section 27 or sub-section (2) of section 28A, or sub-section (2) of section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

SECTION 12D. Utilisation of the Fund. -

(1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India".

16. In the instant case, the Assessee has admitted that the incidence of duty was originally passed on to the buyer. There is no material brought on record to show that the buyer to whom the incidence of duty was passed on by the Assessee did not pass it on to any other person. There is a statutory presumption under Section 12B of the Act that the duty has been passed on to

the ultimate consumer. It is clear from the facts of the instant case that the duty which was originally paid by the Assessee was passed on. The refund claimed by the Assessee is for an amount which is part of the excise duty paid earlier and passed on. The Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched.

It will be useful to refer to the relevant para of Mafatlal Industries v. Union of India (supra) in this connection.

"108. (iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched".

17. Section 11B(2) of the Act contemplates that the amount of refund determined by the Authorities shall be credited to the fund. The Proviso to Section 11B(2) permits the refund to be paid to the applicant instead of being credited to the fund if such amount is relatable to the manufacturer, the buyer or any other such class of applicants as notified by the Central Government.

18. Mr. Venkatraman interpreted the said provision to mean that the only persons who were entitled for claim of refund are the manufacturer, his buyer and any other class of persons as notified by the Central Government. There is no dispute about the fact that no notification has been issued by the Central Government as contemplated in Clause (f) to proviso to Section 11B(2) of the Act. He contested that the claim for refund can be made only by the manufacturer or his buyer and any enquiry pertaining to unjust enrichment should be restricted only to the manufacturer and his buyer. The ultimate buyer/consumer will not figure in the scheme of Sections 11B, 12A, 12B and 12C of the Act. This submission was accepted by the High Court in the impugned judgment. We do not approve the findings of the High Court in this regard.

19. The sine qua non for a claim for refund as contemplated in Section 11B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person. Section 11B(2) provides that, in case it is found that a part of duty of excise paid is refundable, the amount shall be credited to the fund. Section 2(ee) defines Fund to mean the Consumer Welfare Fund established under Section 12C. There is a proviso to Section 11B(2) which postulates that the amount of excise duty which is refundable may be paid to the applicant instead of being credited to the fund, if such amount is relatable to the duty of excise paid by the manufacturer and he had not passed on the incidence of such duty to any other person. Clause (e) to proviso of Section 11B(2) also enables the buyer to receive the refund if he had borne the duty of excise, provided he did not pass on the incidence of such duty to any other person. There is a third category of a class of applicants who may be specified by the Central Government by a notification in the official gazette who are also entitled for refund of the duty of excise. A plain reading of Clauses (d), (e) and (f) of the proviso to Section 11B(2) shows that refund to be made to an applicant should be relatable only to the duty of excise paid by the three categories of persons mentioned

therein i.e. the manufacturer, the buyer and a class of applicants notified by the Central Government. Clause (e) refers to the buyer which is not restricted to the first buyer from the manufacturer. The buyer mentioned in the above Clause can be a buyer downstream as well. While dealing with the absence of a provision for refund to the consumer in the rules this Court in Mafatlal Industries v. Union of India (supra) held as follows :-

"98. A major attack is mounted by the learned counsel for petitioners-appellants on Section 11B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organization to get the grant. There is no provision in the Act, Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Shri Nariman. It is a colourable device - declaimed Shri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Shri Parasaran to this criticism runs thus : It ill-becomes the manufacturers/Assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organization had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to sub-section (2) of Section 11B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can

always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method - says Shri Parasaran".

20. *There was a further submission which was considered in the said judgment about the convenience/difficulty for the ultimate consumer to make applications for refund. In that connection it was held as follows :-*

"99. We agree with Shri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12C which creates the Consumer Welfare Fund and Section 12D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provide for "grants" being made in favour of consumer organisations for being spent on welfare of consumers. But, this is perhaps for the reason that clause (e) of the proviso to sub-section (2) of Section 11B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in clause (e) of Explanation B appended to Section 11B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. A practical difficulty is pointed out in this behalf by the learned counsel for appellants-petitioners: It is pointed out that the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund - it is submitted - he has to go to the place where the duty has been paid by the manufacturer and apply there. It is also pointed out that purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claims will be filed only by purchasers of high-priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the

provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground - assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg [(1981) 4 SCC 675 : 1982 SCC (Tax) 30 : AIR 1981 SC 2138] and other decisions cited in paras 87 and 88.)"

21. That a consumer can make an application for refund is clear from paras 98 and 99 of the judgment of this Court in Mafatlal Industries (supra). We are bound by the said findings of a Larger Bench of this Court. The word 'buyer' in Clause (e) to proviso to Section 11B(2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which remains to be considered is the requirement of verification to be done for the purpose of finding out who ultimately bore the burden of excise duty. It might be difficult to identify who had actually borne the burden but such verification would definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched. If it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilized for the benefit of the consumers as provided in Section 12D.

22. The High Court proceeded on an erroneous assumption of fact as well. It was held by the High Court that there is no unjust enrichment as the burden has not been passed on. The High Court's interpretation of Section 11B is also not correct."

4.4 Admittedly the application for the refunds have been filed by the appellant in respect of the goods which were cleared by them on payment of duty assessed by them on the value determined at the place and time of removal. It is settled law that the duty has to be determined and paid by the appellant assessee at the time of clearance of the goods on the invoice made by them. It is also settle principle of accounting that the accounts are maintained on the accrual basis and the appellant assessee recovers determined on the invoice from his customer the moment he clears the goods after assessing the duty on the invoice. Central Excise Duty, is indirect tax and is tax on the consumer of the goods. The assessee is only an intermediary in the entire chain, who collects the duty from his customer and deposits the same to exchequer. Thus the burden of the duty is always on the customer and that forms the basis of the principles of unjust enrichment enshrined in section 11B

of the Central Excise Act, 1944. This principle of unjust enrichment has been held by the Hon'ble Apex Court, in case of Mafatlal Industries Ltd. 1997 (89) ELT 247 (SC)] as constitutional. This decision has been referred by the Hon'ble Apex Court in the case of Addisson & Co referred above.

4.5 Section 12D creates a statutory presumption to the effect that the burden of the duty reflected on the invoice has been passed on to the consumer of the goods. It is also interesting to note that "credit notes" which form the basis of the refund claim filed are the documents which have no statutory recognition under any of the provision of the Central Excise Act, 1944. These documents have been used widely, under the principles of accounting for adjustment of the books of account. However these documents are not recognized as a mean for the refund of Central Excise Duty by the seller to the buyer of the goods. Further the seller is not having any authority to refund any excise duty the burden of which has been passed on by him to the buyer of goods. In case of the Mafatlal Industries Ltd & Addisson&Co referred above Hon'ble Supreme Court has after referring to the provisions of the Section 11 B, concluded that the purchaser/ buyer of the goods could have claimed the refund of any excess duty paid. It is settled law that when statute provides for a manner of doing a thing it should be done in the manner as provided or not at all. Hon'ble supreme Court in case of Mafatlal Industries Ltd., reiterated the same principle stating as follows:

"99. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/ plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts

under Article 226 - and of this Court under Article 32 - cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties, imposed thereunder . Section 11B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasize in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.

(ii)

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above

requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv)

(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi)

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

(viii)

(ix) *The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.*

(x) *By virtue of sub-section (3) to Section 11B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.*

(xi)

(xii) Section 11B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962."

4.6 The basic crux of the above referred decision of the Hon'ble Apex Court is that the claim for the refund of any excess duty paid should be made in accordance with the provision of the Section 11 B of Central Excise Act, 1944 by the person who has borne the burden of duty and adjudicated accordingly. It can be the first purchaser or the second purchaser or so on of the goods cleared on payment of duty sought as refund. The credit note issued by the manufacturer to the dealer/customer who has procured from the manufacturer, is evidently not the person who would have borne the burden of duty claimed as refund. He

would have passed on the burden to his customers and so on. Thus mere issuance of credit note is not a proof of discharging the burden of showing that the duty claimed as refund has not been borne by some other person.

4.7 Hon'ble Bombay High court has in the appellant case vide order dated 24.09.2018, referred to para 35 and 36 of the decision of the Hon'ble Apex Court in case of Addisson & Co. The said paragraphs are reproduced below:

35. *The respondent-Assessee is a 100 per cent Export Oriented Unit (EOU) manufacturing cotton yarn. The respondent filed an application for refund of an amount of Rs. 2,00,827/- on 14-8-2002 on the ground that it had paid excess excise duty at the rate of 18.11 per cent instead of 9.20 per cent. The Assessee initially passed on the duty incidence to its customers. Later the Assessee returned the excess duty amount to its buyers which was evidenced by a certificate issued by the Chartered Accountant on 2-8-2002. The refund claim was rejected by the Deputy Commissioner of Central Excise, Kolhapur Division vide an order dated 24-9-2002 on the ground that the Assessee did not submit either the credit notes or the Chartered Accountant's certificate at the time of filing the refund application. Not satisfied with the genuineness of the documents the Deputy Commissioner rejected the refund claim. The Commissioner (Appeals), Central Excise, Pune allowed the appeal filed by the Assessee by taking note of the certificate issued by the Chartered Accountant and the credit notes dated 29-7-2002. The Appellate Authority accepted the Assessee's contentions and held that there was no reason to doubt the genuineness of the documents produced. The Appellate Authority allowed the appeal of the Assessee and the said order was confirmed by the Customs, Excise and Service Tax Appellate Tribunal vide judgment and order dated 6-10-2005. The said order of Central Excise and Service Tax Appellate Tribunal was further confirmed by the High Court of Judicature at Bombay in Customs Excise Appeal No. 100 of 2008 filed by the Revenue. The Revenue has filed the above Civil Appeal challenging the validity of the judgment of the High Court in Central Excise Appeal No. 100 of 2008.*

36. *Except for a factual dispute about the genuineness of the certificate issued by the Chartered Accountant and the credit notes raised by the Assessee regarding the return of the excess duty paid by the Assessee, there is no dispute in this case of the duty being passed on to any other person by the buyer. As it is clear that the Assessee has borne the burden of duty, it cannot be said that it is not entitled for the*

refund of the excess duty paid. In view of the facts of this case being different from Civil Appeal No. 7906 of 2002, the appeal preferred by the Revenue is dismissed."

4.7 As directed by the Hon'ble High Court vide order dated while remanding the matter for reconsideration to the tribunal vide order dated 24.09.2018 in Central Excise Appeal No 49/2017 we refer to the Certificate of Chartered Accountant produced by the Appellant Assessee:

GAVASKAR DOSHI & CO.
Chartered Accountants

EXHIBIT-M

Mahesh Gavaskar
M.Com. FCA ACS DISA

Pune Office : 6, Mrunmayee Society, **150**
43/6, Erandwane, Nal Stop,
Behind Bank of India, Karve Road,
Pune - 411 004.
Phone : (020) - 2543 8480 / 2542 3634
Fax : (020) - 2543 7637
E-mail : Info@gavaskardoshi.com
Mahesh.g@gavaskardoshi.com

CERTIFICATE

On the basis of books of accounts and documents shown to us, This is to certify that m/s Vilsons Roofing Products Pvt Ltd, factory at Plot No.C-2, Kagal-hatkanangale five star industrial area Kolhapur-416216. ECC No.AACCV0661MXM001 has shown an Rs. 19,20,012/-[Rupees Nineteen Lacs Twenty Thousand and Twelve only] amount receivable towards central excise paid on Rate difference, for the period as detailed below as on 31.03.2009.

PERIOD	TOTAL EXCISE DUTY
1 st April 08 to 30 th April 08	3,76,027
1 st May 08 to 31 st May 08	2,56,028
1 st June 08 to 30 th June 08	1,53,279
1 st July 08 to 31 st July 08	76,983
1 st August 08 to 31 st August 08	60,927
1 st September 08 to 30 th September 08	1,62,284
1 st October 08 to 31 st October 08	1,10,607
1 st November 08 to 30 th November 08	1,08,198
1 st December 08 to 31 st December 08	95,213
1 st January 09 to 31 st January 09	1,04,017
1 st February 09 to 31 st March 09	4,16,449
TOTAL	19,20,012

This Certificate is issued at the request of the company.

For Gavaskar Doshi & Co.
Chartered Accountants


M.K.Gavaskar
Partner
Mem. No.37573
Date:- 27th July 2009
Place:- Pune



From the above certificate what is evident that certain amounts paid towards central excise duty is shown as amount receivable in the books of account of the appellant. Said certificate is totally silent on the aspect as to who has borne the burden of duty as the same do not refer to any invoice or the credit notes issued by the appellant assessee. Further just

an averment made to effect "receivable in book of accounts" would not be enough to say that burden of the duty has been borne by the appellant and none other than appellant. In case referred by in the Hon'ble Apex Court in para 35 above specific averment has been made that the Chartered Accountant had Certified about the return of the excess duty to the customers. While dismissing the appeal filed by Commissioner Central Excise, (Central excise Appeal No 100 of 2008 referred in the para 35 of the order of Hon'ble Supreme Court in case of Addisson) Hon'ble Bombay High Court had observed as follows:

"Heard the learned Counsel for appellant. The appellate authority has recorded a finding of fact that the CA certificate which was produced in support of the claim shows that the benefit has not been transferred to the customers mentioning not only the credit notes but also cheques issued to the customers. In this view of the matter, we see no reason to interfere. Appeal is therefore rejected."

Hon'ble Supreme Court has dismissed the appeal against this order by referring to the Chartered Accountant certificate which clearly contained the details of credit notes and the cheques issued. We do not find such details in the CA Certificate produced, hence it cannot be said that this CA Certificate establishes that the burden of the duty claimed as refund has not been passed on to the customers. Thus we do not find any merits in the submission made to remand the matter for consideration of the issue in light of the CA Certificate.

4.8 On the issue whether the Appellant could have filed the refund claim without the self assessment made by the appellant on the invoice determining the duty payable on the goods cleared by the appellant being modified by the appellate authority a larger bench of tribunal has in the case of Eurotex Industries and Exports Ltd [2007 (216) ELT 136 (T-LB)] has observed as follows:

4. The respondents' contention that under Section 27 of the Customs Act, 1962 a claim for refund can be made by any person who had paid duty in pursuance of an order of assessment implies that a claim for refund can be made without challenging the assessment in appeal and that since Section 27 of the Customs Act and Section 11B of the Central Excise Act providing a period of six months to one year for filing a refund claim would become redundant as the appeal proceeding against the assessment order would never be over within that period and that both Section 27 and Section 11B provide that whereas a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund, the amount

to such person without his having to make any claim in that behalf implies that the claim of refund can be made without challenging the assessment order have been adequately dealt by the Apex Court decisions in the case of Priya Blue Industries and Flock (India) Pvt. Ltd., and negatived the relevant paragraphs of these decisions are reproduced below :

Priya Blue

"5. Under Section 27 of the Customs Act, 1962 a claim for refund can be made by any person who had (a) paid duty in pursuance of an Order of Assessment or (b) a person who had borne the duty. It has been strenuously submitted that the words "in pursuance of an Order of Assessment" necessarily imply that a claim for refund can be made without challenging the Assessment in an Appeal. It is submitted that if the assessment is not correct, a party could file a claim for refund. It was submitted that if the assessment is not correct, a party could file a claim for refund and the correctness of the Assessment Order can be examined whilst considering the claim for refund. It was submitted that the wording of Section 27, particularly, the provisions regarding filing of a claim for refund within the period of 1 year or 6 months also showed that a claim for refund could be made even though no Appeal had been filed against the Assessment Order. It was submitted that if a claim for refund could only be made after an Appeal was filed by the party, then the provisions regarding filing of a claim within 1 year or 6 months would become redundant as the Appeal proceedings would never be over within that period. It was submitted that in the claim for refund the party could take up the contention that the Order of Assessment was not correct and could claim refund on that basis even without filing an Appeal.

6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India)'s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding: The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.

Flock India

10. Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

5. Our attention has also been drawn to the Circulars issued by the Board as contained in the Customs Appraising Manual Volume V and Chapter 15 of the CBEC's Customs Manual of instructions which lay down that at times, when it is found that duty has been paid in excess than what was actually leviable on the goods, which excess payment may be due to lack of information on the part of importer/exporter or non-submission of documents required for claim of value or rate of duty or due to shortage/short landing, pilferage of goods, refund of excess amount of duty paid can be claimed by the importer/exporter under Section 27 of the Customs Act and further Board's Letter vide F. No. 55/98/70-Cus-IV, dated 25-8-1970, 249/70 provides that if an assessment was made by appraiser, which is merely countersigned by the Assistant Collector, the refund can be claimed under Section 27 itself whereas if assessment is changed by the Assistant Collector, refund

cannot be claimed under Section 27 without challenging the assessment itself. In view of the circulars, it was submitted that same are binding on the revenue as per Apex Court decision in the case of *Collector of Central Excise, Vadodara v. Dhiren Chemical Industries - 2002 (139) E.L.T. 3 (S.C.)* and *Arviva Industries (I) Ltd. v. U.O.I. - 2007 (209) E.L.T. 5 (S.C.)* and therefore the refund claims which are filed in pursuance of these circulars cannot be rejected. We however find that the Board has issued a Circular No. 24/2004, dated 18-3-2004 vide F. No. 438/18/2003-Cus-IV, bringing to the notice of the field formations the Apex Court decision in the case of *Flock India* and other cases holding that a refund claim is not maintainable when the assessee does not challenge assessment order and directed them to follow the decision of the Supreme Court and since this circular was issued after 2003 when the Customs Manual was issued, the same will have precedence over earlier circulars and therefore it cannot be said that the Revenue has not followed its own circular which are binding on them. Besides there is a contrary decision of the Supreme Court in the case of *Kalyani Packaging Industry v. Union of India - 2004 (168) E.L.T. 143 (S.C.)* which held that circular issued by the Board cannot stand in preference to the decision of the constitutional Bench of the Supreme Court. We also observed, that the Apex Court decision in the case of *Priya Blue* and *Flock India* were followed by the Tribunal and upheld by the Supreme Court in the case of *HCL Perot Systems Ltd. v. Commissioner of Customs, New Delhi - 2004 (165) E.L.T. A77 (S.C.)*, *Super Cassette Industries v. Commissioner of Customs - 2004 (163) E.L.T. A116* and that the Supreme Court decision in the case of *Sales Tax Officer, Benaras & Ors. v. Kanhaiya Lal Mukundlal Saraf, (1959) SCR 1350*, which was followed in *Shri Valabh Glass* case was overruled by the Apex Court in the case of *Mafatlal Industries Ltd. v. Union of India - 1997 (89) E.L.T. 217*. Further in Paragraph 70 of the *Mafatlal* decision, Supreme Court has observed that where a duty has been collected under a particular order which has become final, the refund of duty cannot be claimed unless the order (whether it is a order of assessment, the adjudication or any other order under which the duty is paid) is set aside according to law. We are not convinced by the plea of the respondent that when an assessment is made in accordance with the claim made by the assessee, such an assessment cannot be challenged by him, as he cannot be said to be aggrieved by the order of the assessment, as it is the job of the proper officer to pass a correct assessment order irrespective of the claim made by the assessee and the grievance is from the assessment order and not from his claim especially when the Apex Court in the two decisions in

the case of Priya Blue and Flock India, has categorically held that a refund is not maintainable unless and until the assessment order in pursuance of which the duty was paid has not been challenged."

4.9 Same view has been echoed by a three judges bench of Hon'ble Supreme Court has in case of ITC, Ltd. [2019 (368) ELT 216 (SC)] as follows:

35. *Section 27 of the Act prior to amendment by Finance Act, 2011 provided for refund procedure. Any person could claim a refund of duty and interest if any paid on such duty. Refund of duty and interest if any paid pursuant to the order of assessment or borne by him, may make an application for refund of such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs within one year in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital. In any other case before the expiry of six months from the date of payment of duty and interest. He has to further satisfy that he has not passed on such liability to any other person. The limitation of one year or six months shall not apply where any duty and interest has been paid under protest. It is made clear by the second proviso to Section 27 that in case of refund becomes necessary as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months shall commence from the date of such judgment, decree, order or direction.*

36. *Section 27 of the Customs Act as amended by Finance Act, 2011 provides that any person claiming refund of any duty or interest paid or borne by him, may make an application in such form and manner as may be prescribed for such refund to the Assistant or Deputy Commissioner of Customs before the expiry of one year from the date of payment of such duty or interest. If an application for refund has been made before Finance Bill received the assent of the President, it is deemed to be filed under the provision of Section 27(1) as existed and to be dealt with under Section 27(2). The period of limitation of one year provided by the provisions of Section 27 has to be computed in the case of goods which are exempt from payment of duty by a special order issued under Section 25(2) from the date of issue of such an order as provided in Section 27(1B)(a). Where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any Court, the limitation of one year shall be computed from the date of such judgment, decree,*

order or direction. It is provided in Section 27(1B)(c) that where any duty is paid provisionally under Section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in the case of re-assessment, from the date of such re-assessment. The second proviso to Section 27 makes it clear that limitation of 1 year shall not apply where any duty or interest has been paid under protest.

37. Under Section 27(2)(a) it is incumbent upon the applicant to satisfy that the amount of duty or interest of which refund has been claimed, had not been passed by him to any other person, the provision aims at preventing unjust enrichment.

38. No doubt about it that the expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self-assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self-assessment as observed by this Court in *Escorts Ltd. v. Union of India & Ors.* (supra).

39. In *Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd.* - 2000 (120) E.L.T. 285 (S.C.) = (2000) 6 SCC 650, the question which came up for consideration before this Court was non-challenge of an appealable order where the adjudicating authority had passed an order which is appealable under the statute, and the party aggrieved did not choose to file an appeal. This Court held that it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing the order. The provisions of the Central Excise Act, 1944 came up for consideration. The Court has observed :

"10. Coming to the question that is raised, there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing its order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be

rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view was taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that whereas a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, if an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for the refund which, if we may term it so, is in the nature of execution of a decree/order. In the case at hand, it was specifically mentioned in the order of the Assistant Collector that the assessee may file an appeal against the order before the Collector (Appeals) if so advised.” (emphasis supplied)

40. In *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)* - 2004 (172) E.L.T. 145 (S.C.) = (2005) 10 SCC 433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus :

“6. We are unable to accept this submission. Just such a contention has been negatived by this Court in *Flock (India)* case (2000) 6 SCC 650. Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.

7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the claim for refund had to be filed within a period of six months. It was still held, in *Flock (India)*’s case (*supra*), that in the absence of an appeal having been filed no refund claim could be made.

8. *The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained."*

(emphasis supplied)

41. *It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.*

42. *It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder :*

"128. Appeals to [Commissioner (Appeals)]. — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order :

[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]

[(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

43. *As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider*

amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra)."

Though the law has been explained referring to provisions of Custom Act, 1962, it need to be noted that law has been applied by the Hon'ble Apex Court in Case of ITC, which was a case under the Central Excise Act, 1944 as is evident from para 7 to 10 of the said order, reproduced below:

"7. The facts of the case of ITC Limited are that the appellants manufacture paper from both conventional and unconventional raw materials. In the course of the manufacturing activity, waste paper/broke arises which are recycled in the manufacturing process by making pulp. Sometimes, after entry in the RG 1 register, the paper is found to be defective and incapable of being sold and as such is required to be reprocessed and if that is not possible, then it is rejected and has to be re-pulped and recycled.

8. The appellant had been paying duty on paper cleared from its factory. The rate of duty of paper manufactured from conventional and unconventional raw material differed. The appellants availed exemption under Notification No. 67/95-C.E., dated March 16, 1995 as to the duty in respect of waste paper/fresh broke. By Notification No. 6/2000-C.E., dated March 1, 2000 complete exemption was granted in respect of paper up to the specified quantitative limit manufactured from unconventional raw materials. Upon receipt of a letter dated March 30, 2001 from the Superintendent of Central Excise, the Appellant examined the matter and realized the mistake committed by it in availing the exemption under Notification No. 67/95-C.E. in respect of waste paper/broke utilized in the manufacture of paper cleared at 'nil' rate of duty under Notification No. 6/2000-C.E. From May 2001 onwards, the appellant stopped availing the exemption and started payment of duty on waste paper/broke.

9. The relevant period involved in the appeal i.e. July 2001 to March 2002. The Appellant's assessments for this period were provisional and these entries were finalized on 30-1-2003. The provisional assessment order was passed on 1-3-2002. The appellant has claimed that at the time of the said final assessment order dated 30-1-2003, it was not aware of the Notification No. 10/96-C.E. or the said Circular dated 1-3-2001 and as such, no claim thereunder was made by it till that time nor was any such claim so considered or decided in the said final assessment order.

10. On July 18, 2003, the appellant filed a refund claim for an amount of Rs. 28,73,120/- in respect of the duty paid on the said waste paper/broke during the period from July 2001 to March 2002. The said

refund claim was filed under Section 11(B) of the Central Excise Act, 1944 (for short, referred to as "the 1944 Act") and within the statutory period of limitation."

4.10 In the present cases nothing has been produced before us to hold that the assessment orders made by the appellants have ever been modified by any authority in appellate proceedings. Appellants have argued that this was never the issue in the show cause notice etc. For that purpose we refer to the show cause notice dated 9th November 2010, which is reproduced below:

**"OFFICE OF THE ASSISTANT COMMISSIONER, CENTRAL EXCISE,
KOLHAPUR I DIV. RATIKAMAL COMPLEX, OPP. BASANT BAHAR
TALKIES, ASSEMBLY ROAD, NEW SHAHUPURI, KOLHAPUR. 416
003**

*F. No. V/Adj/EA2/Vilson/010-291/10/
Kolhapur, the 9th November, 2010*

To,

M/s. Vilsons Roofing Product Pvt. Ltd.

C-2, Five Star MIDC, Kagal,

Kolhapur,

NOTICE TO SHOW CAUSE

Whereas it appears that M/s. Vilsons Roofing Product Pvt. Ltd., C-2, Five Star MIDC, Kagal, Kolhapur (hereinafter referred to as the claimant) are holder of Central Excise Regd. No. AACCV 0661 M XM 001 and are engaged in manufacturing of Fibre Cement Corrugated Sheets / Flat Sheets / Accessories falling under CSH No. 68114010 and are also availing facility of Cenvat Credit under Cenvat Credit Rules, 2004.

Whereas it also appears that the claimant have filed claim of refund of Rs. 1,01,615/- with this office on 18.12.2009 on the basis of the duty paid on Fibre Cement Corrugated Sheets / Flat Sheets / Accessories, which were cleared by the claimant to their customers during the period from 01.01.2009 to 31.01.2009. The said refund claim of the claimant was sanctioned vide OIO No. ADJ/291/KOP-1/2009 (256/REF/2009) dtd. 25.02.2010. However the Department has not accepted the OIO dtd. 25.02.2010; as the said OIO is not legal, proper and correct on the grounds that :-

1. The Assistant Commissioner, Central Excise, Kolhapur I Division had not independently examined the Refund claim and not given any findings regarding admissibility of refund. claim or unjust enrichment etc. and therefore, the Order-In- Original is

not a speaking order and not a legal and correct Order-In-Original.

2. The Commissioner (Appeals), Pune II (Kolhapur)'s Order-In-Appeal No.P-II/PAP/193 to 195/2009 dt. 14.09.2009 is relied upon by the Assistant Commissioner, Central Excise, Kolhapur I Division while granting the refund in the present Order-In-Original. **This refund claim was not case of consequential refund by following Commissioner (Appeal)'s said Order-In-Appeal.** This Department has already filled an appeal against the Commissioner (Appeals)'s Order-in-Appeal No. P-II/PAP/193 to 195/2009 dt.14.09.2009 with CESTAT Mumbai on 22.01.2010 which is pending. In the Grounds of Appeal before CESTAT, the Department has stated that "The Commissioner (Appeals) erred in appreciating the fact that the assessee have issued the credit notes to their buyers wherein only the amount of CST VAT is shown separately and the duty element does not find mention at all. This indicates that the assessee has already passed on the duty element to the buyers and accordingly the doctrine of 'unjust enrichment' is applicable." Therefore, the reliance by Assistant Commissioner on the Commissioner (Appeal)'s order, particularly when Order-In-Original is appealed against is not correct and hence the Order-In-Original Is not legal, not proper.

3. The assessee has not produced any contract or other document to evidence that the rate difference was due to some contract already existing before the sale of goods to the dealers.. Therefore, the credit notes which are devoid of any clarification on rate difference prove that the amount of credit given by the assessee to the dealer does not include any element of Central Excise Duty. The Order-In-Original did not have any findings in this aspect at all. Therefore the Order-In-Original of sanctioning the refund is not legal, correct and proper.

Whereas it further appears that the Commissioner (Appeals), Pune-I, vide Order-in-Appeal No. P-I/RKS/158-162/2010 dtd. 28.09.2010 has set aside the above. said OIO dtd. 25.02.2010 and has remanded back the case for examine the admissibility of the refund claim on merits, on the basis of documentary evidence. The said refund claim dtd. 18.12.2009, now appears to be erroneously refunded to the claimant and is therefore required to be recovered from the claimant.

Now, therefore, M/s. Vilsons Roofing Products Pvt. Ltd., are called upon to Show Cause to the Assistant Commissioner, Central Excise, Kolhapur I Division, having his office situated at Ratikamal Complex, Opp. Basant Bahar Talkies, New Shahupuri, Kolhapur, as to why the refund claim for

Rs. 1,01,615/- sanctioned vide OIO No. ADJ/2917KOP-1/2009 (256/REF/2009) dtd. 25.02.2010; should not be demanded and recovered from them under the provisions of the Section 11A(1) of Central Excise Act, 1944.

The claimant is hereby directed to submit their written reply within 07 days from the date of receipt of this Notice and personal hearing is fixed in the matter on 18.11.2010 and 19.11.2010 at 11.00 AM. They are requested to produce all the evidences, upon which they intend to rely in support of their defense, at the time of showing cause.

If no cause is shown against the action proposed to be taken within 07 days or if they fail to appear before the adjudicating authority when the case is posted for hearing, the same will be decided Ex-parte on the basis of evidence available on records.

This notice has been issued to the assessee without prejudice to any other action that may be taken against them under the Central Excise Act, 1944 and Rules made there under and any other law for the time being in force in India."

In para 2 of the show cause notice specific averment has been made that the refund claim was not the case of consequential refund arising out of the order of the appellate authority. In para 3, specifically it has been stated that no documents such as contract etc. evidencing the fact that rate difference was on account of contractual agreement between the seller and buyer has been produced. In our view specific averments on the merits of the refund have been made in the show cause notice including the averment that refund claimed is not on account of the decision rendered in the favour of appellant assessee. Thus we do not find any merits in the submissions made by the appellant assessee on this account.

4.11 Appellant assessee has challenged the appeals filed by the revenue on the ground that they are contrary to the litigation policy of the Government of India in terms of the amounts involved in the dispute. We take note of the submission made and also the fact that at the time when the said appeals were filed they were not barred as per the litigation policy. With the passage of the time the monetary limit, for filing the appeals have been enhanced. Revenue authorities were also directed to examine in respect of withdrawal of the appeals that are below the threshold level specified. In the present case revenue has not filed any application seeking withdrawal of these two appeals. In our view in absence of any such application seeking withdrawal of the appeal the appeal will have to be considered and decided on the merits.

4.12 Appellants have in their submissions admitted that certain refund claims filed by them are time barred as they were filed beyond the period of limitation as per Section 11B of the Central Excise Act, 1944 and they do not dispute the rejection of these refund claims on ground of limitation. As we do not find the refund claims even otherwise admissible to the appellant we take the note of the above submission and hold where the refund claims are filed beyond the prescribed period of limitation they are rejected on this ground also.

4.13 We also agree with the submission of the appellants that where so ever the refund is held admissible, but cannot be paid to them for the reason of unjust enrichment, the amount to be refunded needs to be credited to the Consumer Welfare Fund.

5.1 The appeals filed by the revenue and detailed at S No 1 & 2 in table in para 1, are allowed on merits.

5.2 We do not find merits in any of the appeals at S No 3 to 24 in the table in para 1, filed by the appellant assessee and dismiss the same.

5.3 Appeal at S No 25 in table in para 1, is dismissed as infructuous

(Order pronounced on 25.04.2023)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)