CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89021 OF 2014

[Arising out of Order-in-Appeal No: 2592(CRC,II B)/2014(JNCH)/IMP-2490 dated 16th June 2014 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

ABB India Ltd
19 Mfg Plot No. 79, Street No. 17
MIDC Industrial Area, Nasik - 422007 … ***Appellant***

versus

Commissioner of Customs (Import)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 89022 OF 2014

[Arising out of Order-in-Appeal No: 2594(CRC,II B)/2014(JNCH)/IMP-2490 dated 16th June 2014 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

ABB India Ltd
19 Mfg Plot No. 79, Street No. 17
MIDC Industrial Area, Nasik - 422007 … ***Appellant***

versus

Commissioner of Customs (Import)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 ***…Respondent***

AND

CUSTOMS APPEAL NO: 89023 OF 2014

[Arising out of Order-in-Appeal No: 2593(CRC,II B)/2014(JNCH)/IMP-2490 dated 16th June 2014 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

ABB India Ltd
19 Mfg Plot No. 79, Street No. 17
MIDC Industrial Area, Nasik - 422007 … ***Appellant***

versus

Commissioner of Customs (Import)
Jawaharlal Nehru Customs House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707 ***…Respondent***

APPEARANCE:
Shri T Vishwanathan, Shri Akhilesh Kangsia and Ms Apoorva Parihar, Advocates
Shri Deepak Sharma, Assistant, Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 86039-86041/2025

DATE OF HEARING: 28/11/2024
DATE OF DECISION: 27/05/2025

PER: C J MATHEW

These three appeals challenge three seemingly innocuous orders of Commissioner of Customs (Appeals), Mumbai-II that affirmed rejection of claim for refund of 'special additional duty (SAD)' discharged by M/s ABB India Ltd on import of goods for the seemingly innocuous reason of insufficient satisfaction in evidencing that the burden of duty had not been passed on. Seemingly innocuous, because the justification, *viz.*, bar of unjust enrichment not having been overcome, is intent set out in section 27 of Customs Act, 1962 for refund of duties of customs paid in excess of that authorized by law. Seemingly innocuous, because the levy stems from section 3(5) of Customs Tariff Act, 1975 enabling the Central Government to direct such payment to the extent of, and for the purpose, prescribed therein unlike the duties attached to import, *viz*., basic customs duty (BCD) and additional duty of customs under section 3(1) of Customs Tariff Act, 1975, from ‘charging provision’ in the statute. Seemingly innocuous, because the design of the levy of this indirect tax, intended by notification for burdening only on ‘actual users’ of imported goods, specifies, as intended, *ex post facto* evincing of discharge of the levy so countervailed. And seemingly innocuous, in attempting to insinuate enlarging of ‘denial domain’ for retention of duties not intended by law to be collected.

2. The background sets the tone for the grounds of appeal and, primarily, from the imputation that, even in the face of the claim for refund being nothing other than entitled exemption owing to the peculiar structuring of the levy, despite support by usual evidence of not having passed on the ‘special additional duty (SAD)’ as an indirect tax, the representative of the State chose to retain the collected amount. It is common ground that three sets of claims; comprising six[1] in relation to bills of entry no. 8415175/05.11.2012, no.

[1] [disposed by order-in-appeal no. 2592(CRC,II B)/2014(JNCH)/IMP-2490 dated 16th June 2014]

8466704/12.11.2012, no. 5700028/10.01.2012, no. 7558518/ 01.08.2012, no. 7254387/29.05.2012 and no. 4898632/12.10.2011 for ₹ 2,20,91,130, one[2] in relation to bill of entry no. 8032032/24.09.2012 for ₹ 2,25,15,273 on supplies to M/s Power Grid Corporation of India Ltd and eight[3] in relation to bill of entry no. 5517471/20.12.2011, no. 5284557/24.11.2011, no. 5261737/ 22.11.2011, no. 5286132/ 24.11.2011, no. 5634606/02.11.2012, no. 5317361/28.11.2011, no. 5317155/28.11.2011 and no. 5286189/24.11.2011 for ₹ 63,57,891 on supplies made to M/s ICI-C&C, Mainpuri, had been filed within the time stipulated in notification[4] no. 102/2007-Cus dated 14th September 2007, for refund of the 'special additional duty (SAD)' discharged at the time of import. Learned Counsel for appellant contends that there was no scope for denial once all the conditions prescribed in the said notification had been complied with despite which the amount was not returned to them by resort to refuge of section 27(2) of Customs Act, 1962 on the finding that *proviso* therein was not attracted.

3. According to Learned Counsel, the original authority misconstrued the agreement and correspondence with one of the buyers in due course, M/s ICI-C&C, Mainpuri, to conclude from the condition of 'price inclusive of all duties', and the clarification thereon, to determine adversely against the appellant. He relied upon the decision

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[2] [disposed by order-in-appeal no. 2594(CRC,II B)/2014(JNCH)/IMP-2492 dated 16th June 2014
[3] [disposed by order-in-appeal no. 2593(CRC,II B)/2014(JNCH)/IMP-2491 dated 16th June 2014]
[4] [notification no. 93/2008-Cus dated 1st August 2008]

of the Tribunal in *Commissioner of Customs v. PMC Project India [2019 (370) ELT 1429 (Tri-Ahmd)]* besides pointing to confirmation from the buyers, too, that the price charged on them did not include the particular element of duties paid for clearance of the goods. He argued that, considering the adverse presumption incorporated in law, circular[5] of the Central Board of Indirect Taxes & Customs (CBIC) had stipulated furnishing of certificate of chartered accountant to suffice for a limited purpose which the lower authorities apparently chose to disregard in manner reserved for refund claims preferred on grounds of collection by mistake. It was further contended that only by inclusion of such duty in commercial invoice of further sale could it be inferred that burden of duty had been passed on for which reliance was placed on decision of the Tribunal in *Commissioner of Central Excise v. NG Thakkar & Sons [2014 (301) ELT 229 (Bom)]*.

4. Learned Authorized Representative submitted that the lower authorities had been led to the firm conclusion of the claims not having overcome the ‘bar of unjust enrichment’ from the contracts and agreements with the buyers; apparently, he had no choice but to espouse the law as the letters and agreement left no room for doubt that all duty was included in the contract value. It was pointed out that the certificate of chartered accountant did not suffice for survival of test of ‘unjust enrichment’ as set out in the decision of the Tribunal in *Bharat*

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[5] [no. 06/2008-Cus dated 28th April 2008]

Electronics v. Commissioner of Customs [2013 (2) ECS (117) (Tri-MUM)].

5. The requisition for, and discard of, certification, evincing that burden of duties paid had been borne by the claimant, even if serving no purpose other than unauthorizedly withholding duties of customs collected from the importer, is the veritable catalyst for transforming certainty of tax, in law, to discretionary patronage of tax administration, in practice. In effect, refund of duties is nothing but a charge on the State upon demonstration of levy having been discharged and of mistake of law in making payment established to efface character of levy; on the first two there is no disputation and consequence of the last left in no doubt. The essence of 'indirect tax' is the passing on of the burden to, and with tacit concurrence of, the buyer owing to which refund becomes a vested right to reimbursement only upon overcoming the presumption, incorporated by Central Excise and Customs Laws (Amendment) Act, 1991[6], that every incidence of discharge of indirect tax had been passed on. The Hon'ble Supreme Court, in *Mafatlal Industries and ors v. Union of India [(1997) 5 SCC 536]*, affirmed the mechanism incorporated in section 11B of Central Excise Act, 1944 for excoriating taint of 'unjust enrichment' before restitution of duties paid mistakenly or collected unauthorizedly by rejecting attempt to depict such duties as moneys in contracted transaction thus

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[6] Chapter III

> *'66…….We must say that we are not concerned with the question of desirability of a provision which could have been made but with the legality of the provision which has been made. It cannot be suggested that the Parliament should necessarily have made such a provision or that in absence of such provision, the provisions made are violative of Article 265 of the Constitution.'*

before going on to hold that

> *'69……Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right following from Article 265 or as a statutory right/equitable right affirmed by section 72 of the Contract Act, the result is the same – there is no automatic or unconditional right to refund.'*

for institutionalizing 'sieving through mesh' of 'unjust enrichment' whether refund was claimable owing to mistaken discharge, misconstruction of levy or illegal collection. In so doing, it was also held that

> *'70…….We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is ununderstandable how an assessment/ adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis….. All claims for refund ought to be, and ought to have been filed only under and in accordance with Rule 11/Section 11-B and under no other provision and in no other forum.'*

and to reiterate that, even if on considerations of equity and in case of tax settled as unconstitutional in matter prosecuted by a person long after assessment of another person was finalized, the contractual consequence of altered duties would require the claimant to establish burden of the levy having been borne without passing it on to be entitled to receive refund thereto in much the same way, as the amended section 11B of Central Excise and Salt Act, 1944, was found to be not violative of the constitution, prescribed.

6. Every tax paid, even upon ceasing to be a levy - owing to sanctification solely by conformity with Article 265 of the Constitution - and to be erased from the Consolidated Fund of India, may be returned to the assessee only upon satisfaction of the designated authority[7] that the incidence thereof had not been passed on. The law was enacted upon parliamentary initiative, and deliberations thereupon, as counter to ‘unjust enrichment’ which, notwithstanding the transformation of the character of the deposit and consequent exclusion from revenue receipt, enabled retention by the State as ‘custodian’ for the unknown bearer of burden of illegal, or unconstitutional, levy. The controversy was over ‘unjust enrichment’ from ‘double benefit’ of ‘duties of central excise’ – by collection from customers as duty only to be appropriated by manufacturers as something other than duty - but the statutory provisioning did extend to the two levies then assigned to the Union and, as far as Customs Act, 1962 was concerned, Chapter VI,

[7] Assistant Commissioner of Customs/Deputy Commissioner of Customs

incorporated thereby, extended the regulatory frame, and only for the limited purpose, beyond ‘imported goods’ with which customs charge was co-terminus; the machinery provision of section 27 of Customs Act, 1962 was, thus, not only made subordinate to the deemed fiction of presumption under section 28D therein but also, by lack of recourse by Central Government or Central Board of Excise & Customs (CBEC) to section 156 and section 157, respectively, of Customs Act, 1962, rendered statutory appropriation of uncharted waters, beyond clearance for home consumption and by section 28C therein, over ‘deemed domestic goods’, and lacking any rein on exercise of discretion. Possibility of ‘alleging of unjust retention’ was rendered ‘non-starter’ to confer complete and unabridged discretion upon the designated officer of customs that the Hon’ble Supreme Court, while elaborating on the availability of defence against statutory presumption in duties of central excise from the machinery provisions then in place, was not faced with in *re Mafatlal Industries and ors*.

7. That dispute had its genesis in refund of duties of central excise withheld by operation of amended section of Central Excise and Salt Act, 1994 and, while not specifically restricting the outcome accordingly and despite only occasional allusions to section 27 of Customs Act, 1962, did not prejudice affirmation of the enactment itself and the machinery provisions thereof as applicable in the situations envisaged therein.

8. Though both customs and central excise are indirect levies, the intersection of duty payment and passing on of liability concurrently is built only into the latter with clear disaggregation of duty liability on occurrence of the taxable event and refund, not unnaturally, claimed after possession of goods have passed on to the buyer; moreover, with the assessee having merely to establish that nothing beyond the value assessed to duty was received from the buyer, further transactions were not relevant to be entitled for sanction of the refund amount. *Per contra*, the loss of identity of the collected amount as 'duties of customs', in any further transaction, places the importer claiming refund in more trying conditions than an assessee under Central Excise Act, 1944 which, considering the additional burden of duties of excise on imported goods, is discriminatory. Consequently, in refunds under section 27 of Customs Act, 1962, the evaluation of 'unjust enrichment', inevitably, turned out to be about appropriateness of price charged on buyer that, in the absence of any rules or regulations framed by Central Government or regulation of Central Board of Excise & Customs (CBEC), was left entirely to the exercise of discretion, or whims, on the part of the designated officer; thus, jurisdiction over pricing, which is not within the remit of a law enacted in pursuance of Article 265 of the Constitution, was, effectively, vested thereby in designated officer under section 27 of Customs Act, 1962. The applicability of 'unjust enrichment' was, nonetheless, taken to have finality in relation to duties

of customs, too, owing to coverage in *re Mafatlal Industries Ltd* even on matters not considered in *re Mafatlal Industries Ltd.*

9. A dispute over refund of duties of customs, arising from alleged misapplication of exemption notification before the amendment in section 27 of Customs Act, 1962, was before the Hon'ble Supreme Court in *Union of India v. Solar Pesticides Pvt Ltd [(2000) 116 ELT 401 (SC)]* and, taking note that the refund sought was, indeed, of duty collected without authority of law and, even if in relation to captive consumption with non-operability of section 28C of Customs Act, 1962 from absence of sale, proceeded to examine applicability of 'unjust enrichment', and on the foundation of finality in *re Mafatlal Industries Ltd* in matters of customs duties, too, thus

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> *(iii).....The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect theduty 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....'*

to conclude that even captive consumers of 'duty paid' imported goods are not beyond having to establish their right to reimbursement of levy collected without authority of law.

10. The present dispute is not about either of the duties dealt with in *re Mafatlal Industries Ltd* or about captive consumption over which the Hon'ble Supreme Court concerned itself with in *re Solar Pesticides Pvt Ltd* because the levy under section 3(5) of Customs Tariff Act, 1975 did not exist till 2005 and its predecessor levy under section 3A of Customs Tariff Act, 1975 not till 1998; the levy itself was intended to mirror the tax on sale of commodities in List II of Seventh Schedule to the Constitution. Unlike other levies burdening imports, 'special additional duty (SAD)' was to be fastened on imports which are captively consumed and exempted for those intended to be traded. It is not a case of levy that is illegal or unconstitutional to which the decision in *re Mafatlal Industries Ltd* unequivocally is made applicable. It is a case of exemption that, instead of being availed upfront, was, owing to peculiarities of oversight, to be reclaimed after discharge of appropriate liabilities on sale. That it was referred to as 'refund' in the relevant exemption notification does not clothe it, in the absence of definition for the expression in section 2 of Customs Act, 1962, as refund intended by section 27 of Customs Act, 1962. Indeed, the claim is preferred against exemption notification issued under section 25 of Customs Act, 1962 and nowhere does that notification impose any condition of compliance with section 27 of Customs Act,1962 for entitlement to refund. In absence thereto, it is not open to the designated authority to

insist upon full specification thereto. It may also be noted that the exemption notification was backed by instructions specifically requiring that certification by chartered accountant was required to be taken. In the absence of generality in section 27 of Customs Act, 1962 controlling the refund of ‘special additional duty (SAD)’ or specific reference to any documents in the procedure prescribed, such restriction cannot be insinuated by any authority – competent or otherwise – to deny refund except by taking the law into one’s own hands.

11. Consequently, the rejection of claim was not in order. The original authority was required to consider only such impediments as stipulated in the notification and the resort to placing onus on the appellant is inappropriate. To enable proper disposal of the dispute, it was necessary for the designated official to render a finding in the context. Accordingly, the matter is restored to the original adjudication authority to determine the claim for refund. Appeals are allowed by way of remand.

(Order pronounced in the open court on 27/05/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*