

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

REGIONAL BENCH - COURT NO. I

CUSTOMS APPEAL No. 86789 of 2022

(Arising out of Order-in-Appeal No. 468 (CRC-I)/2022(JNCH)/Appeals dated 24.05.2022 passed by the Commissioner of Customs (Appeals), Mumbai Customs Zone-II, Mumbai)

Imperial Waterproofing Industries Limited

.... Appellants

Block No.23, New Sun Mill Compound
Lower Parel
Mumbai – 400 013.

VERSUS

Commissioner of Customs

.... Respondent

Nhava Sheva-III Commissionerate

Jawaharlal Nehru Customs House (JNCH)
Nhava Sheva, Taluk Uran
Raigad District – 400 707.

APPEARANCE:

Shri Anil Balani along with Ms. Priyasha Pawar, Advocates for the Appellants

Shri Dinesh Nanal, Authorized Representative for the Respondent

CORAM: HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86297/2022

Date of Hearing: 13.05.2025

Date of Decision: 22.08.2025

PER: M.M. PARTHIBAN

This appeal has been filed by M/s Imperial Waterproofing Industries Limited, Mumbai (herein after, for short, referred to as 'the appellants') assailing the Order-in-Appeal No. 468 (CRC-I)/2022(JNCH)/Appeals dated 24.05.2022 (referred to, as 'the impugned order') passed by the Commissioner of Customs (Appeals), Mumbai Customs Zone-II, Mumbai.

2.1 Brief facts of the case, leading to this appeal, are summarized herein below:

2.2 The appellants regularly import goods through JNCH Customs, Nhava Sheva port; they had imported 'Acrylonitrile Butadiene Rubber' (NBR) falling under Customs Tariff Heading (CTH) 4002 by filing eight Bills of Entry (B/E) No.957979 dated 09.11.2006; No.968444 dated 20.11.2006; No.977535

dated 28.11.2006; No.995193 dated 14.12.2006; No.603834 dated 22.12.2006; No.620368 dated 10.01.2007; No.632437 dated 19.01.2007 and No.647545 dated 05.02.2007, all from same supplier M/s Korea Kumho Petro Chemical Co. Ltd., Seoul, Korea (KKPC). The appellants had paid applicable duties of customs relating to aforesaid eight B/Es, including the Anti-Dumping Duty (ADD) imposed vide S. No.1 of Notification No. 78/2005-Customs (ADD) dated 01.09.2005 for a duty amount of US\$ 138.39 per M.T., before clearance of the goods from Customs control. The issue with respect to the rate/amount at which the ADD had been imposed in respect of NBR by the Central Government was under dispute before the Principal Bench of this Tribunal in the case of *Apar Industries Limited Vs. Designated Authority* – 2006 (204) E.L.T. 180 (Tri. Del.) and the Tribunal had decided in its Final Order No. 37-39/06-AD dated 22.09.2006 in Appeals No. C/935/05-AD and No. C/68-69/06-AD that *"the appeals filed by exporter/importer are allowed, subject to the direction that the impugned notification No. 78/2005 dated 1st September, 2005, will be suitably amended by the Government of India by imposing the anti-dumping duty at the rate of US \$ 38.73 per MT on the subject goods imported from Korea Kumho Petrochemicals..."*. As a result, the ADD levied at the rate of US \$ 138.39 per M.T., vide Notification No. 78/2005-Customs (ADD) dated 01.09.2005, was amended by way of substitution of the duty amount at S. No. 1 with "38.73" i.e., duty amount of US \$ 138.39 per M.T. was substituted with US \$ 38.73 per M.T. Such substitution was effected by the Ministry of Finance in issuing Notification No.11/2007-Customs dated 31.01.2007, in pursuance of the acceptance of the above order of the Tribunal by the Designated Authority in the Ministry of Commerce (i.e., Director General of Trade Remedies, Department of Commerce) and who had recommended for consequential change in the Ministry of Finance notification imposing the ADD on the impugned goods.

2.3 On the basis of Notification No.11/2007-Customs dated 31.01.2007 issued in revising the duty amount of ADD liable to be paid on the impugned goods at US \$ 38.73 per M.T., and the appellants having paid the duty amount of ADD at a higher rate of US \$ 138.39 per M.T., in respect of eight B/Es referred above, had filed a refund application dated 20.08.2007 with Central Refund Cell (CRC) of JNCH Customs claiming for refund of Rs.5,56,513/-. The said refund claim application was scrutinised by the jurisdictional Assistant Commissioner of Customs, CRC, JNCH in issuing a deficiency memo dated 21.06.2007 asking the appellants to produce re-assessment order and to furnish copy of notifications No.11/2007-Customs

and No.78/2005-Cus. (ADD) dated 01.09.2005. In adjudication of the aforesaid refund claim, original authority had rejected the refund claim made by the appellants vide issue of Order-in-Original dated 24.12.2008. The aforesaid issue has been represented by the appellants before the authorities below in three rounds of litigation as summarised below:

Issue represented by appellants	Order-in-Original reference	Order-in-Appeal reference	Summary
Refund claim of higher ADD paid in 8 B/Es vide application dated 20.08.2007	No.2123/08 AMCD dt. 24.12.2008, Refund of Rs.5,56,513/- rejected	No.332(CRC-I)/2009 (JNCH) dt.25.06.2009, B/Es ordered to be re-assessed and issue speaking order	Litigation Round-I
Refund claim of higher ADD paid in 8 B/Es vide application dated 07.12.2016	No.18514/16-17 AM (I) dt. 07.02.2017, Refund of Rs.5,56,513/- rejected u/Sec.27 ibid	No.513(CRC-IB)/2018 (JNCH)-Appeals-II dt. 25.05.2018, refund in one B/E No.647545 dt.05.02.2007 ordered to be examined for unjust enrichment and refund claim of 7 B/Es to be decided afresh	Litigation Round-II. Committee of CCs have accepted this order on 19.07. 2018
Re-assessment of 7 B/Es and eligibility to notification No.11/2007-Cus.	No.11/2019-20/AC/ NS-I/JNCH/CAC dt. 15.04.2019, holding appellants not eligible for consequential benefit as notification dt. 31.01.2007 has no retrospective effect; re-assessment is unwarranted; CRC to examine refund of 1 B/E No.647545	No.694(Gr.-IIH-K)/2020 (JNCH)-Appeals-II dt. 22.05.2020, order of original authority upheld and appeal filed by appellants was rejected.	Litigation Round- IIIA
Refund claim of higher ADD paid in 8 B/Es vide application dated 26.06.2018	No.572/2020-21/AM (I)/NS-III dt. 07.01.2021, Refund of Rs.5,56,513/- rejected.	No.468(CRC-I)/2022 (JNCH)/Appeals dt. 24.05.2022, upheld the order of original authority on finding that there is no infirmity therein and rejected the appeal filed by appellants.	Litigation Round- IIIB

2.4 In the last round of litigation immediately preceding this appeal, the jurisdictional Deputy Commissioner of Customs, CRC-I, NS-III, JNCH, had examined the refund claim filed by appellants and rejected the same on the grounds of merits of the claim, non-submission of challans evidencing payment of ADD and on the clause of unjust enrichment vide Order-in-Original dated 07.01.2021. Being aggrieved by the said order, the appellants had filed an appeal before the Commissioner of Customs (Appeals); who in disposing of the appeal vide impugned order dated 24.05.2022 has held that there is no infirmity in the order of the original authority and therefore by

upholding the same, rejected the appeal filed by the appellants. Feeling aggrieved with the impugned order dated 24.05.2022, the appellants have filed this appeal before the Tribunal. It is also noted that as against Order-in-Appeal dated 22.05.2020, the appellants have preferred separate appeals vide Diary No. 86254/2020 and 86253/2020 which are not the matter of dispute herein, even though these relate to connected matters.

3.1 Learned Advocate appearing for the appellants had submitted that they paid the Anti-Dumping Duty (ADD) along with applicable customs duty at a higher rate of US \$ 138.39 per M.T., as against the correct rate of duty US \$ 38.73 per M.T., which was substituted vide Notification No.11/2007-Customs dated 31.01.2007, amending the original Notification No.78/2005-Customs dated 01.09.2005. The appellants have been importing the impugned goods from M/s Korea Kumho Petro Chemical Co. Ltd., Seoul, Korea (KKPC) and the reduced ADD is applicable only for imports from Korea through this specific supplier. By relying on the decision of the Tribunal in the case of *Commissioner of Customs, ICD, New Delhi Vs. Kohinoor India Ltd.*, - 2014 (304) E.L.T. 102 (Tri.-Del.), he claimed that the reduced amount of duty is applicable with retrospective effect. In respect of eight B/Es referred above, where they had paid higher ADD, they had filed a refund application dated 20.08.2007 before the Central Refund Cell (CRC) of JNCH Customs claiming for refund of Rs.5,56,513/-. Further, since the appellants had paid the higher ADD duty under protest, the department cannot retain or withhold refund of excess duty, on the ground of insufficiency of documents or on limitation of time/ time bar.

3.2 Learned Advocate further submitted that "import duty" means customs duty leviable on the import of goods under the provisions of the Customs Act, 1962 and Customs Tariff Act, 1975; and therefore he claimed that the appellants cannot be levied with ADD at higher rate, than the one which is legally sustainable at the correct rate, for denial of refund of such excess paid duty. Further, he submitted that since the appellants had paid the ADD duty at higher rates under protest, such excess payment of amount of ADD is only a deposit with the government. Therefore, he claimed that the limitation of time limit and unjust enrichment shall not be applicable to their case.

3.3 In support of their case, the Learned Counsel had relied upon the judgements in the following cases:

(i) *Apar Industries Ltd. Vs Designated Authority* – Principal Bench – 2006 (204) E.L.T. 180 (Tri.-Del.);

(ii) *Government of India Vs. Indian Tobacco Association* – [2005 (187) E.L.T. 162 (S.C.)]

(iii) *Mehler Engineered Products India Pvt. Ltd., Vs. Union of India* - [2018 (364) E.L.T. 27 (Mad.)]

4. Learned Authorized Representative (AR) appearing for Revenue, reiterated the findings made by the Commissioner (Appeals) in the impugned order and submitted that in the absence of production of supporting documents which the importer is required to file along with the refund application and the fulfilment of unjust enrichment angle, allowing refund to the importer under Section 27 *ibid*, is not permissible. Accordingly, he submitted that impugned order is sustainable and prayed for rejection of the appeal filed by the appellant.

5. Heard both sides and perused the case records. The additional submission made in the form written paper book in this case was also perused carefully.

6. The short issue for determination before the Tribunal is whether the amount of Rs.5,56,513/- paid by the appellants towards Anti-Dumping Duty (ADD) liability for the import of impugned goods viz., 'Acrylonitrile Butadiene Rubber' (NBR) falling under Customs Tariff Heading (CTH) 4002, covered under eight specific Bills of Entry are eligible for refund or not?, in terms of Section 27 of the Customs Act, 1962.

7. In order to appreciate the issue under dispute, specific legal provisions of the Customs Act, 1962; Customs Tariff Act, 1975 relating to levy of Customs duty, levy of Anti-Dumping Duty (ADD), refund of customs duty/ADD, duties specified which are to be levied and the relevant Rules made thereunder are extracted and given below for ease of reference:

Customs Act, 1962

"Section 12. Dutiable goods.

(1) *Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or exported from, India.*

(2) *The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.*

Section 27. Claim for refund of duty.

(1) Any person claiming refund of any duty or interest—

(a) paid by him; or

(b) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest :.....

(1A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty or interest in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty or interest, has not been passed on by him to any other person.

(1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely :—

(a) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year shall be computed from the date of issue of such order;

(b) 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;

(c) 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 case of re-assessment, from the date of such re-assessment."

Customs Tariff Act, 1975**"Section 2. Duties specified in the Schedules to be levied.**

The rates at which duties of customs shall be levied under the Customs Act, 1962 (52 of 1962), are specified in the First and Second Schedules.

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9A. Anti-dumping duty on dumped articles. (1) Where any article is exported by an exporter or producer] from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

Explanation . - For the purposes of this section, -

(a) "margin of dumping", in relation to an article, means the difference between its export price and its normal value;....

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified, and for the manner in which the export price and the normal value of, and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.

(6A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer:

Provided that where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

(8) The provisions of the Customs Act, 1962 (52 of 1962) and all rules and regulations made thereunder, including but not limited to those relating to the date for determination of rate of duty, assessment, non-levy, short-levy, refunds, exemptions, interest, recovery, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act or all rules or regulations made thereunder, as the case may be.

[Sub-section (8) as above was substituted by the Finance (No. 2) Act, 2024, w.e.f. **16-8-2024**. Prior to its substitution, sub-section (8) as amended by Finance (No. 2) Act, 2009, w.e.f. 1-1-1995 read as under:]

(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

9AA. Refund of anti-dumping duty in certain cases. (1) Where upon determination by an officer authorised in this behalf by the Central Government under clause (ii) of sub-section (2), an importer proves to the satisfaction of the Central Government that he has paid anti-dumping duty imposed under sub-section (1) of section 9A on any article, in excess of the actual margin of dumping in relation to such article, the Central Government shall, as soon as may be, reduce such anti-dumping duty as is in excess of actual margin of dumping so determined, in relation to such article or such importer, and such importer shall be entitled to refund of such excess duty:..."

CUSTOMS TARIFF (IDENTIFICATION, ASSESSMENT AND COLLECTION OF ANTI-DUMPING DUTY ON DUMPED ARTICLES AND FOR DETERMINATION OF INJURY) RULES, 1995

In exercise of the powers conferred by sub-section (6) of section 9A and sub-section (2) of section 9B of the Customs Tariff Act, 1975 (51 of 1975) and in supersession of the Customs Tariff (Identification, Assessment and Collection of Duty or Additional Duty on Dumped Articles and for Determination of Injury) Rules, 1985, except as respect things done or omitted to be done before such supersession, the Central Government hereby makes the following rules, namely :-

1. Short title and commencement.

(1) These rules may be called the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

(2) They shall come into force on the 1st day of January, 1995.

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3. Appointment of designated authority.

(1) The Central Government may, by notification in the Official Gazette, appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the designated authority for purposes of these rules.

(2) The Central Government may provide to the designated authority the services of such other persons and such other facilities as it deems fit.

4. Duties of the designated authority.

It shall be the duty of the designated authority, in accordance with these rules, -

(a) to investigate as to the existence, degree and effect of any alleged dumping in relation to import of any article;

(b) to identify the article liable for anti-dumping duty;

(c) to submit its findings, provisional or otherwise to the Central Government as to-

(i) normal value, export price and the margin of dumping in relation to the article under investigation; and

(ii) the injury or threat of injury to an industry established in India or material retardation to the establishment of an industry in India consequent upon the import of such article from the specified countries;

(d) to recommend to the Central Government-

(i) the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, after considering the principles laid down in the Annexure III to these rules; and

(ii) the date of commencement of such duty;

(e) to review the need for continuance of anti-dumping duty.

17. (1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding -

(a) as to,-

(i) the export price, normal value and the margin of dumping of the said article;

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18. Levy of duty. (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17....."

8.1 Plain reading of the above legal provisions, makes the position very clear that the scope of Section 27 *ibid*, deals with refund of duty and with

reference to the definition of duty as per Section 2(15) *ibid*, it refers to the customs duty leviable as per the provisions of the Section 12 *ibid*. Anti-dumping duty is imposed under Section 9A of the Customs Tariff Act, 1975, for the specific purpose of charging extra import duty on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country caused on account of dumping of that particular product. In terms of Section 9A(8) of the Act of 1975, the provisions relating to *inter alia* refunds has been made applicable to ADD as they apply to refund of customs duty under the Act of 1962.

8.2 On perusal of the facts of the case, it also transpires that Anti-Dumping Duty (ADD) levied on the impugned goods imported from M/s Korea Kumho Petro Chemical Co. Ltd., Seoul, Korea (KKPC) was initially mentioned in the Notification No.78/2005-Customs dated 01.09.2005 at Serial No.1 at a higher rate of US \$ 138.39 per M.T., equating with non-cooperative exporter who had not provided the requisite details called for by DGAD, as against the correct rate of duty mentioned as US \$ 38.73 per M.T., which was substituted vide Notification No.11/2007-Customs dated 31.01.2007, amending the original Notification No.78/2005-Customs dated 01.09.2005, after considering the facts that the said exporter have provided the relevant information for determining the 'margin of dumping' and the same was considered by DGAD, after such facts were pointed out in the order of the Tribunal in the case of *Apar Industries Ltd.* (supra). Further, in terms of the aforesaid legal provisions, anti-dumping duty can be levied only to the extent of not exceeding the margin of dumping in relation to such article. Therefore, imposition of ADD in excess of "margin of dumping' is not provided under Section 9A of the Act of 1975, which is the charging section for ADD. In other words, ADD imposed initially at the prescribed rate of US \$ 138.39 per M.T., in Notification No.78/2005-Customs dated 01.09.2005 for S. No.1, does not have the sanction of law under Section 9A *ibid*.

8.3 I find that the original authority while adjudicating the case had made the following findings in the order-in-original dated 07.01.2021 to arrive at a conclusion on whether the claim for refund of duty, is refundable or otherwise. The extract of the same are as below:

DISCUSSIONS & FINDINGS

I have carefully gone through the facts and records of the case and the submissions made by the Importer and I find that:

9. Merit of the claim: Notification No. 78/2005 dated 01.09.2005 was amended by Notification No. 11/2007 dated 31.01.2007 but the effect of the amendment notification was not retrospective. In the instant case, 07 bills of entry, mentioned at Sr. No. 1 to 7 of the Table-I, were filed prior to 31.01.2007 and therefore, the same are not affected by the amended notification. Therefore, the question of refund of ADD does not arise in respect of the said 07 bills of entry.

10. Further, the refund claim filed against the bill of entry no. 647545 dated 05.02.2007 by the Importer was processed in view of the Order-In-Appeal No. 513(CRC-IB)/2018(JNCH)/Appeal-II dated 25.05.2018. However, during processing of the refund claim, I find that the Importer has not submitted the following documents:

- i) Original Challan.
- ii) Original (Importer copy) Bill of Entry.
- iii) CA Certificate.
- iv) Balance Sheet.
- v) RTGS/NEFT Letter.

11. In view of the Para 10 above, I find that Deficiency-cum-Personal Hearing Memo's dated 16.12.2020, 21.12.2020 and 26.12.2020 were issued to the Importer through virtual mode i.e. through email. However, the Importer neither appeared in person or through authorized representative for personal hearing fixed on 17.12.2020, 22.12.2020 and 28.12.2020 by the Refund Sanctioning Authority nor submitted the desired documents as mentioned in Para 10 above. Therefore, I find that the refund claim filed by the Importer for the bill of entry no. 647545 dated 05.02.2007 is incomplete and the same cannot be processed in absence of the aforesaid documents.

12. Limitation:- As per sub Section 1(B)(b) of Section 27 of the Customs Act, 1962, *save as otherwise provided in this Section, the period of limitation of one year shall be computed in the following manner, namely:*

"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."

In the instant case, the Importer vide letter dated 26.06.2018, received in this office on 28.06.2018 had made a request for implementation of the Order-In-Appeal No. 513(CRC-IB)/2018(JNCH)/Appeal-II dated 25.05.2018. Thus, the date of Commissioner (Appeals)'s Order is 25.05.2018 and the date of request of the Importer for implementation of the said O-I-A is 28.06.2018. Therefore, I find that the refund claim filed by the Importer is within the limitation of one year.

F. No. S/12-Misc-474/2016-17/CRC-I/NS-III/JNCH

13. **Quantification:-** In the instant case, the Importer has paid the ADD through Manual Challans and the same are not being reflected in the bills of entry and EDI System. The Importer have not submitted the Manual Challans. Therefore, the refund amount cannot be quantified in absence of the proof of payment of the ADD i.e. Manual Challans.

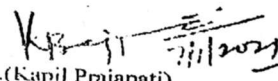
14. **Unjust Enrichment:-** On scrutiny of the refund claim filed by the Importer, it was noticed that the Importer have not submitted Chartered Accountant's Certificate. Therefore, in the instant case, it is not clear that the incidence of duty has been passed or not to anybody directly or indirectly. Thus, I find that the Importer have not fulfilled the criteria of Unjust Enrichment.

15. In view of the above discussions and findings, I pass the following order:

ORDER

i. I reject the refund claim filed for the amount of Rs. 5,56,513/- (Rupees Five Lakh Fifty Six Thousand Five Hundred Thirteen Only) by the Importer M/s. Imperial Waterproofing Industries Pvt. Ltd. (IEC No. 0398018758) having their Regd. office at Block No. 23, New Sun Mill Compound, Lower Parel, Mumbai 400013.

ii. This Order is being issued without prejudice to any other action that may be taken under the Customs Act, 1962 or any other Act or Law for the time being in force.


(Kapil Prajapati)
Deputy Commissioner of Customs
CRC - I / NS-III/JNCH

To
M/s. Imperial Waterproofing Industries Pvt. Ltd.,
Block No. 23, New Sun Mill Compound, Lower Parel,
Mumbai 400013.

Copy to:

- 1) DC/ Review Cell, NhavaSheva-III.
- 2) DC/ Appraising Main (I), NhavaSheva-III.
- 3) Office Copy.

8.4 Learned Commissioner (Appeals) in the impugned order had specifically recorded the directions of the earlier order passed in the II round of litigation by his predecessor, and examined the appeal preferred by the appellants before him for coming to the following conclusions:

13. I find that the Commissioner of Customs (Appeals), vide Order-in-Appeal no. 513(CRC-IB)/2018(JNCH)/Appeal-II dated 25.05.2018, remanded the matter with the following directions:

- i. The OA should decide the aspect of unjust enrichment on the refund pertaining to BE no. 647545 dated 05.02.2007 and dispose of the refund claim after hearing the appellant.
- ii. The refund claim of the remaining seven BEs should also be decided afresh by the OA following the principle of natural justice.

The importer/appellant, vide letter dated 26.06.2018, requested CRC, JNCH to implement the above Order-in-Appeal dated 25.05.2018 (as mentioned in the impugned order). Accordingly, their refund claim was processed by the Deputy Commissioner of Customs, CRC-I, NS-III, JNCH, Nhava Sheva who passed an order vide Order-in-Original no. 572/2020-21/AM(I)/NS-III

S/49-523/2021/Misc/JNCH/Appeal
M/s Imperial Waterproofing Industries Pvt. Ltd.

dated 07.01.2021 wherein their refund claim for refund of ADD amounting to Rs.5,56,513/- (Rs. Five Lakhs Fiftysix Thousand Five Hundred Thirteen Only) paid in respect of eight BEs was rejected. Refund in respect of BE no. 647545 dated 05.02.2007 was rejected for want of documents and refund in respect of the remaining seven BEs was rejected on the ground that the amendment Notification no. 11/2007 dated 31.01.2007 was not having retrospective effect. So, the impugned order is the consequence of Order-in-Appeal dated 25.05.2018. (2)

14. From the discussions above it emerges that the appeal pending in CESTAT and the impugned Order-in-Original are consequences of two different Orders-in-Appeal.

15. As regards legality of the impugned Order-in-Original, Ld. Advocate of the appellant, in their written submission forwarded through email dated 09.05.2022, has submitted that the refund claim in respect of BE no. 647545 dated 05.02.2007 be reconsidered on the basis of documents submitted by them. In this regard I find from Paras 10, 13 and 14 of the impugned order that the importer/appellant has not submitted Original Challan, Original (Importer Copy) Bill of Entry, CA Certificate, Balance Sheet and RTGS/NEFT Letter to process their refund claim despite being given sufficient opportunities. Deficiency-cum-Personal Hearing Memos dated 16.12.2020, 21.12.2020 and 26.12.2020 were issued to them through e-mail for appearance for personal hearing on 17.12.2020, 22.12.2020 and 28.12.2020 respectively, but neither any body appeared for personal hearing nor they submitted the required documents. As the ADD was paid through manual challans in respect of the impugned BEs, the same is not reflected in the concerned BE and EDI system and hence, in the absence of proof of payment of ADD, i.e., manual challans, refund amount cannot be quantified. Further, the importer/appellant failed to fulfil the criteria of unjust enrichment. In view of these facts, I am of the view that the OA has rightly rejected the refund in respect of BE no. 647545 dated 05.02.2007.

16. As regards the remaining seven BEs, I find that the refund claim in respect of these BEs was rejected by the OA on the ground that Notification no. 78/2005 dated 01.09.2005 was amended vide Notification no. 11/2007 dated 31.01.2007, but the amendment notification was not effective retrospectively while these BEs were filed before 31.01.2007. I find that the Ld. Advocate of the appellant has submitted that they filed an appeal against the Order-in-Appeal no. 694(Gr. II H-K)/2020(JNCH)/Appeal-II dated 22.05.2020 in CESTAT on 29.10.2020 which is pending for hearing and final disposal. Vide this Order-in-Appeal the Appellate Authority had upheld the Order-in-Original no. 11/2019-20/AC/NS-II/JNCH/CAC dated 15.04.2019 wherein it had been held that the appellant was not eligible for any consequential benefit in respect of the seven BEs filed prior to 31.01.2007 as Notification no. 11/2007-Customs dated 31.01.2007 was not having retrospective effect and re-assessment of the impugned eight BEs was unwarranted as the appellant had not paid ADD through the EDI system. Further, the importer/appellant was advised to approach the CRC for refund of excess amount of ADD paid vide BE no.647545 dated 05.02.2007 which was filed post 31.01.2007.

17. Nothing has been brought before me by the appellant to show that there is a stay by the Hon'ble CESTAT on the Order-in-Appeal no. 694(Gr. II H-K)/2020(JNCH)/Appeal-II dated 22.05.2020. So the said Order-in-Appeal still holds the ground vide which it has been settled that the appellant was not eligible for any consequential benefit in respect of the seven BEs filed

S/49-523/2021/Misc/JNCH/Appeal
M/s Imperial Waterproofing Industries Pvt. Ltd.

prior to 31.01.2007 as Notification no. 11/2007-Customs dated 31.01.2007 was not having retrospective effect. This is the ground on which the OA has rejected the refund claim of the appellant in respect of seven BEs. So, I do not find any infirmity in the impugned order passed by the OA.

18. In view of the above discussions and findings, I am of the considered view that there is no infirmity in the impugned Order-in-Original No. 572/2020-21/AM(I)/NS-III dated 07.01.2021 passed by the Original Authority and hence, I uphold the same. Thus, I do not find any merit in the appeal filed by the Appellant and hence, I reject the same.

19. Accordingly, appeal no. 523/2021 filed by M/s Imperial Waterproofing Industries Pvt. Ltd. stands disposed of in the above terms.



Kiran
24.5.21
(KIRAN VERMA)

COMMISSIONER OF CUSTOMS (APPEALS)
JNCH, NHAVA SHEVA, MUMBAI ZONE – II.

1. M/s Imperial Waterproofing Industries Pvt. Ltd.,
Block No. 23, New Sun Mill Compound,
Lower Parel, Mumbai – 400 013.

2. Assistant/Deputy Commissioner of Customs,
CRC-I, NS-III, JNCH, Nhava Sheva.

Copy to:

1. The Chief Commissioner of Customs, JNCH, Nhava Sheva, Mumbai II.
2. The Commissioner of Customs (I), NS – III, JNCH, Nhava Sheva, Mumbai II.
3. The Asstt./Deputy Commissioner of Customs, CRAC (I), JNCH, Nhava Sheva, Mumbai II.
4. Office copy.
5. Box File.

8.5 From the above, it transpires that the original authority had taken into consideration the orders passed by the learned Commissioner (Appeals) in the earlier two rounds of litigation, and had sought from the appellants certain documents such as (i) Original challan); (ii) Original B/E (importer copy); (iii) CA certificate; (iv) Balance Sheet and (v) RTGS/NEFT letter. Since, such documents were not produced he concluded that the refund claim is incomplete. However, he has rightly held that the refund claim filed by the importer vide letter dated 26.06.2018, was well within the time limitation of one year the refund claim under Section 27 *ibid*. Furthermore, in the absence of manual challans for payment of ADD not being submitted by the appellants as proof of payment of ADD, and in the absence of CA certificate, he concluded that the refund amount cannot be quantified, and the appellants have not fulfilled the unjust enrichment criteria. Further, learned Commissioner of Customs (Appeals) in the impugned order, had upheld the above order of the original authority and rejected the appeal filed by the appellants.

9.1 I find from the above, that all the relevant issues relating to grant of refund has been examined by the authorities below, to ascertain the fact whether the ADD paid on imported goods is refundable or otherwise. However, I find that the original authority had not taken into consideration the details of customs duty paid in the various B/Es, which have been recorded manually in the challans duly affixed for its receipt by the Bank. Further, he has also not taken into consideration the fact that the appellants while filing their first refund claim application before the jurisdictional customs authorities (CRC) had submitted the various challans indicating the amount of ADD paid, which have been captured in the order of the original authority dated 24.12.2008. Therefore, I find that the conclusion arrived at by the original authority to the extent that the documents of Original challan, Original B/E (importer copy), RTGS/NEFT letter having not been produced by the appellants for treating the refund application as incomplete, is factually incorrect. Further, as the claim for refund have been submitted by the appellants in the previous two rounds of litigation before the CRC, it cannot be said that the customs authorities have no documents or the relevant files with them, since the issue has been examined earlier, right from December, 2008 till the date of passing the original order dated 07.01.2021. The extract of these documents has been captured and placed below:

Duplicate (Importer copy)
~~Indian Customs EDI System - Imports (ICES/I)~~
 JNPT, Nhava Sheva, Mumbai - 400 707.

G 5658756 BILL OF ENTRY FOR HOME CONSUMPTION

[Custom Sin: INNSA1] CHA : 11/570 [BALAJI SHIPPING AGENCY]
 BE No/Dt./cc/Typ: 957979 /09/11/2006/N/H DOC No./Dt/Officer: 1122648/13-11-2006/SLRA T



GATEWAY-CFS
 E.D.I. Service Centre

Importer Details : 0398018758 PAN : AAAC11676D
 IMPERIAL WATER PROOFING INDUSTRIES PVT.LTD.
 BLOCK NO.23, NEW SUN MILLS COMP.
 LOWER PAREL,
 MUMBAI MAHARASHTRA 400013

IGM No : 15502/2006 08/11/2006 Port Of Loading : Busan(Korea)
 Cntry Of Orign : KOREA, REPUBLIC OF Cntry Of Consign :
 RL No : APLU005801294 H/BL No :
 Date : 17/10/2006 Date :
 No. Of Pkgs. : 16 BOX Gross Wt. : 17600.000 KGS
 Marks: AS PER B/L
 & Nos

Inv No & Dt. : 140713 28/09/2006 KOREA KUMHO PETROCHEMICAL CO LTD
 Inv Val : 32424.00 USD TOI: CIF KUMHO BLDG NO.57 JONGRO GU SEQU
 Freight : 0.00 KOREA
 Insurance : 0.00

SVB Load(Ass): Cust. House:
 SVB Load(Dty): HSS Load Rate: 0.00% Amount: 0.00
 Misc. Charges: 0.00

Discount Rate: 0.00 Discount Amount: 0.00
 Item Details
 Exchange rate: 1.00 USD = 45.5500 INR

Slno	RITC	Description	CTH	C.Nptn	C.NSNO	RSP	Load	PROV
Qty	Unit Price	Unit	CETH	E.Nptn	E.NSNO	Cus Dty Rt	BCD amt(Rs)	CVD amt(Rs)
1	40025900	ACRYLONITRILE BUTADIENE RUBBER KOSYN KNB-3SL (NITR						03
13770.00	1.930000	40025900				12.50 %	0.00	
Exim Ntn	(DEEC)	093/2004 1	BCD:0			CVD: 0		
KGS	BCD Fg	160377.00 CVD Fg	288778.00					
	1222646.77	40025900				16.00 %	0.00	
	Educational Cess on CVD					2.00 %	0.00	
	Customs Educational Cess					2.00 %	0.00	
	Addl Duty - (Imports)	019/2006				4.00 %	0.00	
1	40025900	ACRYLONITRILE BUTADIENE RUBBER KOSYN KNB-3SL (NITR						06
3030.00	1.930000	40025900				12.50 %	0.00	
Exim Ntn	(DEPB)	089/2005 1	BCD:0			CVD: 0		
KGS	BCD Fg	34302.00 CVD Fg	0.00					
	269035.56	40025900				16.00 %	48426.40	
	Educational Cess on CVD					2.00 %	968.53	
	Customs Educational Cess					2.00 %	987.90	
	Addl Duty - (Imports)	019/2006				4.00 %	14148.80	

Rs.	1491682.33	Page Total	Rs.	64531.63
BCD	Rs. 1491682.33	BE Gross Total	Rs.	64531.63
ANTID	Rs. 0.00	NCD Duty	Rs.	0.00
CVD	Rs. 0.00	SAFEGUARD Duty	Rs.	0.00
CESS	Rs. 48426.40	Sch 2 Spl Excise Duty		

9.2 Further, on careful perusal of the records of the case, it is amply clear that in respect of imports vide eight B/Es, applicable customs duty had been paid along with ADD, as the imported goods are allowed for clearance for home consumption by the proper officer of customs under Section 47 of the Act of 1962, only upon satisfaction that the importer-appellants have paid the duty assessed thereon. It also transpires from the records of the case, that the claim for refund has arisen from the Final Order passed by the Tribunal, by issue of Notification Customs dated 31.01.2007. Therefore, I am of the considered view that the refund application filed by the appellants can be considered on the basis of available records with the Customs Department.

9.3 The facts of the case and the complete history of the anti-dumping investigations conducted by the Designated Authority (DA)/DGAD as indicated by Directorate General of Trade Remedies, Department of Commerce in their website indicates the following:

(i) DA had initiated the anti-dumping investigations in respect of Acrylonitrile Butadiene Rubber (NBR) originating in/exported from Germany and Korea RP on 15.03.1996; issued Final Findings in Sunset (First) Review recommending continued imposition of ADD on 21.09.2002; issued Final Findings in Mid Term Review on 06.05.2005; and initiated Sunset (Second) Review on 08.10.2007.

(ii) DA in his Sunset Review (2) of anti-dumping duty imposed on imports of Acrylonitrile Butadiene Rubber (NBR) originating in/exported from Germany and Korea RP and submitted his recommendations vide the FINAL FINDINGS in Notification No. 15/6/2007-DGAD dated 04.10.2008, suggesting that the ADD imposed on KKPC shall continue to be charged at US \$ 38.73 per MT. The extract of such recommendation is given below:

"K. RECOMMENDATIONS

118. Having concluded that the domestic industry continues to suffer material injury on account of dumped imports from Korea RP and there is likelihood of continuation of dumping and injury on account of imports from Korea RP if the duties are revoked, the Authority is of the opinion that continuation of the measure is required against imports from Korea. The Authority therefore recommends continuation of the existing duty (as notified vide customs Notification no. 78/2005- Customs dated 01.09.2005 and as amended vide notification no. 11/2007- Customs dated 31.01.2007) in respect of both cooperative and non cooperative exporters from Korea RP as is in place as on date. As LG has also cooperated in the sunset review proceedings, they will be treated at par with another cooperating exporter namely KKPC. Accordingly, the duty recommended is US \$ 38.73 per MT for cooperating exporters namely KKPC and LG and US\$ 362.75 per MT for other non cooperating exporters of Korea RP."

(iii) DA in initiation of Sunset Review (3) of anti-dumping duty in respect of impugned goods i.e., NBR on 31.12.2013, issued final findings on 30.06.2015 had imposed ADD amount of US \$ 57 per MT on exported by KKPC; further, in the final findings providing DA's recommendations in F. No. 7/5/2020-DGTR dated 24.11.2020, the DA had recommended US \$ 47.43 per MT on impugned goods exported by KKPC.

On careful perusal of the comprehensive details about the anti-dumping investigations conducted by the Designated Authority/DGAD, it clearly transpires that the recommendations made in the final findings dated 04.10.2008, demonstrate that the ADD amount of anti-dumping duty recommended is only US \$ 38.73 per MT for co-operating exporters namely M/s Korea Kumho Petro Chemical Co. Ltd., Seoul, Korea (KKPC) during the disputed period.

9.4 On the basis of the above detailed discussions in the previous paragraphs, and the statutory position mandated by Section 9A of the Act of 1975, I am of the considered view that the Notification No.11/2007-Customs dated 31.01.2007 issued by the Ministry of Finance in pursuance of the acceptance of the order of the Tribunal in the *Apar Industries* (supra) by the Designated Authority in the Ministry of Commerce (i.e., Director General of Trade Remedies, Department of Commerce) prescribing ADD amount for entry at S. No. 1 as "US \$ 38.73 per M.T." by amending the amount of ADD at "US \$ 138.39 per M.T." in Notification No. 78/2005-Customs (ADD) dated 01.09.2005, has the retrospective effect. Consequently, the amount of ADD paid by the appellants over and above the ADD liable to be paid in terms of the notification(s) issued under the Act of 1975, is refundable in terms of Section 27 of the Customs Act, 1962. Inasmuch as there is no dispute on the amount of refund claimed by the appellants in respect of eight B/Es, being the excess paid ADD, I am also of the considered view that the refund of Rs.5,56,513/- is admissible under Section 27 *ibid*. Therefore, I am of the considered view, that the impugned order is contrary to the factual position of the case as discussed above and on this ground, it is liable to be set aside.

10. As regards the question about the refund of Rs.5,56,513/- being the excess ADD paid by the appellants, whether it is refundable to the Consumer Welfare Fund or to the appellants, the question of 'unjust enrichment' angle is required to be examined. In order to decide whether, the incidence of duty in respect of excess ADD paid by the appellants-importer had not been passed on to any other person, the factual position duly evidenced by

Balance Sheet(s), certificate from Chartered Accountant and Other supporting records, if any, requires to be examined by the Original Authority as provided in Section 27 *ibid*.

11. The issue of refund under the indirect tax statute has been dealt with in detail by the Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd. Vs. Union of India* – 1997 (89) E.L.T. 247 (S.C.). In the judgement delivered on 19.12.1996, the Hon'ble Supreme Court had elaborated the various situations in which the refund of duty/tax arises and how the question of unjust engagement has been addressed. The relevant paragraph of the said judgement is extracted and given below:

"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 emphasise 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) **Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional**, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.*

*Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the **Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account**. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.*

(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) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment of levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

(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) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(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) The decision of this Court in Sales Tax Officer, Benaras v. Kanhaiyalal Mukundlal Saraf [1959 S.C.R. 1350] must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiyalal have also been wrongly decided to the above extent. This declaration - or the law laid down in propositions (i) to (vii) above - shall not however entitle the

State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any Authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an Authority, Tribunal or Court or otherwise.

(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) Section 11B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners [[1992 \(61\) E.L.T. 321 \(SC\)](#) = 1992 (4) S.C.C. 389] and Union of India v. I.T.C. [[1993 \(67\) E.L.T. 3 \(SC\)](#) = 1993 Suppl. (4) S.C.C. 326] have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act [September 19, 1991], they cannot be re-opened and/or governed by Section 11B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the Appellate Authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(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."

12. I also find that the Hon'ble Madras High Court in the case of *Mehler Engineered Products India Private Limited Vs. Union of India* in W.P. No. 13656-13657 of 2017 having identical set of facts have examine the issues and delivered their judgement dated 21.06.2018, by holding that Notification issued subsequent to the original notification substituting the chapter heading is retrospective in nature. The relevant paragraphs in the said judgement is extracted and given below:

"8. *To be noted that the notification uses the word 'substituted'. The word 'substituted' has been used to mean that wherever in the notification dated 21-10-2015, the Entry 5402 occurs, it shall be substituted with Entry 5402 47.*

9.1 *The Hon'ble Supreme Court in the case of Zile Singh v. State of Haryana reported in 2004 (8) SCC 1 laid down four factors which are relevant to answer the question as to whether the legislature had sufficiently expressed that intention given in the statute retrospectivity they being (a) general scope and purview of the statute; (b) the remedy sought to be applied (c) the former state of the law; and (d) what it was the legislature contemplated. This decision has been followed in the case of Commissioner of Income Tax I, Ahmedabad v. Gold Coin Health Food Private Limited reported in 2008(9) SCC 622.*

9.2 *Thus, the Court while deciding whether a statute is clarificatory or declaratory has to consider the same by taking note of the above mentioned four factors. In the absence of retrospective operation having been expressly given the Courts are entitled to construe the provision and answer the question whether the legislature had an intention to give the statute retrospective operation.*

9.3 *More or less an identical question came up for consideration before the High Court of Karnataka in Commissioner of Central Excise and Sales Tax, Bangalore v. Fosroc Chemicals (India) Pvt. Limited reported in [2015 \(318\) E.L.T. 240 \(Kar.\)](#), the Court took note of the decision of the Hon'ble Supreme Court in Shanmarao V. Parulekar v. The District Magistrate, Thane, Bombay and Others reported in AIR 1952 SC 324 which dealt with the scope of substitution of a provision by way of amendment held as under :-*

"When a subsequent Act amends an earlier one in such a way as to incorporate itself or a part of itself into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words has been written into the earlier Act with pen and ink and the old words scored out so that there is no need to refer to the amending Act at all".

9.4 *In Shyam Sunder & Others v. Ram Kumar & Another reported in AIR 2001 SC 2472, the Hon'ble Supreme Court while dealing with the question whether a substituted provision necessarily mean the amended provision is retrospective in nature, held as follows :-*

"A substituted section in an Act is the product of an amending Act and all the effects and consequences that follow in the case of an amending Act the same would also follow in the case of a substituted section in an Act."

9.5 In the case of *Government of India v. Indian Tobacco Association* reported in [2005 \(187\) E.L.T. 162 \(S.C.\)](#) while dealing with the exemption notification which was issued by way of substitution, it was held as follows :-

"15. The word 'substitute' ordinarily would mean 'to put (one) in place of another' or 'to replace'. In *Black's Law Dictionary, Fifth Edition* at page 1281, the word 'substitute' has been defined to mean 'to put in the place of another person or thing' or 'to exchange'. In *Collins English Dictionary*, the word 'substitute' has been defined to mean to serve or cause to serve in place of another person or thing; 'to replace (an atom or group in a molecule) with (another atom or group); or 'a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague'.

16. By reason of the aforementioned amendment no substantive right has been taken away nor any penal consequence has been imposed. Only an obvious mistake was sought to be removed thereby.

17. There cannot furthermore be any doubt whatsoever that when a person is held to be eligible to obtain the benefits of an exemption notification, the same should be liberally construed."

10. The legal principles deducible from the above decisions is that if subsequent Act amends an earlier one in such a way as it incorporate itself or a part of itself into the earlier, the Act must be construed as 'retrospective'. This is so, because, the word "substituted" would mean 'to put one in the place of another' or 'to replace'. Thus, on account of such substitution whatever consequences which have to follow would naturally be applicable to the assessee by such substitution. Thus, notification dated 22-2-2016 in Notification No. 51 of 2016-Cus.(ADD) having substituted Entry 5402 47 in the notification dated 21-10-2015 bearing Notification No. 51 of 2015, it would mean that the Entry in the Notification dated 21-10-2015 shall be 5402 47 for all purpose and it shall be so with effect from 21-10-2015.

11. The Learned Counsel for the Revenue vehemently contended that the product classification is indicative only and is in no way binding on the anti-dumping duty investigation. In the instant case, the question of considering this submission does not arise, in the light of the Notification No. 5 of 2016, dated 22-2-2016, which clearly states that it is a notification issued in substitution of the earlier notification. Therefore, the proper reading of Notification No. 51 of 2015, dated 21-10-2015 is to read the Entry as 5402 47.

12. Thus, for the above reasons it is held that the Notification No. 5 of 2016, dated 22-2-2016 being substitutive in nature is held to be retrospective.

13. The Learned Counsel for the Revenue submitted that the writ petitions should not be entertained and the petitioner should be relegated to avail the alternative remedy as no question of law involved.

14. Since the Court has been called upon to adjudicate the effect of the notification, there is substantial question of law involved and therefore, the Court deems it proper not to relegate the petitioner to avail the appeal remedy as the scope of interpretation of the notification as to whether it is retrospective or not by an appellate authority is very limited.

15. *For the above reasons, Writ Petition No. 13656 of 2017 is allowed and the respondent is directed to consider and sanction refund claim made by the petitioner as expeditiously as possible, preferably, within a period of three months from the date of receipt of a copy of this order.*

16. *For the reasons set out and the findings rendered in the preceding paragraph, the order-in-original dated 22-3-2010 is held to be not sustainable. Accordingly, the same is set aside. Consequently, it is held that the petitioner, who has imported products classifiable under Chapter Heading - CTH 5402 20 90, is not liable for payment of anti-dumping duty on the subject goods. In the result Writ Petition No. 13657 of 2017 is allowed. No costs."*

13. I further find that the judgement of the Hon'ble Supreme Court delivered in the case of *Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited*, in Civil Appeal No.8750 of 2014 relied upon by the learned AR is not relevant to the present case, inasmuch as the facts in the relied upon case are entirely different from the facts of the present case before me. In the referred case, three different types of amendments were introduced in the Income Tax viz., prospective amendment with effect from (w.e.f.) a fixed date, retrospective amendment w.e.f. a fixed anterior date and clarificatory amendments which are retrospective in nature, through issued in the Finance Bill, 2002. In the context of levy of surcharge on block assessment is concerned, it was introduced by insertion of a proviso clause to Section 113 vide Finance Act, 2002 with effect from 01.06.2002. In this case, the facts of the case are that 'Notes on Clauses' appended to Finance Bill, 2002 while proposing the insertion of proviso categorically stated that this amendment will take into effect from 01.06.2022. Therefore, it was held in that case that levy of surcharge on block assessment year was having prospective effect. However, in the facts of the case before me, the amount of duty to be imposed as Anti-dumping duty is determined on the basis of 'margin of dumping' which was correctly determined as US \$ 38.73 per M.T., instead of incorrectly determined amount initially at US \$ 138.39 per M.T. and the mistaken was rectified by way of substitution vide issue of Notification No.11/2007-Customs dated 31.01.2007. Therefore, the facts of the present case is entirely on different footing and the above referred case cited by the learned AR is not applicable here. Further, it is also been held in the said judgement dated 15.09.2014 by the Hon'ble Supreme Court that if a concerned provision of taxing statute is ambiguous and vague and is susceptible to two interpretations, then the interpretation which favours the subjects, as against there the revenue, has to be preferred.

14. In view of the foregoing discussions and on the basis of the judgements of the higher judicial forum delivered on the disputed issue, I hold that the impugned order is liable to be set aside, as it had denied refund of an amount of Rs.5,56,513/- being the excess Anti-Dumping Duty (ADD) in eight B/Es over and above the ADD applicable at US \$ 38.73 per M.T. as mentioned in Notification No.11/2007-Customs dated 31.01.2007, issued by the Ministry of Finance. Further, on the basis of the above discussions in preceding paragraphs, I am also of the considered view that Notification No.11/2007-Customs dated 31.01.2007 substituting the amount of ADD as mentioned in Notification No. 78/2005-Customs (ADD) dated 01.09.2005 has retrospective effect, since the same has been issued in acceptance of the order of the Tribunal in the case of *Apar Industries* (supra) and the Designated Authority in the Ministry of Commerce (i.e., Director General of Trade Remedies, Department of Commerce) had also recommended for consequential change in the Ministry of Finance notification imposing the ADD on the impugned goods. However, as the question of unjust enrichment has not been examined by the authorities below and in order to consider refund of the excess duty paid, I am of the considered view that this issue is required to be examined by the Original Authority. Therefore, I consider it necessary to remand the case for the limited purpose of examining the unjust enrichment angle by the Original Authority as provided in Section 27 *ibid* and decide the amount of refund of Rs.5,56,513/- on account of excess ADD paid, either to be credited to the Consumer Welfare Fund, or, to the appellants, as may be decided therein. Needless to state that reasonable opportunity for hearing shall be given to the appellants by the Original Authority and he shall also consider the documents to be submitted by the appellants before him for enabling to take appropriate decision on the matter, being remanded back to him.

15. In the result, the impugned order dated 24.05.2022 is set aside and the appeal filed by the appellants is partly allowed in favour of the appellants by way of remand to the original authority for the limited purpose as discussed in paragraph 14 above.

(Order pronounced in open court on 22.08.2025)

(M.M. Parthiban)
Member (Technical)