

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.388 OF 2016

M/s. CMS Info Systems Limited
a Company, incorporated under the
erstwhile Companies Act, 1956, having
their registered office at 11th Floor,
Silver Metropolis, W.E. Highway,
Goregaon (East),
Mumbai – 400 063.

.... Petitioners

- Versus -

1. The Union of India
Ministry of Finance, North Block,
New Delhi – 110 001.
2. The Central Board of Excise & Customs,
Ministry of Finance, North Block,
New Delhi – 110 001.
3. The Commissioner of Customs
JNPT, Nhava Sheva, Uran, Dist:
Raigad, Maharashtra-400 707.
4. The Assistant Commissioner of Customs
(Refund), Refund Section Customs
House, JNPT, Nhava Sheva, Uran,
Dist: Raigad, Maharashtra- 400 707.

.... Respondents

Mr. M.H. Patil with Mr. Sachin Chitnis & Ms Aparna
Hirandagi for the Petitioners.

Mr. Pradeep S. Jetly for the Respondents.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : DECEMBER 19, 2016

ORAL JUDGMENT : (Per Shri S.C. Dharmadhikari, J.)

1. By this petition under Article 226 of the Constitution of India, the petitioners pray for issuing a writ of certiorari or any other appropriate writ, order or direction calling for the records pertaining to the applicability of Notification No.93/2008-Cus, dated 1-8-2008, and on a perusal and scrutiny thereof be further pleased to quash and set aside the stipulation thereunder fixing the time limit of one year for filing of refund claim from the date of payment of Special Additional Duty of Customs (SAD). This further Notification of 2008 amended Notification No.102/2007-Cus, dated 14-9-2007, on the file of respondent Nos.3 and 4.

2. The petitioners, therefore, pray that this Notification be declared as null and void and ultra vires Article 14 of the Constitution of India.

3. As a consequence, by a writ of mandamus, the writ petitioners seek a a direction to respondent Nos.3 and 4 to consider their refund claim independent of condition (c) of para 2 of Notification No.102/2007-Cus, dated 14-9-2007, as amended by Notification No.93/2008-Cus, dated 1-8-2008.

4. The petitioners, therefore, submit that the refund application be directed to be taken on file and proceeded in accordance with law. This writ petition has been filed on 15-12-2015 in this Court.

5. Since we have heard both sides in great detail at the stage of admission, we grant **rule**. The respondents waive service. By consent, rule is made returnable forthwith.

6. We have to set out a few facts to appreciate the contention of the learned counsel appearing for the petitioners. The petitioners are a Company incorporated under the Companies Act, 1956. The respondents are the authorities under the Customs Act, 1962 (for short, "the said Act").

7. The petitioners state that they are engaged in import of Automatic Teller Machines (ATMs). They are clearing the same for installation to State Bank of India, as per the periodical orders by the State Bank of India. Thus, what is projected is that this Automatic Teller Machine (ATM) is a computerised machine that permits the Bank customers to gain access to their accounts with a magnetically encoded plastic card and a code number. It enables the customers to perform several banking operations without the help of a Teller, such as to withdraw cash, make deposits, pay bills, etc.. The Reserve Bank of India, in terms of its authorisation and permission, has been insisting that every Bank to install such ATMs. Therefore, the petitioners engaged itself in the import, distribution, sale and installation of ATMs primarily to State Bank of India. The petitioners have entered into an agreement with State Bank of India, Mumbai, on 23-8-2013. In the light of this agreement and the subsequent confirmed order from the State Bank of India that the petitioners approached a party abroad. The petitioners imported from that party, based in Seoul, South Korea, 7843 numbers of Cash

Dispensers and 742 Cash Deposit Machines, out of which 3307 machines were imported at JNPT Port, Nhava Sheva. These machines were imported and cleared from JNPT Customs on payment of all applicable customs duties, including Basic Customs Duty, Additional Customs Duty and Special Additional Customs Duty. This last duty shall be terms as “SAD” for short. The writ petition concerns only this SAD.

8. The petitioners rely upon the first Notification No.102/2007, dated 14-9-2007, which exempts goods in the First Schedule of the Customs Tariff Act, 1975 (for short, “CTA”) from the whole of SAD leviable under Section 3(5) of the CTA. The petitioners fairly state that the exempted goods when imported into India for subsequent sale are exempt on fulfillment of certain conditions. The petitioners submit that though they have imported and cleared all the goods from the JNPT Customs, the subsequent movement of these machines is not in their control. That is restricted by the agreement dated 23-8-2013. The Local Head Office of the State Bank of India has to place local purchase order on the petitioner-company, who, in

turn, will supply the goods to State Banks, spread over various States in India and then remove to individual sites the imported goods in accordance with the information given by State Bank of India. Thus, depending upon the availability of the sites, these machines are installed thereafter. It is in these circumstances that post-import the further events are not within the control of the present petitioners.

9. The petitioners highlight in the writ petition that the intention of such duties (SAD) is to counter-balance the sales tax/value added tax, etc., leviable on like goods sold in India. If such goods are produced indigenously, then, their sale has to attract all the above duties. Therefore, the exemption under Section 25(1) of the said Act from SAD is conditional upon subsequent sale. It is submitted that the petitioners are liable to pay all duties at the time of import of the goods. The petitioners, who are the importer of the goods, while issuing the invoice for sale of the goods, specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of Section 3 of the

CTA shall be admissible. The petitioners have to file a claim for refund of the additional duty paid on the imported goods. However, unless and until there is an evidence of sale, the petitioners would not be able to comply with the terms and conditions of the exemption Notification and avail of the exemption. The goods have to be sold and then alone the petitioners can be called upon to pay the sales tax/value added tax. Therefore, in the event of sale, documents evidencing the payment of sales tax/value added tax would enable the petitioners to avail of the exemption. The sale of the exempted goods is thus a precondition and until that is complied, refund cannot be obtained.

10. It is in this regard that the stipulation with regard to time is questioned by urging that the period of one year stipulated from the date of import presupposes that the goods can be sold within this period. It is not possible to gauge the market condition prevailing at the particular time. Therefore, the subsequent sale is the triggering point for refund and that is not within the control of the petitioners. There cannot be,

therefore, a unreasonable condition to obtain refund. If such conditions as are unreasonable, unfair and unjust are allowed to control the benefit of the exemption Notification, particularly refund, to the extent such stipulation disentitles the petitioners to avail of the exemption Notification, that must be struck down. That must be struck down as ultra vires Article 14 of the Constitution of India. The petitioners rely upon the fact that from September, 2013 to January, 2014, the bills of entries vide which the ATMs were imported, are on record. Thereafter, the petitioners in terms of their contract with the State Bank of India have to await the supply and installation orders. That order comes from each branch of the State Bank of India. These branches are spread across the entire country. Therefore, the ATMs to be sold takes time and depending upon the further events and developments.

11. It is only on completion of transaction of sale and payment of sales tax/value added tax that the petitioners sought to file the refund claim. The petitioners sought refund of additional duty paid under the bills of entry in proportion to

actual supplies effected. The refund was for the sum of Rs.1,43,76,435/-. The refund application filed with respondent No.4 was not taken on record as being beyond the period of limitation stipulated in the Notification. The petitioners were forced to submit this application then to respondent No.3. In the light of the Notification and which till 2008 did not have any time limit, but inserted it thereafter, that the refund application has not been processed. This has deprived the petitioners of the benefit of the exemption Notification.

12. To the extent above, the Notification is challenged and impugned in the writ petition.

13. Mr. Patil, learned counsel appearing on behalf of the petitioners, would submit that if the refund application is to be filed within one year from the payment of SAD but the import is for subsequent sale and even exemption is on that term being satisfied, then, that period of one year cannot commence unless and until the goods are sold. Mr. Patil has taken us through the Notification dated 14-9-2007 and its amendment vide the

further Notification dated 1-8-2008. He would submit that the Central Government, on being satisfied that it is necessary in the public interest so to do, exempted the goods falling within the First Schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under Section 3(5) of Section 3 of the CTA. But the exemption Notification contains several conditions. So far as conditions 2(a) and 2(b) are concerned, there is no complaint. The condition 2(c) requires a claim for refund to be filed with the Jurisdictional Customs Officer before the expiry of the period of one year from the date of payment of the additional duty of customs. Mr. Patil's argument is that the Notification does not end here. It also contains two other conditions being condition 2(d) and condition 2(e). The first requires the importer to pay on the sale of goods appropriate sales tax or value added tax, as the case may be, and to provide along with copies of the documents falling within condition 2(e) (i) to (iii) of the Notification so as to entitle the importer to claim refund. Therefore, it is apparent that it is a sale and

subsequent to the import which is contemplated by the Central Government. It is on that event taking place that the exemption can be availed of. The petitioners and parties like them have no control over the market conditions. Therefore, the period of limitation should never and can never be intended to commence from the date of payment of Special Additional Duty of Customs but it must commence from the date of sale of the goods. That would be a reasonable and proper stipulation. However, condition 2(c) freezes the entitlement of refund and no refund application can be filed after the period of one year from the date of payment of the SAD. It is in these circumstances that Mr. Patil would submit that the stipulation or condition is wholly unreasonable, unfair, unjust and violates the mandate of Article 14 of the Constitution. It completely negates the effect of the exemption.

14. Mr. Patil places reliance upon a Judgment of a Division Bench of the High Court of Delhi in the case of **Sony India Pvt. Ltd Vs. Commissioner of Customs, New Delhi**, reported in 2014 (304) E.L.T. 660 (Del.). He also placed

reliance upon a Judgment following this and rendered once again by the High Court of Delhi in the case of **Pee Gee International Vs. Commr. of Cus. (ICD), Tughlakabad, New Delhi**, reported in 2016 (343) E.L.T. 72 (Del.). Mr. Patil would submit that once such a stipulation, as is impugned in the present petition, is found to be discriminatory, unfair and *ultra vires* as above, the respondents cannot rely upon the same. Though the view taken by the High Court of Delhi has only persuasive value, yet, Mr. Patil would submit that the interpretation placed on the provisions of the Act and the exemption Notification by the High Court of Delhi is the only possible interpretation.

15. The interpretation is placed by invoking the doctrine that law does not compel a person to perform an impossible obligation or comply with an impossible condition. Mr. Patil has also brought to our notice the fact that a Special Leave Petition was filed by the Revenue to challenge the Judgment of the High Court of Delhi in **Sony India's** case (*supra*), but even that was dismissed.

16. It is in these circumstances that it is submitted by him that the refund application be directed to be processed. After conclusion of the hearing on the earlier occasion and before we were to commence dictation of Judgment, Mr. Patil sought to rely upon a Division Bench Judgment of this Court in the case of **Weikfield Products Company (India) Pvt. Ltd. Vs. Union of India**, reported in 1991 (51) E.L.T. 323 (Bom.).

17. On the other hand, Mr. Jetly, appearing for the Revenue, would submit that only two importers are seeking to impugn and question the terms and conditions in the exemption Notification. There is no vested right in matters of exemption/relaxation and if at all there is an exemption from the payment of tax or duty and if that is conditional, then, no assessee can argue that he would be entitled to the exemption but not bound by the terms and conditions. The terms and conditions based on which exemption is granted, cannot be ignored and brushed aside to claim the exemption. In the present case, Mr. Jetly relies upon the substantive provisions of the said Act. Mr. Jetly

submits that the power to grant refund does not flow from the exemption Notification. That is a substantive power carved out by Section 27 of the Customs Act, 1962. Mr. Jetly would submit that the view taken by the Hon'ble High Court of Delhi ignores Sections 17, 25, 27(1) and 46 of the said Act. The limitation is imposed by Section 27(1) and the period of limitation therein remains unchallenged. Mr. Jetly emphasised the difference in the language of sub-section (1) and sub-section (2) of Section 25. He would submit that the Notification in question cannot extend the period to claim refund. Neither the Customs Tariff Act, 1975 or the Notification or any other law provide for refund. It is the substantive Customs Act, 1962 which provides for the same. In these circumstances, a conditional exemption and consistent with the power conferred by Section 27 of the said Act cannot be said to be unreasonable, unfair, unjust, arbitrary and discriminatory at all. None can insist on a refund. None can insist that a refund application whenever and wherever filed should be considered and decided on merits. For all these reasons, he would submit that this Court cannot be

held to be bound by the view of the Hon'ble High Court of Delhi. That view, with great respect, according to Mr. Jetly, cannot be sustained. For this reason, he would submit that there is no merit in the writ petition and it deserves to be dismissed.

18. For properly appreciating the rival contentions, we must refer to some of the provisions of the Customs Act, 1962. It is an Act to consolidate and amend the law relating to customs. The Act aims to sternly and expeditiously deal with smuggled goods and to curb such tendency and prevent revenue leakage. That is how this Act and its provisions have been interpreted by the Hon'ble Supreme Court of India in the case of **Commissioner of Customs (Preventive) Vs. M. Ambalal & Co.**, reported in (2011) 2 SCC 74. Some of the paragraphs of this judgment are extremely relevant for our purpose. They read as under :

“10. The Customs Act, 1962 is an Act to consolidate and amend the law relating to Customs. The object of the Act is to regulate the import and export of goods, into and from the shores of India, or otherwise, and determine the customs duty payable. It also attempts to fill the lacunae of the previous customs legislations viz. the Sea Customs

Act and the Land Customs Act. It also aims to counter the difficulties that have emerged over the years due to the changing economic and financial conditions; amongst them it proposes to tackle the increasing problems of smuggling both in and out of the country. The Act aims to sternly and expeditiously deal with smuggled goods, and curb the dents on the revenue thus caused. In order to deal with the menace of smuggling, the authorities are enabled to detect, conduct search and seizure, and if necessary, confiscate such smuggled goods, within the territory of India.

... ..

16. It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. The rule regarding exemptions is that exemptions should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. This composite rule is not stated in any particular judgment in so many words. In fact, majority of judgments emphasize that exemptions are to be strictly interpreted while some of them insist that exemptions in fiscal Statutes are to be liberally interpreted giving an apparent impression that they are contradictory to each other. But this is only apparent. A close scrutiny will reveal that there is no real contradiction amongst the judgments at all. The synthesis of the views is quite clearly that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. The two go very well with each other because they relate to two different sets of circumstances.

17 The notification issued by the Central Government in exercise of the powers conferred by Section 25(1) of the Act exempts the articles enumerated in the Table annexed when imported into India from payment of duty under the Act. The language used in the notification is plain and unambiguous. Therefore, we are required to consider the same in their ordinary sense. A construction which permits one to take advantage of one's own wrong or to impair one's own objections under a Statute should be disregarded. The interpretation should as far as possible be beneficial in the sense that it should suppress the mischief and advance the remedy without doing violence to the language. From the wording of the above exemption notification, it is clear that the benefit of the exemption envisaged is for those goods that are imported.”

The term “bill of entry” is defined in Section 2(4) to mean a bill of entry referred to in Section 46. Then, the definition of the terms “dutiable goods” and “duty” is relevant. Dutiable goods means any goods which are chargeable to duty and on which duty has not been paid. The term “duty” is defined in Section 2(15) to mean a duty of customs, leviable under the Act. The term “import” is defined with its grammatical variations and cognate expressions to mean bringing into India from a place outside India. Imported goods mean any goods brought into

India from a place outside India but does not include goods which have been cleared for home consumption. The definition of the term “importer” in Section 2(26) is also relevant. The earlier definitions in Section 2, Clauses (23) and (25) are not relevant for our purpose. “Proper officer”, in relation to any functions to be performed under this Act means the officer of customs who is assigned those functions by the Board {Section 2(34)}. The words “tariff value” are defined in Section 2(40). The word “value” is defined in Section 2, Clause 41.

19. Chapters II and III of the said Act contain provisions about the classes of officers of customs, appointment of customs ports, airports, etc.. Chapter IV enlists the prohibitions on importation and exportation of goods. Chapter IV-A enables detection of illegally imported goods and prevention of the disposal thereof. Chapter IV-B deals with prevention or detection of illegal export of goods. Chapter IV-C contains Section 11-N which confers power to exempt from the provisions of Chapters IV-A and IV-B. Then comes Chapter V which is titled, levy of, and exemption from, customs duties and it contains Sections 12

to 28-BA. Section 12 deals with dutiable goods whereas Section 13 deals with duty on pilfered goods. Section 14 speaks of valuation of goods and Section 15 the date for determination of rate of duty and tariff valuation of imported goods. Section 15, to the extent relevant, reads thus:-

**“15. Date for Determination of Rate of Duty and
Tariff Valuation of Imported Goods. –**

(1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force, -

(a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse under section 68, on the date on which the goods are actually removed from the warehouse;

(c) in the case of any other goods, on the date of payment of duty :

Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.

(2) The provisions of this section shall not apply to baggage and goods imported by post.

Sub-section (1), states that the rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force. In the case of goods entered for human consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section and in the case of goods cleared from a warehouse, the date stipulated vide clause (b) of sub-section (1) of Section 15. Section 16 contains a similar stipulation but in the case of export goods. Section 17 provides for assessment of duty in the case of goods imported and referable to Section 46. Section 18 enables provisional assessment of duty. Section 19 deals with determination of duty where goods consist of articles liable to different rates of duty. Section 20 which has been substituted by Act 32 of 1994 deals with re-importation of goods. Then Section 21 provides for dealing with goods derelict, wreck, etc., as imported goods. Section 22 provides for abatement of duty on damaged or deteriorated goods. Section 23 deals with remission of duty on lost, destroyed or abandoned goods. Section 24 confers power to make rules for denaturing or mutilation of

goods. Then comes Section 25 which reads thus:-

“25. Power to Grant Exemption from Duty. –

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from payment of duty, for reasons to be stated in such order, any goods, of strategic or secret nature, or for charitable purpose, on which duty is leviable.

(2-A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette, at any time within one year of issue of the notification under sub-section (1) or under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by

providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

(4) Every notification issued under sub-section (1) or sub-section (2-A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.

(5) ***

(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.

Explanation: "Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

(7) The mineral oils (including petroleum and natural gas) extracted or produced in the continental shelf of India or exclusive economic zone of India as referred to in section 6 and section 7, respectively, of the Territorial Waters Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, (80 of 1976) and imported prior to 7th day of February, 2002 shall be deemed to be and shall always be deemed to have been exempted from the whole of duties of customs leviable on such mineral

oils, and accordingly, notwithstanding anything contained in any judgment, decree or order of any Court, tribunal or other authority, no suit or other proceedings in respect of such mineral oils shall be maintained or continued in any Court, tribunal or other authority.

(8) Notwithstanding the exemption provided under sub-section (7), no refund of duties of customs paid in respect of the mineral oils specified therein shall be made.”

A bare perusal of sub-section (1) of Section 25 would show that the power to grant exemption from the duty is to be exercised in public interest. It is to be exercised by issuing a Notification in the Official Gazette. That must clearly indicate that goods may be exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the Notification. The goods of any specified description can be exempt from the whole or any part of duty of customs leviable thereon. Then comes sub-section (2), which has been substituted by Act 32 of 2003, which enables the Central Government and on being satisfied that it is necessary for the public interest so to do, issue a special order exempting from payment of duty, under circumstances of an exceptional nature

to be stated in such order, any goods on which duty is leviable. Then comes sub-section (2-A) which is inserted by Act 20 of 2002 with effect from 11-5-2002 and which enables clarifying the scope or applicability of any Notification issued under sub-section (1) or order issued under sub-section (2). Sub-section (3) states in clearest term that any exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable. Thus, this sub-section deals with exemption from a part of the duty of customs. Sub-section (4) states that every Notification issued under sub-section (1) or sub-section (2-A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette. We are not concerned with sub-sections (6), (7) and (8).

20. Then comes the power of refund which is to be found in Section 26. Section 26-A enables refund of import duty

in certain cases and then appears Section 27 which is titled as

“Claim for refund of duty”. That provision reads as under:-

“27. Claim for Refund of Duty. –

(1) Any person claiming refund of any duty and interest, if any, paid on such duty –

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him, may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs;

(a) 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, before the expiry of one year;

(b) in any other case, before the expiry of six months, from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application 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 and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991,

such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2):

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

Provided also that 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 or six months, as the case may be, shall be computed from the date of issue of such order.

Explanation I : For the purposes of this sub-section, "the date of payment of duty and interest, if any, paid on such duty", in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

Explanation II : Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.

(2) If, on receipt of any such application, the Assistant Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty 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 and interest, if any, paid on such duty as determined by the Assistant

Commissioner of Customs 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) the duty and interest, if any, paid on such duty paid by the importer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty 61] to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75;

(f) the duty and interest, if any, paid on such duty 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 and interest, if any, paid on such 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 or any Court or in any other provision of this Act or the regulations 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 clause (f) of the first 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.”

The various sub-sections of Section 27 have to be read together

and harmoniously with other sections of the Act so as to make a consistent whole of the enactment and the power to deal with refund application or claim for refund of any duty or interest. That the application shall be accompanied by such documents or other evidence 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. Sub-section (1-B) of Section 27 states, save as otherwise provided in the section, the period of limitation of one year shall be computed in the manner stated and set out therein. Thus the refund has to be claimed by making an application in such a form and manner as may be prescribed for such refund. The application has to be made 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. Mr. Jetly points to Section 46 and therefore we reproduce the same:-

“46. Entry of Goods on Importation. –

(1) The importer of any goods, other than goods intended for transit or transshipment, shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form:

Provided that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof

(a) to examine the goods in the presence of an officer of customs, or

(b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) A bill of entry under sub-section (1) may be presented at any time after the delivery of the import manifest or import report as the case may be :
Provided that the Commissioner of Customs may in any special circumstances permit a bill of entry to be presented before the delivery of such report:

Provided further that a bill of entry may be

presented even before the delivery of such manifest if the vessel or the aircraft by which the goods have been shipped for importation into India is expected to arrive within thirty days from the date of such presentation.

(4) The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.”

21. Section 46 falls in Chapter VII, titled as “Clearance of imported goods and export goods. The importer shall make entry thereof by presenting electronically to the proper officer a bill of entry for home consumption or warehousing in the prescribed form.

22. We find, on a harmonious reading of all provisions and right up to Chapter XIV that reliance by Mr. Jetly on the

same is well-placed. It is clear from a reading of these provisions that remission, concession, relaxation and exemption are statutorily recognised and accepted concepts. In case of exemption what is to be borne in mind is that the act of import of goods and the goods themselves being subject to import duty, generally that would have to be paid unless exempted. The exemption is therefore a departure and the payment is a rule. In the case of exemption which is conditional, then, even a condition of actual payment can be imposed. However, the exemption to be complete may then contemplate refund. Even with regard to refund conditions can be imposed and as a part and parcel of the exemption Notification itself. Mr. Patil does not dispute this power and flowing from the Act itself. He does not dispute that exemption cannot be claimed as a right. Equally, he does not dispute the principle that there is no vested right of refund. Eventually, everything must flow from the statute and the exercise of statutory power. That exemption can be conditional also, is undisputed. That the terms and conditions of the present exemption Notification have not been challenged,

save and except to the limited extent noted above is equally undisputed. The power of refund and the limitations prescribed for claiming it fell for consideration of the Hon'ble Supreme Court in the case of **Union of India & Anr. vs. Kirloskar Pneumatic Company Limited reported in AIR 1996 SC 3285 = 1997 (93) ELT 323**. Following paragraphs of the judgment are extremely relevant for our purpose :

“2. This appeal is directed against, what is called, "Minutes of the order" made by the Bombay High Court on 23rd June, 1995. The order reads:

"1. The Petitioners will file an application for refund, in respect of the consignments imported as referred to in this Petition, in the prescribed form as per the amended Section 27 of the Customs Acts 1962, within 2 weeks from today.

2. The Respondents will dispose of the aforesaid Refund Claim, *on merits*, within 10 weeks from the filing of the same.

3. The Respondents shall not reject the refund application on the ground that it is time barred.

4. The Petition is disposed of accordingly.

5. No order as to costs."

3. The Revenue is questioning the validity and correctness of Clause (3) of the said order whereby the High Court has directed the authorities under the Customs Act not to reject the respondent's application for refund on the ground that it is time barred and to dispose it of on merits.

6. In this appeal we are not concerned either with the maintainability of the writ petition or its merits. The only contention raised and which we are considering is whether the direction given by the High Court that the Customs Authorities "shall not reject the refund application on the ground that it is time barred", is valid in law. With respect we think that it is not.

9. [Section 27](#) of the Customs Act provides for claims for refund of duty. The section has been substituted by a new section by [Central Act 40 of 1991](#) (with effect from September 20, 1991). The amended [Section 27](#) severely curtails the right to refund but for the purpose of this appeal, it is not necessary to refer to that aspect. Suffice it to say that sub-sections (1) and (2) of [Section 27](#) (both before and after amendment) provide for filing an application for amendment within a period of six months of the payment of duty except in a case where it has been paid under protest. What is relevant herein is sub-section (4) of unamended [Section 27](#) and sub-section (3) of amended [Section 27](#). It would be sufficient if we set out the said sub-sections. Sub-section (4) of unamended [Section 27](#) read as follows:

"27(4) Save as provided in [section 26](#), no claim for refund of any duty shall be entertained except in accordance with the provisions of this section."

Sub-section (3) of amended [Section 27](#) reads thus:

"27(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the regulation made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2)".

10. According to these sub-sections, a claim for refund or an order of refund can be made only in accordance with

the provisions of [Section 27](#) which *inter alia* includes the period of limitation mentioned therein. Mr. Hidayatullah submitted that the period of limitation prescribed by [Section 27](#) does not apply either to a suit filed by the importer or to a writ petition filed by him and that in such cases the period of limitation would be three years. Learned counsel refers to certain decisions of this Court to that effect. We shall assume for the purposes of this appeal that it is so, notwithstanding the fact that the said question is now pending before a larger Constitution Bench of nine Judges along with the issue relating to unjust enrichment. Yet the question is whether it is permissible for the High Court to direct the Authorities under the Act to act contrary to the aforesaid statutory provision. We do not think it is, even while acting under [Article 226](#) of the Constitution. The power conferred by [Article 226/227](#) is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the [Customs Act](#), cannot be directed to ignore or act contrary to [Section 27](#), whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its power under [Article 226](#) or the power of a civil court. No such delegation or conferment can ever be conceived. We are, therefore, of the opinion that the direction contained in clause (3) of the impugned order is unsustainable in law. When we expressed this view during the hearing Mr. Hidayatullah requested that in such a case the matter be remitted to the High Court and the High Court be left free to dispose of the writ petition according to law.”

23. Now we proceed to reproduce the two Notifications:-

{Notification No.102/2007-Cus., dated 14-9-2007}

“Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales

Tax Paid by importer.- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, *inter alia*, provide copies of the following documents along with the refund claim:

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.

{Notification No.102/2007-Cus., dated 14-9-2007}"

{Notification No.102/2007-Cus., dated 14-9-2007 as amended by Notification No.93/2008-Cus., dated 1-8-2008}

“Exemption from special CVD to all goods imported for subsequent sale when VAT/Sales Tax Paid by importer.- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling within the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) when imported into India for subsequent sale, from the whole of the additional duty of customs leviable

thereon under sub-section (5) of section 3 of the said Customs Tariff Act (hereinafter referred to as the said additional duty).

2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:

(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, *inter alia*, provide copies of the following documents along with the refund claim:

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods.

3. The jurisdictional customs officer shall sanction the refund on satisfying himself that the conditions referred to in para 2 above, are fulfilled.

{Notification No.102/2007-Cus., dated 14-9-2007 as amended by Notification No.93/2008-Cus., dated 1-8-2008}"

24. The first notification grants exemption from Special counter-vailing duty to all goods imported for subsequent sale when VAT/sales tax is paid by the importer and equally the third condition is to be found in sub-clause (c) of Clause 2. There as well the exemption is in public interest and in relation to goods falling within the First Schedule to the CTA when imported into India for subsequent sale. That is providing for exemption from additional duties. Then, the further Notification is in relation to exemption from Special CVD to all goods imported for subsequent sale when Vat/Sales Tax is paid by the importer. That prescribes a period of one year for claiming refund and it is

that condition which is really challenged. Therefore, it is not as if no payment has to be made. The importer of the goods shall pay all duties including the said additional duty of customs, as applicable, at the time of importation of goods. Then, while issuing invoice for sale of the goods, the importer shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of Section 3 of the CTA shall be admissible. That the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the Jurisdictional Custom Officer. The second Notification purports to introduce and by re-wording clause 2(c) that the refund claim has to be filed with the Jurisdictional Customs Officer before the expiry of one year from the date of payment of the said additional duty of customs.

25. Mr. Patil has brought to our notice and fairly Sections 25 and 27 and equally Sections 1, 2 and 3 of the CTA, 1975. The CTA is an Act act to consolidate and amend the law relating to customs duties. Section 2 thereof states that the rates

at which duties of customs shall be levied under the Customs Act, 1962, are specified in the First and Second Schedules. Section 3 enables levy of additional duty equal to excise duty, sales tax, local taxes and other charges. That Section reads thus:-

“3. Levy of additional duty equal to excise duty.-

(1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article:

Explanation.— In this sub-section, the expression “the excise duty for the time being leviable on a like article if produced or manufactured in India” means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs and where such duty is leviable at different rates, the highest duty.

(2) For the purpose of calculating under this section, the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of

the Customs Act, 1962, be the aggregate of—

(i) the value of the imported article determined under sub-section (1) of section 14 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but not including the duty referred to in sub-section (1).

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or not] such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules for the purposes of sub-section (3), the Central Government shall have regard to the average quantum of the excise duty payable on the raw materials, components or ingredients used in the production or manufacture of such like article.

(5) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(6) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.”

26. A perusal of sub-sections (3) and (4) of this Section reveals that if the Central Government is satisfied that it is necessary in the public interest to levy on any imported article an additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature, then, it should proceed to act in terms of these sub-sections and levy an additional duty. Sub-section (5) enables counter-balancing by the above Act of sales tax, value added tax, local tax or any other charges.

27. By sub-section (6) of Section 3 it is clarified that the provisions of the said Act and the Rules and Regulations made thereunder, including those relating to drawbacks, refunds and

exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.

28. Therefore, though this Act enables the levy of the additional duty equal to excise duty, sales tax, etc., eventually it is an Act to consolidate and amend the law relating to customs duty. The duties which are levied have then to be specified and for effective and proper recovery. Even when there is any claim made for draw-back, refund and exemption, it is the substantive law, namely, the Customs Act, 1962 which would govern the field. Else no refund can be claimed.

29. The High Court of Delhi considered a claim which was raised by the appellant before it. It was involved in the import, distribution and sale of electronic and information technology products. The appellant secured the release of imported goods on payment of customs duty, including the basic customs duty, additional customs duty. The appellant relied on the same exemption notification. The appellant imported some

of the items as set out in para 3 of that Judgment and thereafter filed a refund claim. The refund claim was allowed in part. On appeal against the order passed by the Assistant Commissioner, the Commissioner of Customs (Appeals) rejected the appeal on the ground that the dates of payment of duty provided by the appellant in respect of four bills of entry were incorrect. The CESTAT upheld the findings of the Appellate Authority on the ground that the refund claims were time barred, having been filed beyond the period of one year from the date of payment mandated in the amended notification.

30. The very argument which was canvassed before us, namely, that the original exemption notification neither stipulated a time period within which the refund was to be claimed, nor it makes Section 27 of the Customs Act applicable to such claims. Secondly, since imports and payments of relevant customs duty were made when the original notification was in force and the amended notification had no retrospective effect, the appellant before the High Court of Delhi was entitled to refund of special additional customs duty.

31. It is in dealing with the first argument that the observations in paras 10, 11, 12, 13 and 14 have been relied upon. Then in para 17, the said High Court holds thus:-

“17. Plainly, therefore, Section 27 was understood as not applying to SAD cases, even though it was in the statute book for many years. Yet, with the introduction of the circular and then the notification (No.93), the Customs authorities started insisting that such limitation period which was prescribed with effect from 1-8-2008 (by notification) became applicable. There is a body of law that essential legislative policy aspects (period of limitation being one such aspect) cannot be formulated or prescribed by subordinate legislation. *Khemka and Co. (Agencies) Private Ltd. v. State of Maharashtra*, (1975) 35 STC 571 and other decisions are authority on the question that in matters which deal with substantive rights, such as imposition of penalties and other provisions that adversely affect statutory rights, the parent enactment must clearly impose such obligations; subordinate legislation or rules cannot prevail or be made, in such cases. The imposition of a period of limitation for the first time, without statutory amendment, through a notification, therefore could not prevail.”

32. On a perusal of these observations, it is apparent that the intent of the additional duties is to counter-balance the local taxes or other charges leviable on a like article. Then comes the aspect of exemption in relation to which the Hon'ble

High Court observes that the intent is to allow a refund of the special additional customs duty because the importer has suffered the incidence of SADC on import. That was meant to counter-balance the sales tax/VAT leviable on a like article in India. These very articles have been sold and the importer then has to bear the burden even of the sales tax/VAT on sale of these goods.

33. It is submitted that the Hon'ble High Court of Delhi has clearly opined and held that the provisions of the Customs Act on the rules and mechanism for refund are incorporated by reference in Section 3(5) of the CTA only "so far as may be" applicable. Since SADC is levied under Section 3(5) and that is refundable only on subsequent sale, then, no limitation period can possibly be imposed for advancing a refund claim. We have carefully perused the above observations and in the light of the analysis of the statutory provisions and the scheme of refund by us, with greatest respect, we are unable to agree with the High Court of Delhi on this point. The Rules and Regulations under the provisions of the Customs Act 1962, including those relating

to draw-back, refund and exemption shall so far as may be applied and this reveals that for the purposes of making a application seeking refund, its consideration, that Customs Act and its provisions are made applicable even to the Tariff Act and the duties mentioned thereunder. Therefore, a provision for drawback, refund and exemption from such duties can be made by relying on the Customs Act, 1962. The power to refund is to be found in section 27 of the Customs Act, 1962, and that was always there. The amendment to the notification introducing a limitation for seeking refund apart, section 27 with its condition of a limitation period was throughout on the statute book. That is the only provision enabling granting refund of any duty is undisputed. The notification granting exemption and under consideration in the case, enables claiming a refund of duty (SAD) but the power to grant it is in the substantive law. Precisely, that is the case herein. Further, we find that there is an exemption granted and which is conditional. The exemption being conditional, it is not permissible to pick and choose convenient conditions of the exemption Notification and leave

out those which to parties like the petitioners, appear to be onerous and excessive. We do not see how in the teeth of a clear provision in the exemption Notification can the assessee/petitioners before us contend that the exemption Notification is valid for everything else but when it comes to period of limitation therein, that is excessive or unfair, unjust and arbitrary. Once the exemption is conditional, then, all the conditions therein have to be complied with. If that provides for refund, but the application in that behalf is to be made within a specified period, then, that cannot be said to be excessive and arbitrary, far from being unfair, unjust and unreasonable. It cannot be termed illegal as well for the simple reason that subsection (1) of Section 27 of the Customs Act, 1962, which enables claiming of refund by making an application itself speaks of one year outer limit. That is never challenged, including in the present proceedings. That the period of one year commences from the payment of the duty. If that is how Section 27 is worded and every duty is included in its ambit and scope, then, an application seeking refund of the same has to

abide by it, including the bar of limitation contained therein. That is how consistent with that provision even the special exemption Notification carries the same stipulation or condition. We do not see how insistence on complying with it can be said to be imposing a unreasonable, unfair and unjust restriction. Once the nature of the right is considered, then, all the more we are unable to agree with Mr. Patil. There is no vested, much less absolute right in the petitioners to seek refund. Even a refund must be within the framework of the statute and admissible on the terms thereof. We are not inclined to agree with him that compliance with this period is calling upon the petitioner to do or perform something which is impossible. The exemption Notification does not impose any new condition as has been read into it. It grants the exemption from payment of duty conditionally. The exemption can be availed of provided the goods which are imported are subject to payment of duties which include all the duties that are referred to in both the enactment and the notification. If the import is for subsequent sale, then, that invoice must carry a stipulation that no credit for

the additional duty of customs shall be admissible. The importer thereafter can file a claim for refund of the additional duty of customs paid on the imported goods before the expiry of one year from the date of payment of additional duty of customs.

34. Mr. Patil would submit that the importer shall pay on sale of the said goods appropriate sales tax or value added tax, as the case may be, is equally a condition and further requirement is providing of copies of documents along with refund claim. Else, no refund is admissible. We are of the opinion that it is not possible to guess as to whether the refund application would be held to be non-maintainable purely on the grounds or for the reasons suggested. If it is made within a period of one year from the date of payment of the additional duty of customs, then, because there is no subsequent sale and the documents evidencing that, as also proof of payment of the sales tax or local taxes are required to be produced, that their production is also mandated in a particular period and within a particular time limit is not something which we are required to call upon and decide. We have before us a case of rejection of a

refund application simply because it was not filed within one year from the date of payment of the additional duty of customs. In such circumstances and when that stipulation is challenged, all that we can hold is that we are unable to agree, with greatest respect, with the view taken by the Hon'ble High Court of Delhi. With greatest respect, if the exemption can only be claimed within the statutory provisions and not beyond the same, such conditional exemption including the stipulation as above has not been challenged. Only one condition therein cannot be declared *ultra vires* because the petitioners desire to brush it aside. The petitioners have accepted the position that if this exemption Notification had not been issued in exercise of the statutory power, no exemption could have been claimed at all. In these circumstances, merely because a condition is imposed to file a refund application and which is in the nature of a time-bar or limitation, that cannot be held to be onerous, excessive and therefore *ultra vires* Article 14 of the Constitution.

35. We are of the view that it is entirely for the Central Government to take a decision with regard to exemption, the

conditions to be imposed therein and whether those conditions ought to be fulfilled within a time limit. These are matters best left to the Central Government. The Central Government having exercised the powers in terms of the statutory provisions, then, that must govern the whole field. Just as exemption flows from the power to exempt, equally the refund flows from the power to grant such refund and makes it admissible. Both powers flow from the statute, namely, the Customs Act, 1962. It is that statute and the other one which envisages levy, imposition and recovery of customs duties. It is that statute which grants an exemption therefrom but on conditions. Once the statutory scheme is understood in the proper perspective and as a whole, then, merely because the view taken by the Delhi High Court has not been interfered by the Hon'ble Supreme Court will not enable us to follow it. There, the discussion, with greatest respect, is short of all the above noticed provisions.

36. As a result of the above discussion, the writ petition fails. We also feel that the Judgment cited in the case of **Weikfield Products Company (India) Pvt. Ltd.**, copy of which

is handed over today, has no application to the facts and circumstances of the present case. There the Government of India published a notification exempting drinking chocolate powder from whole of excise duty for the first 20 metric tonne clearance provided the total clearance during the financial year is 40 metric tonnes. For the Financial Year March 1, 1973 to March 31, 1974 the company cleared the goods and paid excise duty at full rate. At the end of the financial year, the company had not cleared goods in excess of 40 metric tonnes and therefore was entitled to take advantage of the exemption notification. That is how a refund application was filed. That was partly allowed. The order passed by the Assistant Collector was confirmed in appeal and the matter was carried before the Government of India, Ministry of Finance, Department of Revenue, invoking its revisional jurisdiction. That was also dismissed.

37. It is in such circumstances, the argument that the right to claim exemption accrues only at the end of the financial year and in that case on 1-4-1974. It is not in dispute that the

refund application was filed on 30-11-1974 and therefore could not have been rejected, particularly on the ground of limitation. The argument on behalf of the Revenue was that the petitioner should have paid the duty during the financial year under protest. That having not been done, there was no obligation to refund the entire amount, as claimed.

38. In dealing with such an argument the Division Bench held that there is no such stipulation or condition in the exemption Notification. If the manufacturer could claim exemption only at the end of financial year, then, that could not have been denied on the specious plea, as noted by the Division Bench.

39. Mr. Patil, appearing before us, draws support from all the Judgments cited and essentially on the reasoning that refund in the present case could be claimed only after the subsequent sale of the imported goods. If they had not been sold, the refund could not have been claimed at all. If the exemption Notification grants an exemption in the manner

noted by us, then, it could have been granted only in that mode and not another. In the present case, the exemption Notification states that the importer shall file a claim for refund on the additional duty of customs paid on the imported goods before the expiry of one year from the date of payment of additional duty of customs. The exemption is granted from the payment of this additional duty. That can be availed of provided the goods are imported into India for subsequent sale. However, all the conditions envisage first payment, second a stipulation that when such goods are sold, invoice must indicate that no credit for this additional duty of customs shall be admissible. Thirdly, if at all a refund claim is to be laid, it must be filed within one year from the date of payment. Only in these circumstances and if the goods are sold, the payment of tax as required has to be evidenced as also to its proof produced would not mean that we can override other conditions. Pertinently, it is not regarding all the conditions but only with regard to the limitation that this argument of Mr. Patil is canvassed. Even when the Notification was first issued on 14-9-2007 there may not have been a

stipulation with regard to the period for refund, but the clause was that the refund claim shall be filed within the Jurisdictional Customs Officer. The power to consider that refund claim and grant it, if permissible, is traceable to Section 27 of the Customs Act, 1962. Therefore, it was impossible to ignore the statutory bar and contained in sub-section (1) of Section 27 at any time.

40. All the more, therefore, the reliance on the Division Bench Judgment in the case of Weikfield Products Company (India) Pvt. Ltd. (supra) is misplaced.

41. On account of the foregoing discussion, the writ petition is dismissed. Rule is discharged. There will be no order as to costs.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)