

In the High Court of Judicature at Madras

Dated : 18.3.2021

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

And

The Honourable Ms.Justice R.N.MANJULA

Civil Miscellaneous Appeal No.2898 of 2014

M/s.Mahanadi Coalfields Ltd.,
Orisa

...Appellant

Vs

1.The Customs, Excise and Service
Tax Appellate Tribunal, Chennai-6.

2.The Commissioner of Central Excise,
Central Excise Building, Bibikulam,
Madurai.

...Respondents

APPEAL under Section 35G of the Central Excise Act, 1944 against Final Order No.40163/2014 dated 03.1.2014 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, Chennai.

For Appellant : Mr.T.Ramesh

For Respondent-2 : Mr.T.Pramod Kumar Chopda, SSC

Judgment was delivered by T.S.SIVAGNANAM,J

This appeal filed, by the assessee under Section 35G of the Central Excise Act, 1944 (for short, the Act), is directed against the order dated 03.1.2014 in Final Order No.40163/2014 passed by the first respondent namely the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity, the Tribunal).

2. We have elaborately heard Mr.T.Ramesh, learned counsel appearing for the appellant and Mr.T.Pramod Kumar Chopda, learned Senior Standing Counsel appearing for the second respondent.

3. This appeal is admitted to decide the following substantial questions of law :

"i. When Second Proviso to Section 11B (1) has not at all barred the applicability of the protest lodged by the manufacturer to the refund claim made by the buyer and it simply states that the duty has to be paid under protest, whether it is correct to hold that the refund claim of the buyer is barred by limitation on the ground that the claim was not made within the normal period of limitation despite the fact that the duty for which refund claim was made has been paid under protest by the proper person?

ii. When payment of duty under protest, for which, refund claim has been made by the buyer alone is the relevant factor to determine the limitation under Section 11B, whether it is correct to disallow the refund application made by the buyer on the ground that the buyer ought to have paid the duty within six months of the purchase ? and

iii. In the facts and circumstances of the case where the Hon'ble Supreme Court in the case of National Winders has rendered the categorical finding that the protest lodged by the manufacturer can be extended to the buyer with regard to determination of the limitation under Section 11B of the Central Excise Act, whether it is correct to apply the decision in the case of Allied Photographic, in which, only the passing comment has been made with regard to the applicability of the decision in the case of National Winder with reference to the context and facts involved in the said case of Allied Photographic?"

4. The appellant - assessee purchased PVC impregnated colliery conveyor belting, which formed part of material handling equipment from one M/s.Fenner India Limited, Madurai on different dates during the period from January to March 1992. The said goods were classified by the Department under Sub-Heading 3920.11/3920.12 of the First Schedule to the Central Excise Tariff Act, 1985 (for brevity, the CET Act). The supplier namely the said M/s.Fenner India Limited contested the above classification stating that the said goods were classifiable

under Sub-Heading 3922.90/3926.90 of the First Schedule to the CET Act. However, the supplier paid the higher rate of duty under protest during the disputed period.

5. The classification dispute traveled upto the Hon'ble Supreme Court and by judgment reported in (1995) 77 ELT 8, the dispute was finally settled in favour of the supplier by holding that the said goods were classifiable under Sub-Heading 3922.90/3926.90 of the First Schedule to the CET Act. Based on the above decision, the assessee had borne the entire duty burden paid by the supplier and filed their claim on 22.7.2003 for refund of central excise duty to the tune of Rs.23,14,715/-. The assessee also stated that they had not passed on the duty liability to its customers, as the goods involved were capital goods and no duty was payable on the final product, for which, such goods were used.

6. Thereafter, the Adjudicating Authority namely the Assistant Commissioner of Central Excise, Madurai-II Division issued a show cause notice dated 20.10.2003 proposing to disallow the refund claim on three grounds namely (i) that the assessee had not produced the original duty paid document; (ii) that the assessee did not produce the original letter of protest made by the supplier namely the said M/s.Fenner India Ltd.; and (iii) that the assessee did not produce any evidence to show that the duty burden was not passed on to the customer.

7. The assessee, vide letter dated 28.10.2003, sought time to file their reply. However, the reasons assigned therein were appeared to have been not acceded to and an ex parte Order-in-Original No.47/2003 (Refund) came to be passed on 20.11.2003 by the Deputy Commissioner of Central Excise, Madurai II Division, Madurai disallowing the claim for refund. Aggrieved by such an order, the assessee preferred an appeal before the Commissioner (Appeals), Madurai, who, by order dated 30.6.2004 in Order-in-Appeal No.123/ 2004, remanded the matter to the Adjudicating Authority for de novo consideration.

8. On remand to the Adjudicating Authority, another show cause notice dated 11.10.2004 came to be issued, to which, the assessee filed a reply dated 29.10.2004 questioning that the second show cause notice was not maintainable apart from making submissions on merits. However, the Adjudicating Authority, by Order-in-Original dated 31.1.2005, disallowed the refund claim in its entirety. Again, aggrieved by the said order dated 31.1.2005, the assessee filed an appeal before the Commissioner of Central Excise (Appeals), Madurai-2, who dismissed it by order dated 20.4.2005 on the ground that the refund claim was time barred. As against that, the assessee filed further appeal to the Tribunal, which dismissed the same by the impugned order

dated 03.1.2014 following the earlier order of the Tribunal in the case of M/s.Western Coal Fields Ltd. & another Vs. Commissioner of Central Excise, Trichy [F.O.Nos.1094 and 1095/2005 dated 08.8.2005]. Aggrieved by that, the assessee is before us by way of this appeal.

9. Mr.T.Ramesh, learned counsel appearing for the appellant has contended that the said decision of the Tribunal in the case of M/s.Western Coal Fields Ltd., would have no application to the case on hand. He would point out that before the Tribunal, the assessee fairly stated that though there was a decision of the Tribunal in the case of M/s.Western Coal Fields Ltd., the same had been challenged before the Hon'ble Supreme Court and the matter was pending in Civil Appeal No.807 of 2006 and a request was made before the Tribunal to keep the present appeal pending till a decision was arrived at in the said Civil Appeal No.807 of 2006 pending before the Hon'ble Supreme Court. However, such a prayer was not acceded to and the Tribunal followed its earlier decision in the case of M/s. Western Coal Fields Ltd.

10. It is submitted that on a similar issue, the Tribunal rejected the case of South Eastern Coalfields Ltd. Aggrieved by the same, the said assessee filed an appeal before the Hon'ble Supreme Court in Civil Appeal No.7625 of 2005 and it was dismissed by the Hon'ble Supreme Court by judgment dated 16.12.2006 by applying the decision of the Three Judges Bench of the Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. Allied Photographics India Ltd. [reported in (2004) 166 ELT 3]. A review application was filed by the said assessee namely South Eastern Coalfields Ltd., in R.P.(C).No.333 of 2006, which was allowed on 23.7.2007 setting aside the earlier order dated 16.12.2006 and restoring Civil Appeal No.7625 of 2005 to its original number and after admitting the appeal, it was directed to be tagged along with Civil Appeal No.807 of 2006, which was filed by the said M/s.Western Coalfields Ltd.

11. It is submitted by the learned counsel for the appellant that the review application was allowed after considering the submission of the assessee that the decision of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., would not apply to the facts and circumstances of the case. It is further submitted that ultimately, Civil Appeal No.807 of 2006 filed by M/s.Western Coalfields Ltd., and Civil Appeal No.7625 of 2005 filed by M/s.South Eastern Coalfields Ltd., and other similarly placed assesseees were dismissed by the Hon'ble Supreme Court in the judgment in the case of M/s.Western Coalfields Ltd. Vs. Commissioner of Central Excise [reported in (2019) 365 ELT 849]. It is also submitted by the learned counsel

for the appellant - assessee that as against the judgment of the Hon'ble Supreme Court reported in (2019) 365 ELT 849, the assessee preferred a review application, that the same is yet to be numbered and that either this Court should await the decision in the review application or this Court should permit the appellant to contest the matter on merits.

12. Since the review application filed against the judgment of the Hon'ble Supreme Court reported in (2019) 365 ELT 849 is yet to be numbered and there is nothing on record to show that the review was filed well within the period of limitation, etc., we are not inclined to defer the hearing of the appeal. We have heard the learned counsel appearing for the appellant - assessee in extenso.

13. The endeavour of the learned counsel for the appellant is to distinguish the decision of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., firstly by pointing out that the question, which was referred for consideration before the Three Judges Bench of the Hon'ble Supreme Court was as to whether the claim for refund after final assessment was governed by Section 11B of the Act whereas the case on hand is, admittedly, a case where the duty had been paid under protest by the supplier namely M/s.Fenner India Ltd., and the assessee had borne the duty liability, but had not passed it on to the customers and the classification dispute was settled by the Hon'ble Supreme Court only on 28.3.1995 and therefore, going by the plain language of Second Proviso to Section 11B(1) of the Act, the limitation of six months would not apply where any duty and interest, if any paid on such duty had been paid under protest.

14. The learned counsel for the appellant has elaborately referred to various paragraphs of the decision of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., to support his submission that this decision is distinguishable.

15. It is further submitted by the learned counsel for the appellant that in the decision of the Hon'ble Supreme Court in the case of National Winder Vs. Commissioner of Central Excise [reported in (2003) 154 ELT 350], it was held that if duty was paid by a manufacturer under protest, then the limitation of six months would not apply even to a claim for refund by the purchaser. This decision was rendered by referring to the First Proviso to Section 11B of the Act, which was worded in a manner covering all claims for refund either by the manufacturer or the purchaser. In this regard, Rule 233B of the erstwhile Central Excise Rules, 1944 was also referred to. Therefore, it is

submitted that this decision has to be applied to the case of the appellant - assessee.

16. We have given our anxious consideration to the above submissions. But, we are not inclined to accept the same for several reasons.

17. Firstly, the decision of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., arose out of a reference to a Larger Bench on account of an inconsistency between two decisions of the Three Judges Bench of the Hon'ble Supreme Court in the cases of Sinkhai Synthetics and Chemicals Pvt. Ltd. Vs. Collector of Central Excise [reported in 2002 (143) ELT 17] and Collector of Central Excise, Chennai Vs. T.V.S. Suzuki Ltd. [reported in 2003 (156) ELT 161] on the one hand and the decision of nine-Judge Constitution Bench in the case of Mafatlal Industries Ltd. Vs. Union of India [reported in (1997) 89 ELT 247] on the other hand and a two-Judges Bench of the Hon'ble Supreme Court vide order dated 13.11.2003 referred the matter and the question, which was framed, was as to whether a claim for refund after final assessment was governed by Section 11B of the Act. Before the Hon'ble Supreme Court, the Department submitted that there was a difference between provisional assessment under Rule 9B of the Central Excise Rules and payment of duty under protest in terms of Rule 233B of the Central Excise Rules. By referring to the decision of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd., it was further submitted that under the Second Proviso to Section 11B of the Act, if duty was paid by the manufacturer under protest, the limitation of six months was not applicable and that however, the purchaser of duty paid goods, after finalization of assessment of excise duty payable by the manufacturer, was not entitled to rely upon the said Proviso. It was further argued that in any event, the assessee therein namely M/s.Allied Photographics India Ltd., had claimed refund by filing an independent application on 11.2.1997 and therefore, it was governed by Section 11B(3) of the Act. In support of such a contention, reliance was placed on paragraph 104 of the decision of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. It was further submitted that the decisions of the Hon'ble Supreme Court in the cases of Sinkhai Synthetics and Chemicals Pvt. Ltd. and Collector of Central Excise, Chennai Vs. T.V.S. Suzuki Ltd., run counter to the law laid down in the decision of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd., and that a clarification to that effect was required in the interest of justice.

18. In the decision of the Hon'ble Supreme Court in the case of M/s.Allied Photographics India Ltd., on the contrary, the assessee, on the other hand, argued that M/s.Allied Photographics India Ltd., as a purchaser, was entitled to claim refund of the excess duty as that amount had been passed on by M/s.New India Industries Ltd., to M/s.Allied Photographics India Ltd. In support of such a contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of National Winder. It was further submitted that Section 11B of the Act was not at all attracted and that during the relevant period, the Department insisted upon the said M/s.New India Industries Ltd., for paying excess duty on the footing that M/s.Allied Photographics India Ltd., was related to M/s.New India Industries Ltd. In the facts and circumstances of that case, the said M/s.New India Industries Ltd., paid duty under protest and ultimately after finalization of the assessment, the duty paid became refundable. It was also submitted that if any amount was found to be repayable by the Department to the assessee therein, then the amount had to be refunded without going through Section 11B of the Act. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise Vs. National Tobacco Co. of India Ltd. [reported in 1978 (2) ELT J146]. It was also submitted that the same principle was applicable in cases where the Department had to refund monies to the assessee on finalization of the assessment, which principle had been reiterated in the decision of the Hon'ble Supreme Court in the case of M/s.Mafatlal Industries Ltd., in paragraph 104. It was further submitted that the doctrine of unjust enrichment under Section 11B of the Act would not apply to the case on hand. It was also submitted that Section 11B(3) of the Act would have no bearing on the assessee's case when it was not in dispute that the payment was made under protest. Hence, it was contended that Section 11B(3) of the Act would have no application to the facts of that case.

19. After recording the submissions made on either side, the point for determination as framed by the Hon'ble Supreme Court was as to whether the doctrine of unjust enrichment under Section 11B of the Act was applicable to the facts of the said case having regard to the fact that the manufacturer therein paid the differential disputed excise duty under protest when the assessment was finalized in favour of the manufacturer therein in the light of the judgment of the Hon'ble Supreme Court in the case of Union of India Vs. Bombay Tyre International Ltd. [reported in (1983) 14 ELT 1896], which was rendered in the year 1983/84. The Hon'ble Supreme Court, after carefully analyzing the statutory provisions and in particular Section 11B of the Act, the statement of objects and the reasons for enacting the Amendment Act, 1991 (Act 40 of 1991) and also

taking note of paragraph 104 of the judgment of the Hon'ble Supreme Court in the case of M/s.Mafatlal Industries Ltd., held as follows :

"11. At the outset it may be pointed out that in para 104 there is nothing to suggest that payment of duty under protest does not attract bar of unjust enrichment. Para 104 only states that if refund arises upon finalization of provisional assessment, Section 11B will not apply.

12. In the present case, reliance was placed by the respondent M/s APIL on the above para in support of its contention that payment of duty under protest and payment of duty under provisional assessment are both "on account" payments under the Act. We do not find any merit in this argument. As discussed, there is a basic difference between duty paid under protest and duty paid under Rule 9B. The duty paid under protest falls under Section 11B whereas duty paid under provisional assessment falls under rule 9B. That Section 11B deals with claim for refund whereas Rule 9B deals with making of refund, in which case the assessee has not to comply with Section 11B. Therefore, Section 11B and Rule 9B operate in different spheres and, consequently, in para 104 of the said judgment, it has been held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. In the said para, it has been clarified that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issues, then such claim would attract Section 11B. This is because when the assessee makes an independent refund claim after final orders under Rule 9B(5), such application represents a claim for refund and, it would not come in the category of making of refund and therefore, the bar of unjust enrichment would apply. Hence, there is no merit in the contention of the respondent M/s APIL that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under the said Act. This argument

was obviously advanced because unless the two payments are equated as contended, the respondent M/s APIL was required to comply with Section 11B. In this matter, duty has been paid under protest. It is the case of the respondent M/s APIL that since such payment was similar to payment under rule 9B, the respondent M/s APIL was not required to comply with Section 11B. In the light of the discussion hereinabove, we hold that the respondent was bound to comply with Section 11B. Lastly, in any event, the application dated 11.2.1997 fell in the category of refund claim being made after finalization of assessment of NIIL and, therefore, Section 11B had to be complied with in terms of para 104 of the above judgment in the case of Mafatlal Industries Ltd. (supra). For above stated reasons, since there was failure to comply with Section 11B, the respondent was not entitled to refund.

13. The point which still remains to be decided is whether the respondent herein was entitled to refund without complying with Section 11B of the Act on the ground that it had stepped into the shoes of NIIL (manufacturer) which had paid the duty under protest. It was argued on behalf of the respondent that NIIL had paid the excise duty under protest pending final assessment, which was ultimately decided in favour of NIIL and since NIIL had sold the product to the respondent herein, the respondent was entitled to the benefit of the second proviso to Section 11B(1) which inter alia stated that limitation of six months shall not apply where duty had been paid under protest. We do not find any merit in this argument. In the case of Bombay Tyre International Ltd. (supra), it has been held by this Court that Section 3 of the said Act is a charging section whereas Section 4 is a computation section which covers assessment and collection of excise duty. That the basis of assessment under Section 4 was the real value of excisable goods which included manufacturing cost and manufacturing profit but excluded selling cost and selling profit. That the price charged by the manufacturer for sale of the goods represented the real

value of the goods for assessment of excise duty. In the case of Atic Industries Ltd. Vs. H.H.Dave, Asstt. Collector of Central Excise reported in [AIR 1975 SC 960], this Court has held that the resale price charged by a wholesale dealer who buys goods from the manufacturer cannot be included in the real value of excisable goods in terms of Section 4 of the said Act. Therefore, it is clear that the basis on which a manufacturer claims refund is different from the basis on which a buyer claims refund. The cost of purchase to the buyer consists of purchase price including taxes and duties payable on the date of purchase (other than the refund which is subsequently recoverable by the buyer from the Department). Consequently, it is not open to the buyer to include the refund amount in the cost of purchase on the date when he buys the goods as the right to refund accrues to him at a date after completion of the purchase depending upon his success in the assessment. Lastly, as stated above, Section 11B dealt with claim for refund of duty. It did not deal with making of refund. Therefore, Section 11B(3) stated that no refund shall be made except in terms of Section 11B(2). Section 11B(2)(e) conferred a right on the buyer to claim refund in cases where he proved that he had not passed on the duty to any other person. The entire scheme of Section 11B showed the difference between the rights of a manufacturer to claim refund and the right of the buyer to claim refund as separate and distinct. Moreover, under Section 4 of the said Act, every payment by the manufacturer whether under protest or under provisional assessment was on his own account. The accounts of the manufacturer are different from the accounts of a buyer (distributor). Consequently, there is no merit in the argument advanced on behalf of the respondent that the distributor was entitled to claim refund of "on account" payment made under protest by the manufacturer without complying with Section 11B of the Act.

14. As stated above, para 104 of the judgment in the case Mafatlal Industries Ltd. (supra) states that if refund arises upon

finalization of provisional assessment, Section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra). In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17.1.1991. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied para 104 of the judgment of the Constitution Bench in the case of Mafatlal Industries Ltd. (supra), which with respect, had no application. As stated above, para 104 of the judgment in the case of Mafatlal Industries Ltd. (supra) dealt with refund consequent upon finalization of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalization of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of Mafatlal Industries Ltd. (supra). We may also point out that the judgment in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra) is based on the concession made by the counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned counsel for the respondent herein placed reliance on the judgment of this Court in the case of TVS Suzuki Ltd. (supra). In that case, application for refund was filed. This was on completion of final assessment. On 9.7.1996, the Department issued a show-cause notice as to why the refund claim should not be rejected for non-compliance of Section 11B. By order dated 17.7.1996, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner (Appeals) observed

that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of para 104 of the judgment of this Court in Mafatlal Industries Ltd. (supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under rule 9B(5). The judgment of this Court in the case of TVS Suzuki Ltd. (supra), therefore, supports the view which we have taken herein above that refund consequent upon finalization of provisional assessment did not attract the bar of unjust enrichment.

15. Mr. Ganesh, learned senior counsel appearing on behalf of the respondent vehemently urged that the issue arising in the present matter is squarely covered by the decision of Division Bench of this Court in the case of National Winder Vs. Commissioner of Central Excise, Allahabad [2003 (154) ELT 350] in which it has been held that if duty is paid by a manufacturer under protest then limitation of six months will not apply to a claim of refund by a purchaser. For the reasons given hereinabove, we hold that the said judgment is per incuriam. At this stage, it is important to note that the Division Bench judgment [Hon. S.N. Variava & B.P. Singh, JJ.] in the case of National Winder (supra) was delivered on 11.3.2003. However, on 13.11.2003, the Division Bench [Hon. S.N. Variava & H.K. Sema, JJ.], has referred the matter as stated above to the larger bench in the light of conflict which the Division Bench noticed between the earlier judgments of this Court on one hand and paragraph 104 of the judgment of the Constitution Bench of nine-Judges in the case of Mafatlal Industries Ltd. (supra). Hence, by this judgment, we have clarified the position in law."

20. A combined reading of the above paragraphs would clearly show that the Hon'ble Supreme Court considered the issue in its entirety and also with regard to cases where duty had been paid under protest.

21. The decision of the Hon'ble Supreme Court in the case of Sinkhai Synthetics and Chemicals Pvt. Ltd., was held to be per incuriam, as it was based on a concession made by the learned counsel appearing for the Department. The decision of the Hon'ble Supreme Court in the case of T.V.S.Suzuki Ltd., was held to have supported the view taken by the Court in the decision of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., wherein paragraph 104 of the judgment of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd., was referred to. The Hon'ble Supreme Court took note of the submissions of the assessee therein by placing reliance on the decision of the Hon'ble Supreme Court in the case of National Winder as has been done before us by Mr.T.Ramesh, learned counsel appearing for the appellant - assessee. In paragraph 15 of the judgment of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., this submission had been rejected holding that in the case of National Winder, it had been held that if the duty was paid by a manufacturer under protest, then the limitation of six months would not apply to a claim of refund by a purchaser. The decision of the Hon'ble Supreme Court in the case of National Winder was held to be per incuriam in the light of the reasons assigned in the decision of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd and in this regard, we may point out that paragraphs 12 and 14 are a clear answer to the argument, which has been placed before us by referring to the decision of the Hon'ble Supreme Court in the case of National Winder, which was held to be a judgment in per incuriam.

22. The above aspect was taken note of by the Hon'ble Supreme Court while deciding the case of Western Coalfields Ltd. It is a case identical to that of the assessee herein. In fact, the Tribunal, in the impugned order, followed its earlier decision in the case of Western Coalfields Ltd. The Hon'ble Supreme Court, after noting the facts of the case, held that the period for which, the refund of excise duty has been claimed, differed, but in all cases, applications had been filed by the buyer (assessee herein) much after the period of limitation, which was six months from the date of purchase of goods at the time of filing of the application to claim refund under Section 11B of the Act. Thereafter, the Supreme Court proceeded to examine Section 11B of the Act and noted the relevant paragraph in the decision of the Hon'ble Supreme Court in the case of Allied Photographics India Ltd., and rejected the case of the assessee. The Hon'ble Supreme Court also took note of the argument of the assessee by placing reliance on the decision of the Hon'ble Supreme Court in the case of National Winder and pointed out that the decision in the case of National Winder had

been held to be per incuriam. The relevant portions in the decision of the Hon'ble Supreme Court in the case of Western Coalfields Ltd., read thus :

"12. Section 11B deals with the claim of refund of duty as paid on his own accord by any person for refund of such duty to the competent authority before the expiry of six months from the relevant date as prescribed but where the duty was paid under protest in terms of the 2nd proviso to Section 11B(1), the period of limitation may not apply. Although the buyer can also apply for refund provided the duty of excise is borne by the buyer and he had not passed on the incidence of such duty to any other person as referred to under Section 11B(2)(e) and the application has been moved within the period of six months from the relevant date of purchase of the goods by such person in terms of Section 11B(5)(B)(e) of the Act. The scheme of Section 11B makes a distinction between right of the manufacturer to claim refund from right of the buyer to claim refund treating them separate and distinct for making an application for refund exercising their right under Section 11B of the Act and it has been examined by the three Judge Bench of this Court in Commissioner of Central Excise, Mumbai II Vs. Allied Photographics India Ltd. case(supra) as under:

"Therefore, Section 11B(3) stated that no refund shall be made except in terms of Section 11B(2). Section 11B(2)(e) conferred a right on the buyer to claim refund in cases where he proved that he had not passed on the duty to any other person. The entire scheme of Section 11B showed the difference between the rights of a manufacturer to claim refund and the right of the buyer to claim refund as separate and distinct. Moreover, under Section 4 of the said Act, every payment by the manufacturer whether under protest or under provisional assessment was on his own account. The accounts of the manufacturer are different from the accounts of a buyer (distributor). Consequently, there is no merit in the argument advanced on behalf of

the respondent that the distributor was entitled to claim refund of "on account" payment made under protest by the manufacturer without complying with Section 11B of the Act." It was further held as under: "Having come to the conclusion that the respondent was bound to comply with Section 11B of the Act and having come to the conclusion that the refund application dated 11.2.1997 was time barred in terms of Section 11B of the Act, we are not required to go into the merits of the claim for refund by the respondent who has alleged that it has not passed on the burden of duty to its dealers."

13. It may be appropriate to notice that the view earlier expressed by the two Judge Bench of this Court in National Winder Vs. Commissioner of Central Excise, Allahabad 2003 (11) SCC 361 was held to be per incuriam in Commissioner of Central Excise, Mumbai Vs. Allied Photographics India Ltd. case (supra).

14. In the instant case, indisputably the application was filed by the appellant as a buyer of the goods (conveyor belts) from M/s. Fenner (India) Ltd. who paid the duty under protest much after a period of limitation (six months) as prescribed under the mandate of law disentitles the claim of refund to the appellant as prayed for in view of the judgment of this Court in Commissioner of Central Excise, Mumbai Vs. Allied Photographics India Ltd. case (supra) holding that the purchaser of the goods was not entitled to claim refund of duty made under protest by the manufacturer without complying the mandate of Section 11B of the Act, 1944."

23. The above decision and more particularly the conclusion in paragraph 14 is a clear answer to the assessee's case. Indisputably, the application was filed by the appellant as a buyer of the goods from the supplier namely the said M/s. Fenner India Ltd., which paid duty under protest after the period of limitation prescribed in law and therefore, this would disentitle the claim of refund to the assessee as prayed for by applying the law laid down by the Hon'ble Supreme Court in the

case of Allied Photographics India Ltd., wherein it was held that the purchaser of the goods was not entitled to a claim for refund of duty made under protest by the manufacturer without complying with the mandate of Section 11B of the Act.

24. For all the above reasons, the appellant - assessee has not made out any case to interfere with the impugned order passed by the Tribunal.

25. Accordingly, the above civil miscellaneous appeal stands dismissed and the substantial questions of law framed are answered against the assessee. No costs.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
Chennai.

+1cc to Mr.T.Pramodkumar Chopda, Advocate Sr.17939

+1cc to Mr.T.Ramesh, Advocate Sr.18018

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