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C.M.A. (Central Excise) No.1277 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.10.2024

CORAM :

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A. (Central Excise) No.1277 of 2020

M/s.Servo Packaging Limited,
88/1, Cuddalore Pondy Main Road,
Kattupakkam, Manapet Post,
Puducherry – 607 402.

... Appellant

Vs.

The Commissioner of GST and Central Excise,
Puducherry Commissionerate,
No.1, Goubert Avenue, Beach Road,
Puducherry – 605 001.

... Respondent

Prayer: Appeal under Section 35G of the Central Excise Act read with Section 174 of the Central Goods and Services Tax (CGST) Act, 2017, to answer the “substantial questions of law” in favour of the appellant and consequently, to allow the Civil Miscellaneous Appeal filed by the appellant against the Final Order No.40098 of 2020 dated 05.02.2020 in Excise Appeal No.41700 of 2019 passed by the Tribunal.

For Appellant : Mr.M.A.Mudimannan

For Respondent : Mr.T.Ramesh Kutty
Senior Standing Counsel
Assisted by
Mr.B.Sivaraman
Junior Standing Counsel



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JUDGMENT

WEB COPY (Judgment of the Court was delivered by **C.SARAVANAN, J.**)

This Civil Miscellaneous Appeal is directed against the Impugned Final Order No.40098 of 2020 dated 05.02.2020 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Chennai in Excise Appeal No.E/41700/2019-SM.

2. Though this appeal came up for admission on 27.08.2020, this Court had not framed any questions of law to be answered. The case was thereafter adjourned from time to time and was taken up for hearing by us on 11.09.2024, 04.10.2024, 18.10.2024 and today i.e., on 19.10.2024 under the caption “For Orders”.

3. In this Appeal, the appellant has raised the following substantial questions of law for being answered:-

- i. Whether the adoption of varied reasons for rejection of the refund claim by the authorities including the CESTAT, Chennai was just, proper and legal, especially when the appellant was not put on any formal notice;
- ii. Whether the payment of the CVD and SAD on account of non-fulfillment of a part of the export obligation and on the inputs attributable to short-exports, would make the



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imports normal import and consequently ential the appellant eligible for the Cenvat Credit of the CVD and SAD of the duty so paid.

- iii. Whether the rejection of the refund claim of the duty of CVD and SAD in question in the impugned order, was just, proper and legal in the context of Section 142 of CGST Act, in as much as the inputs were duty paid and physically received in the factory of the appellant and were used in the manufacture of final products on which duty of Central Excise / GST was paid?
- iv. Whether refund of CVD and SAD paid after advent of GST is permissible under Section 142(3) of the CGST Act?

4. The appellant appears to have obtained 6 advance licenses under the relevant Foreign Trade Policy and had imported goods without payment of Basic Customs Duty (BCD), Countervailing Duty (CVD) and various cess and Special Additional Duty (SAD) of customs under Section 3(5) of the Customs Tariff Act, 1975.

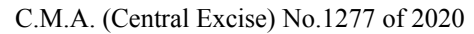
5. It appears that the appellant had difficulty in discharging the export obligations undertaken in respect of 6 advance licenses under the relevant Foreign Trade Policy issued under the Foreign Trade (Development and Regulation) Act, 1992 and therefore, there was a shortfall in discharge of the export obligations undertaken.



6. The appellant appears to have paid the basic customs duty, countervailing duty, various cess during January / February 2019 for a total sum of Rs.46,54,696/-. Of the aforesaid sum of Rs.46,54,696/-, a sum of Rs.14,46,782.90/- was paid by the appellant during February 2019 which related to statutory interest on the belated payment of the Basic Customs Duty (BCD) and other duties and cess foregone at the time of import due to failure on the part of the appellant to fulfil the export obligations.

7. This amount was paid after the Central Excise Act, 1944 and the Rules made thereunder stood subsumed into the GST law with effect from 01.07.2017. Under these circumstances, the appellant requested the respondent for refund amounting to Rs.22,24,104/- (Rs.16,33,128.90/- + Rs.5,90,975.30/-) out of Rs.46,54,696/- under Section 142(3) of the Central Goods and Services Tax (CGST) Act, 2017.

8. If this amount of Rs.22,24,104/- (Rs.16,33,128.90/- + Rs.5,90,975.30/-) paid towards the Countervailing Duty (CVD) and Special Additional Duty (SAD) before the Central Excise Act, 1944 and the Rules made thereunder stood subsumed into the GST law with effect from



under the provisions of the CENVAT Credit Rules, 2004.

Act, 2017, the appellant requested for refund of the aforesaid sum.

(CGST) Act, 2017.

Chennai in Excise Appeal No.E/41700/2019-SM was dismissed by CESTAT



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vide Impugned Final Order No.40098 of 2020 dated 05.02.2020. Thus, the present Civil Miscellaneous Appeal has been filed under Section 35G of the Central Excise Act, 1944 read with Section 174 of the Central Goods and Services Tax (CGST) Act, 2017.

12. In support of the present Appeal, the appellant has placed a strong reliance on the decision of this Court in W.P.Nos.528, 1092 and 1160 of 2019 dated 22.02.2022 wherein, one of us (**Hon'ble Mr.Justice R.Suresh Kumar**) had authored the decision and had applied “Doctrine of Necessity” following the decision of the Hon'ble Supreme Court in **J.Mohapatra and Company and another Vs. State of Orissa and another**, (1984) 4 SCC 103, and had ordered as follows:-

“48. For all these reasons, this Court, having considered the peculiar facts and circumstances of the case, is inclined to dispose of these writ petitions with the following orders:

(i) That the impugned orders in these writ petitions are liable to be set aside, accordingly are set aside. As a sequel, the matters are remitted back to the respondents for reconsideration. While reconsidering the same, the authority concerned, who has to deal with the applications of the petitioners, shall consider and dispose of these applications under Section 142(3) of the CGST Act, 2017.



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(ii) *While reconsidering the said applications, the claim made by the petitioners need not be considered for the purpose of refund of the claim made by them. However, the said claim made by the petitioners can very well be considered for the purpose of permitting the petitioners to carry forward the accrued credit to the electronic credit ledger of the GST regime.*

(iii) *After considering the said applications, as indicated above, the necessary order shall be passed by the respondents within a period of six weeks from the date of receipt of a copy of this order. It is made clear that, before passing the orders as indicated above, an opportunity of being heard shall be given to the petitioners, so that the petitioners can put forth their case by providing all necessary inputs to the satisfaction of the authorities to take a decision thereon.*

49. With these directions, all these Writ Petitions are ordered accordingly. However, there shall be no order as to costs."

13. The views taken in W.P.Nos.528, 1092 and 1160 of 2019 dated 22.02.2022 was also affirmed by a Division Bench of this Court of equal strength in W.A.No.1648 of 2022 vide order dated 17.08.2022.

14. Defending the Impugned Order, the learned Senior Standing Counsel for the respondent on the other hand would submit that the present Civil Miscellaneous Appeal is without any merits and is liable to be dismissed.



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15. It is submitted that no substantial question of law, much less any substantial question of law arises for consideration as the order of this Court in W.P.Nos.528, 1092 and 1160 of 2019 dated 22.02.2022 has been partially modified by the Division Bench of this Court of equal strength in W.A.No.1648 of 2022 vide order dated 17.08.2022 directing the respondent Department to consider the application of the assessee under Section 142(3) of the Central Goods and Services Tax (CGST) Act, 2017, based on the available materials and to dispose the same on merits.

16. It is submitted that the question of granting refund under Section 142(3) of the Central Goods and Services Tax (CGST) Act, 2017 would apply only if refund claims were filed before the “appointed day” as defined in Section 2(10) of the Central Goods and Services Tax (CGST) Act, 2017 i.e., before 01.07.2017.

17. It is submitted that admittedly in this case the claim for refund of the Countervailing Duty (CVD) and Special Additional Duty (SAD) is after the “appointed day” and therefore the refund claim filed after 01.07.2017 (refund



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claim filed in the year 2019) will not be governed by Section 142(3) of the Central Goods and Services Tax (CGST) Act, 2017.

18. That apart, it is submitted that refund if any on CENVAT credit will be governed by only Rule 5 of the CENVAT Credit Rules, 2004, which also stands extinguished with effect from the “appointed day” namely 01.07.2017.

19. That apart, the learned Senior Standing Counsel for the respondent has also placed reliance on the decision of the Division Bench of the High Court of Jharkhand at Ranchi in **M/s.Rungta Mines Limited Vs. Commissioner of Central Goods and Services Tax and Central Excise, Jamshedpur, Jharkhand and others**, 2022-TIOL-252-HC-Jharkhand-GST in WP (T) No.2245 of 2020 vide order dated 15.02.2022 wherein, the law relating to Section 142(3) of the Central Goods and Services Tax (CGST) Act, 2017 has been clearly explained.

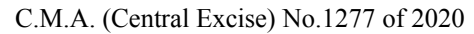
20. We have heard the learned counsel for the appellant and the learned Senior Standing Counsel for the respondent. We have considered the facts of the case.



21. In this case, admittedly, the appellant has not exported finished goods for which the inputs were imported duty free under the advance licenses issued to the appellant. Since the appellant had failed to discharge the export obligation, the appellant was therefore asked to pay various duties / cess forgone by the appellant at the time of their import together with interest. The appellant has also paid the same during January / February, 2019.

22. The duties included Basic Customs Duty (BCD) payable under the provisions of the Customs Act, 1962, Countervailing Duty (CVD) and Special Additional Duty (SAD) payable under the provisions of the Customs Tariff Act, 1975 and Cess payable under the provisions of the various Finance Acts.

23. There is no dispute that under the provisions of the CENVAT credit Rules, 2004, the appellant would have been otherwise entitled to avail and utilize CENVAT credit under the provisions of the CENVAT Credit Rules, 2004 on the Countervailing Duty (CVD) and Special Additional Duty (SAD) and cess paid had the appellant imported such inputs on payment of these duties and cess under the provisions of the above mentioned enactments but for the exemption availed on them at the time of import.



26. Only CENVAT credit that was validly availed but was lying unutilized as on 30.06.2017 i.e., before the “appointed date” under the Central Goods and Services Tax (CGST) Act, 2017, a manufacturer, a service provider and / or a registered dealer would have been entitled to transition such credit to their Electronic Credit Ledger as per Chapter XX of the Central Goods and



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Services Tax (CGST) Act, 2017 and the rules made thereunder. However, any

CENVAT credit which was not eligible for such transfer was to lapse.

27. Under Sub-Section 4 to Section 142 of the Central Goods and Services Tax (CGST) Act, 2017, every claim for refund filed after the appointed day for refund of any duty or tax paid under existing law in respect of the goods or services exported before or after the appointed day, shall be disposed of in accordance with the provisions of the existing law. It reads as under:-

“142. Miscellaneous transitional provisions:

1.
2.
3.
4. Every claim for refund filed after the appointed day for refund of any duty or tax paid under existing law in respect of the goods or services exported before or after the appointed day, shall be disposed of in accordance with the provisions of the existing law.

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse.

Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act.”



WEB COPY 28. Thus, Section 142 of the Central Goods and Services Tax (CGST)

Act, 2017 also does not come to the aid of the appellant.

29. However, the facts remains that the appellant was unable to avail CENVAT credit under the provisions of the CENVAT Credit Rules, 2004 as it stood replaced by the CENVAT Credit Rules, 2017. Consequently, the appellant would have been unable to transition the Countervailing Duty (CVD), Special Additional Duty (SAD) and cess paid after the “appointed date” under the Central Goods and Services Tax (CGST) Act, 2017 after the repeal of the CENVAT Credit Rules, 2017.

30. In this case, the Countervailing Duty (CVD) and Special Additional Duty (SAD) and cess forgone at the time of import were paid after repeal of the Central Excise Act, 1944 and the CENVAT Credit Rules, 2004 after the Central Goods and Services Tax (CGST) Act, 2017 came into force on 01.07.2017. Thus, the appellant could neither avail CENVAT credit under the provisions of the CENVAT Credit Rules, 2004 nor under CENVAT Credit Rules, 2017 nor transition such CENVAT Credit under Chapter XX of the



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Central Goods and Services Tax (CGST) Act, 2017 and the rules made thereunder.

31. Even if the appellant had traded the imported goods due to lack of export order for the finished order, the appellant would have been at best required to pay the duty forgone and pass on the incidence of duty to the customers with the permission of the authorities under the Foreign Trade (Development and Regulation) Act, 1992 and the authorities under the Customs Act, 1962.

32. The appellant would have been entitled to avail Input Tax Credit and reverse the proportionate CENVAT credit under the provisions of the CENVAT Credit Rules, 2004.

33. If the appellant had indeed utilized the imported goods in the manufacture of excisable goods, the appellant would have been still entitled to utilize the CENVAT credit for discharging its duty liability. Even if the appellant had later decided to export the finished product outside the scheme under which the appellant had imported the inputs / goods at concessional duty,



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the appellant could have exported the goods under bond without payment of duty under Rule 19 of the Central Excise Rules, 2002 and claim refund under Rule 5 of the CENVAT Credit Rules, 2004. Which ever way one looks at, the issue would have been revenue neutral in the hands of the appellant.

34. This position is also admitted in the order passed by the Appellate Commissioner vide A.No.204/2019 (CTA-I) (P) dated 24.07.2019.

35. Even if the appellant had requested for refund of these duties paid prior to the “appointed day” i.e., 01.07.2017, the appellant would not have been still entitled to claim refund under Rule 5 of the CENVAT Credit Rules, 2004.

36. Since no export was made, the question of refunding duty, paid by the appellant cannot be countenanced under the provisions of the CENVAT Credit Rules, 2004 read with the restriction under Section 142 of the Central Goods and Services Tax (CGST) Act, 2017.

37. CENVAT credit like Modified Value Added Tax (MODVAT) credit are intended to reduce the cascading effect of duty as held by the Hon’ble



Supreme Court in **Collector of Central Excise, Pune and others Vs. Dai Ichi**

Karkaria Limited and others, (1999) 7 SCC 448.

38. The Hon'ble Supreme Court in **Collector of Central Excise, Pune and others Vs. Dai Ichi Karkaria Limited and others**, (1999) 7 SCC 448, while dealing with valuation of “excisable goods” under Section 4 of the Central Excise Act, 1944 and the Rules made thereunder explained the concept of Modified Value Added Tax (MODVAT) credit as it stood then under the Central Excise Rules, 1944.

39. The Hon'ble Supreme Court there referred to the extract from a Compendium of Guidance Notes of the Institute of Chartered Accountants as revised up to 31.03.1990 in the context of valuation of excisable goods and held once credit is availed validly, it cannot be denied as it. In Paragraph 18, the Hon'ble Supreme Court observed as under:-

“18. *It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the rules which provides for a reversal of the credit by the*



Excise Authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.”

40. In Paragraph 24, the Hon'ble Supreme Court also referred to Guidance Notes of the Institute of Chartered Accountants as revised up to 31.03.1990 and observed as under:-

“24. The learned Attorney General referred to an extract from a compendium of Guidance Notes of the said Institute as revised up to 31-3-1990. It states:

“Where excise duty is paid on excisable goods and such goods are subsequently utilised in the manufacturing process the duty paid on such goods becomes a manufacturing cost and must be included in the valuation of work in progress or finished goods arising from the subsequent processing of such goods.”

It is not clear whether this Guidance Note was issued in relation to excise duty paid on an input under the MODVAT Scheme.

25. We think it is appropriate that the cost of the excisable



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product for the purposes of assessment of excise duty under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules should be reckoned as it would be reckoned by a man of commerce. We think that such realism must inform the meaning that the courts give to words of a commercial nature, like cost, which are not defined in the statutes which use them. A man of commerce would, in our view, look at the matter thus:

“I paid Rs.100/- to the seller of the raw material as the price thereof. The seller of the raw material had paid Rs.10/- as the excise duty thereon. Consequent upon purchasing the raw material and by virtue of the MODVAT Scheme, I have become entitled to the credit of Rs.10/- with the Excise Authorities and can utilise this credit when I pay excise duty on my finished product. The real cost of the raw material (exclusive of freight, insurance and the like) to me is, therefore, Rs.90/-. In reckoning the cost of the final product I would include Rs.90/- on this account.”

This, in real terms, is the cost of the raw material (exclusive of freight, insurance and the like) and it is this, in our view, which should properly be included in computing the cost of the excisable product.

- 26. The view we take about the cost of the raw material is borne out by the Guidance Note of the Indian Institute of Chartered Accountants, and there can be no doubt that this Institute is an authoritative body in the matter of laying down accountancy standards.*
- 27. To answer the question involved in these appeals, in determining the cost of an excisable product covered by the MODVAT Scheme under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules the excise duty paid on raw material also covered by the MODVAT Scheme is not to be included.”*



41. The Hon'ble Supreme Court in **Mafatlal Industries Limited and others Vs Union of India and others**, (1997) 5 SCC 536, has held that refund can be allowed outside the scope of the Act under specific circumstances.

42. The Hon'ble Supreme Court observed that where a refund of tax / duty is claimed on the ground that it has been collected from the petitioner / plaintiff whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with the Central Excise Tariff Act, 1985 or the Customs Act, 1962 read with the Customs Tariff Act, 1975 or by misinterpreting or misapplying any of the Rules, Regulations or Notifications issued under the said enactments, such a claim has necessarily to be preferred in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein.

43. It is further observed that no suit is maintainable in that behalf. At the same time, the Hon'ble Supreme Court held that the jurisdiction of the High Courts under Article 226 of the Constitution of India or for that matter under



Article 32 of the Constitution of India by the Hon'ble Supreme Court cannot be circumscribed by the provisions of the said enactments. However, the Court will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. It held writ petitions will be considered and disposed of in accordance with the provisions of Section 11-B of the Central Excises and Salt Act, 1944. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

44. The Hon'ble Supreme Court further observed that both the enactments (Central Excises and Salt Act, 1944 and the Customs Act, 1962) are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act, 1944 and Section 27 of the Customs Act, 1962 both before and after the **Constitution (sixty ninth) Amendment Act, [1991 (Amendment) Act]** and were constitutionally valid and have to be followed and given effect to.

45. The Hon'ble Supreme Court further observed that Section 72 of the Indian Contract Act, 1872 has no application to such a claim of refund and



cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act, 1944 or the Customs Act, 1962 as the case may be.

46. It is further held that it is necessary to emphasize in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal which is not a departmental organ but also to Court, which is a Civil Court. Summation of the proposition of the Hon'ble Supreme Court in **Mafatlal Industries Limited's case** (*cited supra*) are reproduced below:-

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

- i. Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules,*



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regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 and of this Court under Article 32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute “law” within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the



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Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal which is not a departmental organ but to this Court, which is a civil court.

- ii. *Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J. In *Tilokchand Motichand* [(1969) 1 SCC 110 : (1969) 2 SCR 824 : AIR 1970 SC 898] and we respectfully agree with it.*

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



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this nature is not contemplated by the said enactments and is outside their purview.

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

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



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inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

- iv. *It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the court/tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.*
- v. *Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.*
- vi. *Section 72 of the Contract Act is based upon and*



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incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

- vii. *While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.*
- viii. *The decision of this Court in STO v. Kanhaiya Lal Mukundlal Saraf [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiya Lal [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] have also been wrongly decided to the above extent. This declaration or the law laid down in Propositions (i) to (vii) above shall not however entitle the State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.*
- ix. *The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act,*



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1991 in the Central Excises and Salt Act and the Customs Act are constitutionally valid and are unexceptionable.

- x. *By virtue of sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (**excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created**) have to be preferred and adjudicated only under the provisions of the respective enactments. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32 is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.*
- xi. *Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners [(1992) 4 SCC 389] and Union of India v. ITC [1993 Supp (4) SCC 326]*



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have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated in the sense that the appeal period has also expired before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and/or governed by Section 11-B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

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

47. The present situation has not been considered by the Hon'ble Supreme Court in **Mafatlal Industries Limited's case** (*cited supra*) as neither the amounts have been paid by mistake by the appellant nor there is any issue relating to constitutionality of the provisions seeking to levy duty on the appellant on accounts of its failure to discharge its export obligations undertaken by the appellant under special circumstances.

48. This is a peculiar case, where liability to pay the duty arose well before “appointed date” viz., 01.07.2017 i.e., before the repeal of the Central



Excise Act, 1944 and the Rules made thereunder including the CENVAT Credit Rules, 2004 with the implementation of the Central Goods and Services Tax (CGST) Act, 2017 and the Rules made thereunder with effect from 01.07.2017. The duty liability arose under the old regime but payment was made after the appointed date i.e., after the Central Goods and Services Tax (CGST) Act, 2017 came into force on 01.07.2017.

49. If such Countervailing Duty (CVD), Special Additional Duty (SAD) and cess were paid before the appointed date, the appellant would have been allowed to avail CENVAT credit under the CENVAT Credit Rules, 2004. The appellant also would have been entitled to utilize the same before its repeal for discharging the duty liability as there is no one to one co-relation between the credit availed on inputs and its utilization for discharging the tax liability.

50. Even if such CENVAT credit had remained unutilized, the appellant would have been entitled to transition the credit under transitional provision of the Central Goods and Services Tax (CGST) Act, 2017. Therefore, refund of duty paid can be considered outside the scope of the provisions of these two enactments and the rules.



51. To deny the Input Tax Credit (ITC) to the petitioner would be unfair and arbitrary. This is because of absence of a machinery to allow such credit under the provisions of the CENVAT Credit Rules, 2017. Similarly, there is also no machinery to transition such duty as credit under the provisions of the Central Goods and Services Tax (CGST) Act, 2017. Therefore, refund of such duty paid which would have been available under the CENVAT Credit Rules, 2004, if such duty was paid either before or after 01.07.2017 has to be allowed. In the alternative, the appellant should be allowed a proportionate credit of such duty in its Electronic Credit Ledger as the issue is revenue neutral.

52. Therefore, refund has to be made de hors / has to be entertained under Section 142(3) of the Central Goods and Services Tax (CGST) Act, 2017 although a refund claim can be filed before or after the “appointed day”.

53. Since the appellant was a manufacturer and since the appellant would have been otherwise entitled to CENVAT credit under the CENVAT Credit Rules, 2004 had such duty foregone paid before its repeal, the benefit of such CENVAT Credit cannot be denied.



54. By the same token, such CENVAT credit should be allowed to be transitioned. However, transitioning is not possible under the scheme of Central Goods and Services Tax (CGST) Act, 2017.

55. We are therefore of the view that denial of refund cannot be justified merely because the refund claim was filed after the “appointed date” i.e., 01.07.2017, the date on which GST enactments came into force. We are therefore of the view that the substantial questions of law has to be answered in favour of the appellant.

56. The respondent is therefore directed to either allow cash refund of those duties / cess on which the appellant would have been entitled to avail as CENVAT credit under the provisions of the CENVAT Credit Rules, 2004 or in the alternative allow the appellant to take suitable credit entry in its Electronic Credit Ledger of such duties / cess for discharging tax liability under the respective GST enactments.

57. The above exercise shall be completed within a period of 60 days from the date of receipt of a copy of this order.



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58. Accordingly, we allow this Appeal and answer the substantial questions of law raised in favour of the appellant and against the revenue.

59. This Civil Miscellaneous Appeal, is thus, allowed. No costs.

[R.S.K., J.]

[C.S.N., J.]

19.10.2024

Neutral Citation : Yes / No

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To:

The Commissioner of GST and Central Excise,
Puducherry Commissionerate,
No.1, Goubert Avenue, Beach Road,
Puducherry – 605 001.



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R.SURESH KUMAR, J.

and

C.SARAVANAN, J.

arb

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19.10.2024