

(1995) 11 MAD CK 0082

In the Madras High Court

Case No : Writ Petition No"s. 848-852/92 and 15237/94

Collr. Of Cus.

APPELLANT

Vs

Indo-Swiss Synthetic Gem Mfg. Co. Ltd.

RESPONDENT

Date of Decision : 22-11-1995

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 12B
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 27, 27(2), 28D

Citation : (1995) 52 ECC 53 : (2003) 162 ELT 121

Hon'ble Judges : K.A. Swami, C.J.;Janarthanam, J

Bench : Division Bench

Advocate : C.A. Sundaram and K. Jayachandran, ACGSC, for the Appellant;
Habibullah Badsha, R. Sasidharan and L. Mythili, for the Respondent

Final Decision : Dismissed

Judgement

Janarthanam, J.—The Indo-Swiss Synthetic Gem Manufacturing Company Ltd. (for short "Company") - respondent (in all Writ Appeals - petitioner) is situate at 13/239, Main Road, Mettupalayam-1. The company, it is said, is a manufacturer of synthetic gem. It imported silica crucibles under valid licence from France and filed five bills of entries, namely, (1) D.1211, dated 28-4-1982; (2) D.1212, dated 22-3-1980; (3) D. 262, dated 5-7-1982; (4) D.1105, dated 19-12-1980; and (5) D.1106, dated 19-12-1980.

2. The Assistant Collector of Customs assessed the goods and levied additional or countervailing duty under Customs Tariff Heading 70.21 and under item 23-A(4) of the Central Excise Tariff (for short "CET"). The consignment had been cleared on payment of duty, as demanded.

3. Even though the items imported were silica crucibles, the Assistant Collector of Customs classified the goods for assessing duty under the Heading No. 70.21, which related to "other articles of glass", in view of Chapter Note 3 of Chapter 17, which states, "for the purposes of this schedule "glass" is to be taken to

extend to fused quarts and fused silica". Item No. 23A(4) of CET states that for other glass and glassware including tableware the duty shall be as prescribed therein. u/s 3 of the Customs Tariff Act, 1975 (Act No. 51 of 1975 - for short CUSTA"), "any article which is imported into India shall, in addition, be liable to a duty (hereinafter in this section referred to as 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 imported article." Hence under CUSTA, the additional duty should be equal to the excise duty on a like article manufactured in India.

4. The company filed claim petitions for refund on the ground that silica crucibles were liable to duty under Heading 69.03 of CUSTA and no additional duty was leviable under item 23 of (CET, since Heading 69.03 covers crucibles and the goods were not glassware and hence not liable to additional duty under item 23 of CET.

5. The Assistant Collector of Customs (Refunds) rejected the claims of the company. The appeals preferred by the company to the Appellate Collector of Customs were also rejected. The company then preferred revision to the Central Government, which was later transferred to the Customs, Excise and Gold (Control) Appellate Tribunal (for short "CEGAT") constituted on 11-10-1982 under the Customs Act, 1962 (Act No. 52 of 1962 for short "Act").

6. The Tribunal, by its judgment dated 5-1-1983 in Appeal No. CD(SE)(T) Appeal No. 7/81-B held that since the fused quartz and fused silica have to be considered as "glass" under Chapter Notes 3 in CUSTA, it would be logical to conclude that but for this Chapter notes fused quartz and fused silica would not ordinarily be considered as "glass" and therefore, in the absence of corresponding note or Explanation in CET, "glass" in item 23-A of CET would not ordinarily include the fused quartz and fused silica, and, therefore, not liable to countervailing duty.

7. The company had been importing silica crucibles from 1976 onwards and had been paying the duty as demanded by the Department under the mistaken impression of law that they were classifiable under item 23-A(4) of CET for the purpose of countervailing duty. It is only after the judgment so delivered by CEGAT, the company came to know that it had made payments under the mistaken impression of law and that the authority had no jurisdiction to levy countervailing duty on goods imported by it and that if at all any levy had been collected under item 23A of GET, it should be without authority of law and without jurisdiction and hence it should be refunded.

8. u/s 27 of the Act, the claim should have been made within a period of six months from the date of payment of such duty. While so, if any attempt is made by the company by approaching the authorities for refund, that would be of no

avail. Moreover, since the duty had been collected without there being any sanction of law, the company is entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

9. In these circumstances, the company filed Writ Petition Nos. 2914, 2915, 2916, 2947 and 2948 of 1984 for issue of Mandamus directing (1) the Collector of Customs, Customs House, Madras - 600 001; (2) Union of India through the Secretary, Ministry of Finance, Department of Revenue and Banking, Central Secretariat, North Block, New Delhi; and (3) the Assistant Collector of Customs (Refunds), Customs House, Madras - 600 001 - (appellants in all Writ Appeals - respondents), to refund the sum of Rs. 1,46,918.81, Rs. 31,195.73, Rs. 1,62,281.81, Rs. 26,648.16 and Rs. 76,648.16, being the amount collected as additional duty or countervailing duty under item 23A(4) of CET respectively on bill entries Nos. D.1211, dated 28-4-1982; D.1212, dated 22-3-1980; D.262, dated 5-7-1982; D.1105, dated 19-12-1980 and D.1106 dated 19-12-1980.

10. During the pendency of the above Writ Petitions, the Central Excises and Customs Laws (Amendment) Act, 1991 (Act 40 of 1991 - for short "Amendment Act"), which was published in the Gazette of India, Extraordinary, Part II Section 1, No. 54, dated 18th September, 1991 came into force.

11. Sub-sections (2) and (3) of the substituted Section 27 and the newly introduced provisions, namely, Sections 28C and 28D of "the Act which are relevant for our present purpose are as follows :

"27. Claim for refund of duty. -

(1)

(2) If, on receipt of any such application, the Assistant Collector 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 Collector 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 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 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 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).....,.....

28C. Price of goods to indicate the amount of duty paid thereon. - Notwithstanding anything contained in this Act or other law for the time being in force, every person who is liable to pay duty on any goods shall at the time of clearance of the goods, prominently indicate in all the documents, relating to assessment, sales invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

28D. Presumption that incidence of duty has been passed on to the buyer.

- Every person who had paid the duty on any goods under this Act shall, unless the contrary is proved by him be deemed to have passed on the full incidence of such duty to the buyer of such goods."

12. After the amendments came into force, the appellants-respondents filed a counter -- contending that the Writ Petitions were not maintainable, inasmuch as u/s 27(3) of the amended Act, no refund could be made, except as provided for under Sub-section (2) of Section 27 and therefore, the company should file an application before the Assistant Collector of Customs, who alone was entitled to scrutinise the application and pass appropriate orders thereon, after considering the following questions, namely,

(1) Whether the claims made in these Writ Petitions were or not barred by limitation?

(2) Whether the incidence of duties was or not passed on to anyone in the course of the trade?

and

(3) Whether the disputed duty has or has not been paid under protest.

13. The company, in its supplementary affidavit clarified the position as respects

the user of silica crucibles in the manufacture of synthetic gems, as refractory goods, which could withstand very high industrial temperatures, which were necessary for such process of manufacture. Such crucibles were not sold or traded. Therefore, the question of passing on the duty liability to the customers did not arise. In these circumstances, the company would claim that it was eligible for refund under Clause (a) or (b) of Sub-section (2) of Section 27 of the Act.

14. Learned single Judge, before whom, the aforesaid Writ Petitions were pending, after taking into consideration the arguments of the respective learned Counsel for the parties, focussed on the fact-situation, in the light of the Amendment Act, recorded the findings as below : -

(1) The company had not directly passed on silica crucibles as imported to its customers or buyers and in fact, they were used as refractory goods for the manufacture of synthetic gems, and, therefore, the question of passing on the incidence of duty did not arise;

(2) Additional or countervailing duty had been paid under the mistaken impression of law and the said mistake came to be known only on 5-1-1983, the date of judgment of the CEGAT;

(3) There is no conferment of power on the Assistant Collector of Customs to entertain the claim made beyond the period of six months, except in a case, where the duty is paid "under protest";

(4) The Assistant Collector, being a statutory authority, cannot act beyond the scope of the provisions of the Act and cannot enlarge the period of limitation under the Act;

(5) In case, where the claimant is lawfully entitled to refund institutes appeals or other proceedings and obtains an order or decree; but beyond the prescribed time, he cannot apply before the Assistant Collector for refund within the specified period and thereby he is deprived of the benefit albeit the order or decree obtained by him for refund and in these circumstances, the claimant has no other go except to approach this Court under Article 226 of the Constitution, instead of approaching the statutory authorities prescribed under the Act;

(6) The provision, like Section 28C of the Act cannot be made applicable with reference to imports that were made before the introduction of such a provision. It is on the findings, as above, learned single Judge, by order dated 20-3-1992, allowed all the Writ Petitions as prayed for without costs, giving rise to the present appeals, which were taken on file on 13-7-1992.

15. Writ Petition No. 15237 of 1994 came to be filed on 25-8-1994 before a learned single Judge of this Court who, in turn, ordered notice of motion returnable in three weeks on 30-8-1994. On 20-9-1994, Mr. K. Jayachandran, learned Additional Central Government Standing Counsel, took notice for the respondent and the said Writ Petition was posted, at request, on 26-9-1994, on

which date, it stood adjourned initially to 5-10-1994 and to further subsequent dates and ultimately, on 8-11-1994, the said Writ Petition had, however, been admitted and Rule nisi issued calling for records within eight weeks.

16. The jurisdictional or foundational facts leading to the filing of the said Writ Petition arise this way :

(a) SRF Limited (petitioner), it is a company incorporated under the Indian Companies Act, 1956, it is said, is a leading manufacturer of industrial fabrics having its registered office at Express Building, 9-10, Bahadur Shah Zafar Marg, New Delhi-110 002 and one of its manufacturing unit at Viralimalai, Pudukkottai district, Tamil Nadu with Pin Code number 621316.

(b) The petitioner is said to have been engaged in the manufacture of dipped man made fabrics amongs other things at its Viralimalai Unit. These dipped fabrics consisting of nylon or rayon cord have to be dipped in Resorcinol Formaldehyde Latex solution (for short "RFL solution") in order to achieve a good adhesion of rubber to such cord.

(c) The petitioner is said to manufacture Resorcinol Formaldehyde solution (for short "RF solution") by mixing Resorcinol and Formaldehyde in the presence of Sodium Hydroxide and water and consume the same in the manufacture of RFL solution, otherwise known as "dipped solution".

(d) The present Writ Petition relates to the Central Excise duty paid on RF solution, which is stated to have been captively consumed in the manufacture of dipped solution which is used for the manufacture of dipped fabrics. As early as 1983, the Petitioner contended that RF solution is not "goods" coming within the direct purview of Section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944 - for short "CESA") and hence not subject to any Central Excise duty. This claim was initially rejected by the Assistant Collector of Central Excise, Central Excise Division, No. 4-A, Promenade Road, Trichy-620 001 (respondent) and hence the petitioner was to pay Central Excise duty "under protest" in terms of Rule 233B of the Central Excise Rules, 1944 (for short "CE Rules"), pending appeal proceedings.

(e) This controversy was finally settled by the respondent, on remand made by the Appellate Tribunal, by its order No. 65/90, dated 25-9-1990, wherein the respondent held that RF solution manufactured and used by the petitioner is not "goods" and no duty, therefore, is leviable on the same.

(f) Consequent upon the order of the respondent, the Petitioner filed a refund claim dated 14-3-1991 for refund of a sum of Rs. 5,41,498.67, being the duty paid "under protest" during the period from 1-4-1983 to 20-10-1986 u/s 11B of CESA, as it stood then. In terms of the erstwhile Section 11B, any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date, provided the limitation of six months shall not apply,

where any duty has been paid "under protest".

(g) While the refund application was pending before the respondent, Section 11B of CESA was amended with effect from 20-9-1991, substantially, besides newly introducing Sections 12B and 12C, by the Amendment Act.

(i) The amended Section 11B reads as under :

"11B. Claim for refund of duty. -- (1) Any person claiming re fund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant dale in such form as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of 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 Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) as substituted by this Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation. -- For the purposes of this section -

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India, where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subject to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required which exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on such basis of, such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(f) in any other case, the date of payment of duty.

(2) If, on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise 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 of excise as determined by the Assistant Collector of Central Excise 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) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Collector of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise 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 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 of any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in subsection (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."

(ii) The newly introduced Sections 12B and 12C are as under: -

12B. Presumption that incidence of duty has been passed on to the buyer.

-- Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer Welfare Fund. -- (1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in Sub-section (2) of Section 11B or Sub-section (2) of Section 11C or Sub-section (2) of Section 11D;

(b) the amount of duty of customs referred to in Sub-section (2) of Section 27 or Sub-section (2) of Section 28A, or Sub-section (2) of Section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purpose of this Fund."

(h) Subsequent to the Amendment of Section 11B and the introduction of new Sections 12B and 12C by the Amendment Act, the respondent issued a notice dated 6-1-1992 calling upon the petitioner to show cause why the amount of refund claimed by the petitioner should not be credited to the Consumer Welfare Fund in terms of Sub-section (2) of Section 11B read with Section 12C of CESA.

(i) There was no dispute regarding the claim for refund and the sum claimed by the petitioner as refundable. The only issue that was raised by the respondent

was that the amount claimed as refund should be credited to Consumer Welfare Fund and not to the petitioner.

(j) The show-cause notice went on the premise that even though RF solution is consumed in the manufacture of REL solution, the petitioner could have passed on the burden of duty to consumers indirectly, as the value of finished goods would have included the duty paid on RFL solution.

(k) The petitioner filed a detailed reply on 3-4-1992 to the show-cause notice of the respondent relying upon the judgment of this Court in Writ petition Nos. 2914, 2915, 2916, 2947 and 2948 of 1984 in the case of Indo-swiss Synthetic Gem Mfg. Co. Ltd. Vs. Collector of Customs, in a matter arising u/s 27 of the Act, which had provision relating to refund in pari materia with amended Section 11B of CESA. The petitioner also contended that when it has been held that RF solution is not "goods" at all, the collection and retention of any sum, done outside the provisions of CESA was totally without the authority of law and without jurisdiction.

(l) The petitioner further contended that the invoking of unjust enrichment proposition would apply only when the duty has been passed on to a buyer directly and in the case of captive consumption, there can be no question of passing on the duty liability or the incidence of duty to a third party-buyer.

(m) The respondent, by his Order-in-Original Order No. 51/94 of the Assistant Collector dated 25-3-1994 has confirmed the show-cause notice and has ordered that the amount of Rs. 5,41,498 sanctioned should be credited to the Consumer Welfare Fund u/s 12C of CESA.

(n) The said order was received by the petitioner on 8-7-1994. The impugned order, the petitioner would contend, is not legally tenable and in fact, is, in contravention of the provisions of CESA and the Rules and is without jurisdiction.

(o) Even though there are provisions in the CESA providing for an appeal to be filed before the Collector (Appeals) against the order of the Assistant Collector of Central Excise, the petitioner would claim, that since the issue involves purely a question of law, relatable to the interpretation of Section 11B of CESA, which is in pari materia with the provisions adumbrated u/s 27 of the Act, the interpretation of which is seized of by a Division Bench of this Court in the Writ Appeals as above, there is no efficacious alternative remedy, except to resort to the jurisdiction of this Court under Article 226 of the Constitution of India to quash the impugned order and ultimately prays for a direction to refund the sum in question, instead of crediting it to the Consumer Welfare Fund. In these circumstances, the doors of this Court under writ jurisdiction had, therefore, been, it is said, knocked at.

17. The pith and substance of the counter filed by the respondent is reflected as below:

(a) RF solution, which has no shelf-life, was however, originally construed to be

"goods" and consequently, duty had been levied and collected from the petitioner, of course, "under protest" from 17-10-1983. The petitioner agitated the matter by way of appeal to the Collector (Appeals) and further appeal to CEGAT, which remanded the case to review afresh in the light of the various points raised by the petitioner to the original authority, that is to say, the respondent - Assistant Collector of Customs, who, in turn, after giving a personal hearing, passed an order No. 64/90 dated 29-9-1990 holding that RF solution is not "goods". The duty thus paid under mistaken impression of law, for the period from 17-10-1983 to 20-10-1986, amounting to Rs. 5,41,498.67 is not at all refundable to the petitioner inasmuch as RF solution is used as a raw material or input in the manufacture of RFL solution, which again is used in the manufacture of "dipped man made fabrics" and thus, forming part of the cost of the final product and consequently, passing on the duty paid indirectly to the buyers of the dipped man made fabrics. Further, the burden that the duty paid has not been passed on to the customers or buyers of the end product or the same had been borne by him squarely rests on the shoulders of the petitioner and unless and until proof on such aspects of the matter, forthcoming, it has to be presumed that the duty paid has been passed on to the customer or buyer, in which event there is no other go except to credit the refund of the duty so paid to the Consumer Welfare Fund.

Above all, the Writ Petition is liable to be dismissed in limine on the ground of alternative statutory remedy.

18. Learned single Judge, before whom the Writ Petition was pending, appeared to have directed the Registry to post it, along with Writ Appeals as above, of course, after complying with the procedure obtaining in the Registry in that regard. The Registry complied with the direction in posting the said Writ Petition, along with the Writ Appeals.

19. Arguments in Writ Appeals as well as in the Writ Petition, which were heard in piecemeal on different dates, however, came to fruition on 18-8-1995, on which date, a submission emerged from learned Counsel appearing for the Department to permit an inspection of the factory premises, so as to verify, whether the silica crucibles were actually consumed or not in the ultimate production of the articles manufactured by the Company and consequently, this Bench passed an order as below :

"To-day we have completed the hearing. We would have reserved the cases for judgment but for the submission made by learned counsel for the Department that in the light of the supplementary affidavit filed by the appellant, the Department may be permitted to have an inspection. The Department may be permitted to inspect the actual working of the appellant's factory to ascertain whether the goods in question viz., Silicon crucibles are actually consumed in the ultimate production of the articles manufactured by the appellant. The appellant* has no objection for permitting the Department to inspect its factory for the said purpose. However, it is submitted that such inspection should not be done

without notice to the appellant and in their absence. Learned Counsel for the Department submits that such inspection would be done after notice to the appellant and in the presence of the appellant or its authorised representative. In the light of these submissions the inspection as prayed for is allowed in the aforesaid terms. It is also further ordered that after the inspection, an affidavit along with the report of the inspecting officer should be filed and a copy of such affidavit and the report shall also be furnished to the appellant* before it is filed into the Court. Parties pray for two weeks time to complete the inspection and to file the report. Therefore, we direct these appeals be called on 8-9-1995 for filing the report."

(* "Appellant" herein means "Company" - as earlier indicated)

20. One Vivek C. Khole, Appraiser, Office of the Commissioner of Customs, Customs House, Madras-600 001, accordingly inspected the factory premises of the Company on 30-6-1995 and filed his report dated 4-9-1996, which reads as under :

"Report of visit to the Indo-Swiss Synthetic Gem Manufacturing Company Limited, Mettupalayam - 641 301 on 30-8-1995.

I visited M/s. The Indo-Swiss Synthetic Gem Manufacturing Company Limited on 30-8-1995 after giving notice as per Order of Hon"ble Madras High Court and studied the manufacturing process. In brief the Manufacturing activity of Synthetic Gems can be described as given below :-

1. PREPARATION OF DOUBLE SULPHATE CRYSTALS :

Double Sulphate is manufactured from the solutions of Aluminium Sulphates and Ammonium Sulphates. On cooling the mixed solutions of these two salts tiny crystals of double Sulphate or Ammonical Alum are formed. The Crystals are separated from the mother liquor by centrifuging and dried in drier.

2. CALCINATION:

The Double Sulphate Crystals are weighed and oriained in an oil fired muffle furnace at around 1200°C. The dried double sulphate is taken in A QUARTZ CUPS OF SILICA CRUCIBLES which are kept in muffle furnace.

Silica Crucibles are used for following properties:

1. Ability to withstand high temperature.
2. High resistance to thermal shock.

In these process nine cups are used for one batch. Three cups in each row for three rows. When calcination is taking place moisture, Ammonia gas, Sulphur dioxide gas are escaping. After one hour calcination Aluminium Oxide Powder is obtained.

After calcination for an hour, the crucibles are allowed to cool for approximately

an hour. After removal of Alumina Powder from these crucibles they are again filled with double sulphate which is subjected to calcination. Thus, a crucible is subjected to 5-6 charges in a duration of 12 hours. A crucible was used for 5 charges in a duration of 12 hours. A crucible was used for 5 charges on 30-8-1995, the day I visited.

The life of the crucible is around 100 to 200 charges as per information given by factory. Mostly, after this, it will get cracked.

(1) Mainly due to thermal shock.

(2) Mechanical Impact.

(3) Chemical reaction.

(4) Manufacturing defect.

(5) Human error.

Once crucible develops a crack, it cannot be used further since it will break into pieces, thus getting destroyed and lose its utility without being capable of further use.

3. PRODUCTION OF HYDROGEN AND OXYGEN:

Hydrogen and Oxygen gases are produced by electrolysis of water.

4. FUSION:

With the help of Hydrogen and Oxygen gases and Aluminium Powder obtained during calcination Single Crystals of Alumina are developed . During this process flow of Alumina powder as well as Oxygen and Hydrogen gases are controlled in order to achieve best results. These single crystals are called a Rough Synthetic Gem Stones."

21. In pith and substance, from the submissions of Mr. C.A. Sundaram, learned Additional Central Government Standing Counsel appearing for the appellants; Mr. Habibullah Badsha, learned Senior Counsel representing M/s. B. Sashidharan & D. Mythili, learned Counsel appearing for the respondent (in Writ Appeals) as well as petitioner (in Writ Petition) and Mr. K. Jayachandran, learned Additional Central Government Standing Counsel appearing for the respondent (in the Writ Petition), the points, as below, arise for consideration:

(1) Whether the Scheme of the Amendment Act envisages a direct transfer of the burden of duty of customs or excise, along with the sale of the same goods to the buyer?

(2) Whether the doctrine of unjust enrichment is applicable to cases, where the goods, in respect of which duty of customs or excise had been paid, are either consumed or used in the manufacture of other products?

(3) On whom rests the burden to prove that the incidence of duty has not been

passed on to the buyer or borne by the assessee himself and what are the consequences to flow from such failure therefor?

(4) Whether in pari materia provisions adumbrated u/s 11B of CESA and Section 27 of the Act and other provisions as amended and inserted with effect from 20-9-1991 are applicable retrospectively to refund claims already filed, but pending in appeal etc., proceedings?

(5) Whether the bar of limitation for a claim of refund of duty of customs or excise paid, as had been provided for in the analogous provisions of Section 11B of CESA and Section 27 of the Act is applicable, in the exercise of civil and writ jurisdiction, when such duty of customs or excise had been levied and consequently paid without the authority of law and if it is not so, what are the requirements to be complied with?

(6) Whether any efficacious alternative remedy is available to the petitioner to disentitle him to invoke writ jurisdiction under Article 226 of the Constitution of India?

22. It is not as if the questions as raised above, were not at all raised earlier. The plain fact is that such questions did arise for consideration before the superior Courts of jurisdiction - High Courts and Supreme Court. Better it is, therefore, we feel to make a survey of those decisions in a bid to solve the tangle posed for giving a legal fitment to the foundational facts of the instant cases, in the light of the Scheme envisaged by the Amendment Act.

23. In *Solar Pesticides Pvt. Ltd. Vs. Union of India (UOI)*, , the petitioners manufacture Copper Oxychloride, a chemical extensively used as a fungicide for the treatment of agricultural crop. The petitioners have their factory at Bulsar, which was registered as a Small Scale Industry. The product manufactured by the petitioners was also registered by the Insecticides Board, Faridabad, for the manufacture of Copper Oxychloride. The petitioners require as one of the raw materials, copper scrap for the manufacture of Copper Oxychloride. The petitioners regularly import copper scrap for use in their factory at Bulsar for the manufacture of Copper Oxychloride.

(a) Under the Customs Notification No. 122 of 1978, dated 21-6-1978 a concessional rate of duty was levied on the import of copper scrap, which was used for the manufacture of chemicals. While availing of this concessional Customs duty, the petitioners furnished an end-use bond in favour of the Customs Department, duly guaranteed by the petitioners' Bankers. This bond is for the purpose of ensuring that the copper scrap imported by the petitioners is used for the manufacture of Copper Oxychloride. Once the copper scrap is so consumed, a Chartered Accountant's certificate regarding such consumption along with an affidavit is furnished before the Customs Department. The Customs Department, after verification, cancels the bond.

(b) Under Notification No. 35/81-CE, dated 1-3-1981, an exemption is granted to

waste or scrap of copper, zinc, aluminium and lead, if used in the manufacture of chemicals. Exemption is granted from the whole of the duty of excise leviable inter alia on copper scrap provided that:

(i) it is proved to the satisfaction of an officer not below the rank of Assistant Collector of Central Excise that the said waste or scrap is intended to be used in the manufacture of chemicals; and

(iii) in respect of such use elsewhere than in the factory of production of the aforesaid waste or scrap, the procedure as set out in Chapter X of the Central Excise Rules, 1944 is followed.

(c) The dispute related to the recovery of countervailing duty, that is to say, Additional Customs duty in respect of copper scrap so imported by the petitioners.

(d) In order to avail of the aforesaid exemption notification for the purpose of countervailing duty, the petitioners undisputedly complied with the first condition, namely, that the copper scrap imported by them was used for the manufacture of chemicals. The Becons condition, however, regarding compliance with the procedure set out in Chapter X of the Central Excise Rules, 1944 could not be followed by the petitioners, because, they were not the manufacturers of copper scrap in India. They could not, therefore, follow the procedure laid down in Chapter X for clearing the goods, for the purposes of Excise duty. As the petitioners imported these goods, they could not fulfil the second condition.

(e) As from 1st of August, 1984 for the purpose of countervailing duty the relevant Excise Notification is Notification No. 173/84-CE dated 1-8-1984. This has been subsequently amended on 10-2-1986 and thereafter it was replaced by Exemption Notification No. 177/88-C.E., dated 13-5-1988. For the purposes of the present petition, the relevant particulars of the said notification, as amended from time to time, have substantially remained the same, as those of the earlier notifications. Hence the petitioners were denied of the benefit of those exemption notification for the purpose of levy of Additional Duty of Customs at the time, when they imported copper scrap.

(f) The petitioners filed applications for refund of the additional duty of Customs within the prescribed period; but those refund applications were rejected. The numbers of Bills of Entries and the amounts of refund due were also set out against each of those applications. The Assistant Collector of Customs rejected those application.

(g) That was sought to be challenged in the Writ Petition. During the pendency of the Writ Petition, the Amendment Act came into force. Thus, the plea that was taken up was that although the petitioners would be entitled to the refund claimed by them, their claims ought to be considered in the light of the Amendment Act (Central Act 40 of 1991).

(h) It was in those circumstances, the Bombay High Court had the occasion to

consider the provisions of Section 27 of the Act, and had observed in paragraphs 18 to 26 (at pages 205-206) thus:

"18. Hence the entire scheme is designed for a situation where (1) the importer of goods after clearing the goods on payment of duty, sells these goods to others. In the process either he directly passes on the incidence of duty to his buyer or does not. Only in the latter case will the importer get the refund. Otherwise, the refund will go to the buyer or to the Consumer Welfare Fund as per the Sections. (2) If the duty is passed on to the buyer, the right to recover the duty is also passed on to the buyer of the imported goods. Provided that the buyer has not in turn sold these goods and passed on the duty to the next buyer. (3) The converse situation contemplated is where the importer uses the goods himself. Here there is no question of passing on the incidence of duty to anyone-else since the goods imported are not sold to anyone-else. Hence he can get the refund.

19. Therefore the question of unjust enrichment arises under the amended scheme when refund is asked for by a person who has sold the imported goods and in the process directly passed on the burden of duty to the buyer. Clauses (a), (b) and (c) of the proviso to Section 27(2) and the presumption laid down u/s 28D make this very clear.

20. In the present case the imported copper scrap has not been sold by the petitioners to anybody. They have used the scrap themselves for the manufacture of chemicals. The petitioners have therefore not passed on the duty paid by them on copper scrap to any buyer of copper scrap. Had they done so, the buyer of this imported scrap could have claimed a refund and so on. Since the petitioners have consumed the scrap in the process of manufacturing Copper Oxychloride, they have not passed on the incidence of duty to anybody in the manner envisaged in the scheme. Because the scheme envisages a direct transfer of the burden of duty along with the sale of the same goods which were imported, to the buyer.

21. Undoubtedly, the import duty paid on copper scrap may become a part of the cost of manufacture of Copper Oxychloride. But when Copper Oxychloride is sold in the market, it is difficult to ascertain how much of the original import duty on copper scrap is passed on to the buyer of Copper Oxychloride and in what proportion. Nor can there be in such a case the kind of documentation required under the scheme. So that the buyer of Copper Oxychloride cannot claim a refund of any part of the duty on Copper Scrap. Where there is no sale of the goods which were imported and no direct transfer of the burden of duty to the buyer of the imported goods, the case falls under Clause (a) or (b) of the proviso to Section 27(2).

22. In other words Clause (a) also covers all cases where the importer has not sold the imported goods in the same form in which they were imported, but has used or consumed the goods himself. This would include his using up or

consuming the imported goods in the manufacture of a different commercial commodity. Clause (b) of the proviso brings out this aspect clearly in the case of an individual.

23. The Statement of Objects and Reasons relating to the Central Excise and Customs Laws (Amendment) Act, 1991 is also relevant as throwing light on the circumstances that brought about the amendment. It is stated in the Statement of Objects and Reasons.

"The question of "unjust enrichment" in cases of goods subject to duty of excise of customs has been the subject matter of discussion for quite sometime now. The concept of "unjust enrichment", in so far as it relates to the said duties, is that any refund of these duties made to any manufacturer or importer, who may have initially paid these duties but had passed on the same to the buyers, would be in the nature of a windfall given to such manufacturer or importer.

xx xx xx xx xx xx 3. The Bill aims at giving effect to the aforesaid recommendation of the Committee and proposes the following main amendments in the said Acts, namely :-

(a) the manufacturer or importer of goods shall not be entitled to refund of the duty of excise or, as the case may be, the duty of customs if he has already passed on the incidence of such duty to the buyer;

(b) the burden of proof that the incidence of the duty has not been passed on to the buyer shall be on the person claiming the refund;

(c) every person, who is liable to pay duty of excise or, as the case may be, the duty of customs on any goods, shall be under an obligation to prominently indicate, at the time of clearance of the goods, in all the documents, relating to assessment, etc., the amount of duty which will form part of the price at which such goods will be sold;

(d) the refund of any of the said duties is proposed to be made only to the person who has ultimately borne the incidence of such duty;

(e) xxx xx

xxx xx

xxx xx

(f) xxx xx

xxx xx (g) it is also proposed to provide that where any manufacturer or importer of goods has collected any amount in any manner from the buyer as representing the duty of excise or, as the case may be, the duty of customs, he shall pay the said amount to the credit of the Central Government and the said amount shall be utilised in adjusting the duty payable by the manufacturer or importer on finalisation of assessment. The surplus, if any, will be dealt with in accordance with the aforesaid provisions of Section 11B of the Central Excises

and Salt Act, 1944 and Section 27 of the Customs Act, 1962."

24. The doctrine of unjust enrichment, which is the genesis of the amendment, has no application in cases where the imported goods are either consumed by the importer or are used by him in the manufacture of other products. In the case of the imported product Customs duty paid on it becomes a part of the cost of manufacture of the new item or items in which the imported component is an ingredient. In such cases the doctrine of unjust enrichment is not invoked. In the case of HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, , the Supreme Court has dealt with this aspect of the doctrine of unjust enrichment. In the case before the Supreme Court, the Court dealt with the payment of octroi duty on milkfood powder imported in bulk in drums in the city of Bangalore on which octroi was paid at the time of import. The milkfood powder was repacked in small packs and bottles of various sizes and sent to various places outside Bangalore, except a small quantity which was sold in Bangalore City proper. The manufacturer claimed refund of octroi for the quantity of milkfood powder which was sent outside Bangalore after repacking and/or rebottling. One of the contentions which was raised before the Supreme Court was that refund of octroi cannot be given because there was possibility of unjust enrichment of the claimants. Negating this contention, the Supreme Court observed that the octroi in the case before it was a duty on the entry of the raw materials, for coming in.

"It is the duty on the coming in of the raw materials which is payable by the producer or the manufacturer. It is not the duty on going out of the finished products in respect of which the duty might have been charged or added to the costs passed on to the consumers. In such a situation, no question of "undue enrichment" can possibly arise in this case."

25. In the present case the additional duty of customs is levied on raw material which is being imported. It is not an additional duty on any finished product which is going to be sold to the consumer and to whom the incidence of the additional duty of customs can be passed on directly. Since the additional duty of customs has not been directly passed on by the petitioners to any third party by selling the imported goods, they are entitled to claim refund of this amount under proviso (a) to Section 27(2) of the amended Section 27.

26. It was also submitted before us that in any case since this is a claim for recovery of monies paid under a mistake of law in a petition under Article 226 of the Constitution, the provisions of the Central Excises and Customs Laws (Amendment) Act, 1991 cannot apply in any event. In view of our earlier findings, it is not necessary for us to examine this aspect of the submission which is made before us."

24. In Union of India and others Vs. I.T.C. Limited, , the respondent carried on the business of manufacturing and selling cigarettes and smoking tobacco at its five cigarette factories, including one at Saharanpur in the State of Uttar

Pradesh. The respondent sells its products to wholesale buyers or dealers, who make further sales to secondary wholesalers from where the products reach the retailers and the consumers. During the period between September 1, 1970 and February 28, 1973, the respondent followed the self removal procedure laid down in Chapter VII-A of CE Rules on payment of excise duty, as the manufacture of cigarettes affects excise duty under CESA. The case of the respondent in the Writ Petition was that under a mistake of law regarding the true interpretation of Section 4(a) of the Act, it clears its products, but paid excess excise duty under the impression that the prices charged by the wholesale dealers to the secondary wholesalers would form the correct basis of assessment and not the price at which goods were sold to wholesale dealers.

(a) Consequent upon the judgment of the Apex Court in the case of A.K. Roy and Another Vs. Voltas Limited, , wherein it was held that u/s 4(a) CESA the value for the purpose of assessment is required to be determined on the basis of the price at which the manufacturer sells the products to the wholesale dealers and not the price at which the wholesale dealers further make a sale of the product to secondary wholesalers, the respondent filed five applications before the appropriate authority under CESA seeking refund of the excess excise duty paid under mistake of law. Two applications pertained to the period 1-9-1970 to 28-5-1971 and 1-6-1971 to 19-2-1972 involving refund of Rs. 23,68,686.85 and Rs. 26,21,356.16 respectively. The other three applications, related to the period 20-2-1972 to 28-2-1973. The Assistant Collector of Central Excise by his order dated 9-10-1973 rejected all the five applications.

(b) The respondent preferred appeals before the Collector of Central Excise (Appeals). The Appellate Collector by an order dated 30-12-1975, allowed the appeals arising out of the three refund applications relating to the period 20-2-1972 to 28-2-1973, and set aside the orders passed by the Assistant Collector and ordered consequential relief in favour of the respondent by directing the refund of the excess excise duty paid. The appeals pertaining to the refund applications for Rs. 23,68,686.85 and Rs. 26,21,356.16 for the period 1-9-1970 to 28-5-1971 and 1-6-1971 to 19-2-1972 respectively were, however, rejected by the Collector (Appeals) on the ground that the same were barred by time.

(c) The respondents did not take the matter further under the statute but instead filed W.P. No. 971 of 1976 seeking quashing of the order of the Collector of Central Excise (Appeals) dated 30-12-1975 and also sought a direction by way of Mandamus for refund of the sum of Rs. 49,90,043.01 with interest at 12 per cent per annum thereon.

(d) The Division Bench of the Delhi High Court came to the conclusion that on account of a mistake of law, excess excise duty had been paid by the respondent and received by the Department. The Bench held that there was a legal obligation on the part of the Government to return the excess excise duty received/recovered by it since the same was not payable by the party. Relying

upon their earlier judgment in *Chemicals & Plastics and Anr. v. Union of India and Ors.*, CWP No. 147/79, decided on 10-7-1979, the Division Bench allowed the writ petition filed by the respondent and held that the respondent could not be non-suited on the ground of limitation. The Court set aside the order of the Collector of Central Excise (Appeals) and detailed the Department to refund the sum of Rs. 49,90,043-01 to the respondent. The Bench observed :-

"The duty of excise can be which is levied in accordance with the Act and any money which is realised in excess of what is permissible in law would be a realisation made outside the provisions of the Act. The payment of the excess excise duty which has been made by the petitioners for the period September 1, 1970 to February 19, 1972 cannot be legally termed as payment of excise duty authorised by law as the authorities under the Act themselves did not treat the excess duty in identical circumstances paid for the subsequent period from February 20, 1972 to February 28, 1973, as authorised by law. The excess excise duty was not payable by the petitioners under the Act and there is a corresponding legal right in the petitioners to recover it. This right cannot be defaulted by a mere limitation in the Act or the Rules when the collection is without the authority of law."

The Department was directed to refund to the respondent the sum of Rs. 23,68,686.85 plus Rs. 26,21,356.16, "or such other lesser sum as may be found on verification to be due" within a period of six months from the date of the judgment i.e., April 12, 1982.

(e) Aggrieved by the judgment of the High Court, the Department filed SLP and on 8-10-1982, special leave was granted. In the stay application filed by the Union of India, the Bench directed the appellant to pay to the respondent the amount which it was required to refund under the impugned judgment within a period of six weeks of the respondent furnishing bank guarantee to the Collector of Central Excise, Meerut for the said amount and that in case, the respondent fails in this appeal, it shall refund the amount with interest at 12 per cent per annum to the appellants.

(f) On 15-4-1993, when the case came up for hearing before the apex Court, learned Counsel for the appellants, it seems, raised the plea based on Section 11B, as amended by the Amendment Act 40 of 1991, to deny refund to the respondent. After hearing learned Counsel for the parties, the apex Court directed the respondent "to furnish documentary or other evidence as the respondent may deem appropriate to establish that the amount of duty of excise in relation to which the refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person." The appeal was directed to be posted for hearing on 10-5-1993.

(g) The respondents did not file any documentary or other evidence nor even an affidavit stating that the incidence of duty of excise in relation to which the refund was being claimed had not been passed on to any other person. The

arguments were heard finally on 14-5-1993 and the judgment was reserved, though liberty was granted to learned counsel for the parties to file written submissions, if any, in support of their arguments. The respondent filed written submissions on 31-5-1993. Along with the written submissions an affidavit was also filed. No other material or documentary evidence, to establish that the burden of excess excise duty had been borne by it and not passed on to any other person, was filed. The Union of India filed their written submissions on 21-6-1993.

25. In the light of the background facts, as stated above, the Supreme Court happened to consider the retrospectivity of the amended provisions of Section 11B of CESA and expressed in paragraphs 15, 16 and 17 (at pages 11-14) thus:

"15. It is, thus, seen that u/s 11B(3) (supra) no refund shall be made except as provided for in Sub-section (2), as amended, notwithstanding anything to the contrary contained in any judgment, order or direction of the Appellate Tribunal or any court or in any other provisions of the Act or the Rules made thereunder or under any other law for the time being in force. We are not persuaded to agree with learned counsel for the respondent that the amended provisions of Section 11B can be applied only prospectively i.e., to refund claims made after the introduction of the amendment and would not apply to pending cases and refund claims filed prior thereto and that the prohibition contained therein cannot apply to the present case. The refund in the present case was ordered by the High Court in the Writ Petition by setting aside the orders of the statutory authority refusing the claim for refund, as barred by limitation. The judgment of the High Court is under appeal before us. It was during the pendency of the appeal in this Court, that Section 11B of the Act was amended by Act 40 of 1991 with effect from 20-9-1991. The matter relating to refund was thus wide open before this Court in the present appeal and had not been finally settled when Act 40 of 1991 came into force. As per amended Section 11B, all pending claims for refund on or before 20-9-1991 are required to be dealt with and disposed of in accordance with the amended provisions of law. By operation of Section 11B(3), as amended, notwithstanding the order given by the High Court in the Writ Petition, no refund can be made to the respondent except in accordance with the provisions of Section 11B(2) of the Act. The direction to pay the amount to the respondent to the extent ordered by the Delhi High Court contained in the interim order of this Court dated 8-10-1982 was a conditional one and subject to the respondent (i) furnishing bank guarantee to the Collector of Central Excise, Meerut for the amount in question; and (ii) that in case the respondent fails in this appeal, it shall be liable to pay interest at 12 per cent per annum while refunding the amount to the appellant. Thus, the amount in question was directed to be paid to the respondent by this Court only as an interim arrangement, during the pendency of the appeal and could not be construed to be an order of "execution" of the order and directions of the High Court. The conditional order made on 8-10-1982 did not finally conclude the "refund claim" of the respondent and cannot take the case of the appellant out of the purview of

Section 11B(3) of the Act read with the first proviso to Section 11B(1), as amended. The argument on behalf of the respondent to the contrary is not only spacious but also fallacious. In this connection, it would also be advantageous to note a judgment of a three Judge Bench of this Court in *Union of India and others Vs. Jain Spinners Ltd. and another*, , as the law on the question of retrospectivity of Section 11B(3) has been settled therein. In *Jain Spinners'* case (supra), refund was allowed by the Assistant Collector as a result of the approval of the classification list as filed by the assessee provisionally. Subsequently, on receipt of a test report from the Deputy Chief Chemists, the department took the view that the refund had been erroneously granted and sought to recover it by issuance of a notice. The Assistant Collector confirmed the demand for payment of the duty amount which had been erroneously refunded. The assessee questioned the order of the Assistant Collector through a writ petition before the High Court and also by filing an appeal before the Collector of Central Excise (Appeals). The High Court issued an interim stay in favour of the assessee against the demand confirmed by the Assistant Collector's order subject to the assessee depositing the amount of the demand in the court. The respondent (Union of India) was permitted to withdraw the amount by an interim order of the Court on 19-2-1986 subject to the condition that it would pay interest at bank rate and refund the amount along with interest within two months of the decision of the writ petition if the petitioner ultimately succeeded. The appeal filed by the assessee before the appellate authority, however, succeeded and consequential relief was ordered, "if otherwise admissible". The assessee, thereupon filed an application before the Assistant Collector for refund of the duty plus interest as per the conditions contained in the interim order of the High Court. The assessee also filed an application before the High Court stating that in view of the appellate order, the writ petition no longer survived and sought a direction to the respondents to pay the amount along with interest. The High Court allowed the application of the assessee on 19-9-1991 and directed the Union of India to refund the amount due to the assessee. On 20-9-1991, Act 40 of 1991 came into force, prohibiting the grant of refund except in accordance with the provisions of Sub-section (2) of Section 11B. The Union of India filed an application stating that whether it was the High Court's order of 19-2-1986 or 19-9-1991, it was the duty of the Assistant Collector to satisfy himself that no part of the duty in respect of which refund was claimed was recovered by the assessee from any other person before making an order of refund. The Union of India sought two months time to consider the claim for refund in accordance with the amended provisions of Section 11B. The application was rejected by the High Court in view of the order dated 19-9-1991, which had been passed prior to the coming into force of the Amendment Act with effect from 20-9-1991. In November, 1991, the assessee filed a contempt petition alleging failure on the part of the officers of the Union of India to comply with the High Court's order granting refund to the assessee. When the petition came up for hearing on 18-3-1992, the counsel for the respondent submitted that the question regarding the applicability of the amended provisions was under consideration of the

Government and be sought time. On 13-4-1992, the Assistant Collector passed an exhaustive order holding that since the assessee had passed on the incidence of duty to others, it was not entitled to receive the refund. The High Court at the time of hearing of the contempt petition on 20-4-1992 was apprised of the order of the Assistant Collector; but it held that the decision of the Assistant Collector was not a decision of the Government and directed the Union of India to deposit the entire amount of refund with bank interest on or before 24-4-1992. It was in this background, that the Union of India filed an appeal before this Court against the order dated 20-4-1992 passed by the High Court to give effect to its earlier order dated 19-2-1986. This Court held that the High Court's order of 19th February, 1986, under which alone the refund was claimed could not be an exception to the provisions of Section 11B(3) of the Act, and that the High Court could not have made any order, after September 20, 1991 directing the payment of refund contrary to the amended provisions of Section 11B(2) of the Act. The Court expressed the view that Section 11B(3) of the Act, as amended, would apply to all cases which were pending notwithstanding any order or decree or judgment of a court or Tribunal or the provisions of any other law for the time being in force. This Court inter alia held:

"The only question before us is whether the impugned order dated 20-4-1992 of the High Court which is passed to give effect to its earlier order of 19-2-1986 is valid or not. Since, we are of the view that the order of 19-2-1986 attracts the provisions of Sub-section (3) of Section 11B of the Act which has come into force on 20-9-1991, the respondents are not entitled to take advantage of the said order unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to others."

Repelling an argument raised on behalf of the assessee that the amount deposited in court or withdrawn under orders of the court, would stand on a different footing than the orders of "refund" contemplated by Section 11B(3) of the Act, and would not fall within the mischief of the prohibition contained therein, Sawant J., speaking for the three Judge Bench observed :-

"Further, if the contention advanced by the learned counsel is accepted, it would defeat the amended provisions of the Act. It would then be open to the assessee to obtain orders from courts as in the present case, and instead of paying the assessed amount of duty to the authorities, deposit it in court and raise a plea that what is deposited in Court is not duty and the assessee is entitled to get the refund either directly from the court or if it is withdrawn by the authorities, from the authorities, notwithstanding that they have passed on the duty to others. It would create two official classes of assessee, viz., those who have paid the duty to the authorities and those who have obtained orders from the Courts for depositing the duties in courts. The former will, and the latter will not, be governed by the amended provisions of the Act. This would result in a discriminatory and invidious situation. The view canvassed by the learned counsel will also open a new door for unjust enrichment by enabling the

assesseees to bypass the statutory provisions which have been specifically enacted to prevent the malpractice."

16. The judgment in Jain Spinner's case (supra), therefore, answers fully the submissions raised on behalf of the respondents and we reject the plea raised on behalf of the respondent that the prohibition contained in Section 11B(3) of the Act would not apply to the facts and circumstances of the present case more so because the judgment and order, of the High Court directing refund was pending final adjudication by this Court when the amended provision of Section 11B(3) of the Act came into force with effect from 20-9-1991.

17. That apart, the argument on behalf of the respondent that in the present case "refund has already been made" to the respondent in accordance with the directions of the High Court by virtue of the interim order of the Court dated 8-10-1982 is factually incorrect. It is based on misconstruction both of the order of the High Court as well as the interim order of this Court. After quashing the orders of the Collector, Central Excise (Appeals), holding the two refund applications as time barred, the High Court allowed the writ petition and issued a mandamus "directing the respondents to refund to the petitioners the sum of Rs. 23,68,686.85 + Rs. 26,21,356.16 or such other lesser sum as may be found on verification to be due". Thus, refund had to be made, even under the orders of the High Court dated April 12, 1982, only after "verification of the refund due". The order was, thus, not an order absolute in terms. Admittedly, the respondent did not approach the competent authority for verification of the refund due" and no amount till date has been verified by the competent authority to be due to the respondent. Again, payment made to the respondent under interim orders of this Court dated 8-10-1982 was only an interim arrangement pending disposal of the appeal against the judgment of the Delhi High Court and was further subject to the stipulations and conditions contained therein. That interim order cannot be treated to be an order of "refund" in terms of the directions of the High Court. It is, therefore, futile for the respondent to contend that Section 11B(1), (2) and (3) have no application to the present case. We are of the opinion that in the facts and circumstances of the present case, the provisions of Section 11B as amended by Act 40 of 1991 are clearly attracted to the present case because the order of the Division Bench of the High Court had not acquired any finality when the amendment Act of 1991 came into force and the present appeal was pending in this Court. All pending claims for refund on or from 20-9-1991, are required to be dealt with and disposed of only in accordance with the amended provisions of the law, by reason of the amended Section 11B(3) and the present case is no exception."

26. The Supreme Court also dealt with the question of applicability of the bar of limitation of a claim for refund of duty of excise paid, as provided for in Section 11B of CESA, in the exercise of civil and writ jurisdiction, in paragraphs 5 to 8 (at pages 8-9), which read as under:

"5. The appellants do not dispute that for the purpose of determining assessable

value, it is the price at which the manufacturers sell the products to the wholesale dealers and not the price at which the wholesale dealer make further sale to the secondary wholesalers which is to be taken into account. The High Court found on the basis of the material on the record, that the appellants had received from the respondent the duty of excise in excess of what was admissible in law, because of a wrong interpretation placed by the respondent on the provisions of Section 4 of the Act. The respondent realised the mistake after this Court in *Voltas* case (*supra*) laid down the correct basis for assessment in such cases. It has been settled by this Court that where excess duty was not payable by the party under the provisions of a statute but had in fact been paid under a mistake of law, the party has a right to recover it and there is a corresponding legal obligation on the part of the Government to refund the excess duty so collected because the collection in such cases would be without the Authority of Law. The payment and recovery of excess excise duty was thus on account of a mutual mistake. The Collector of Central Excise (Appeals) accepted this position and allowed three refund applications but rejected the two applications as barred by limitation. The Department did not question the order of the Collector, Central Excise (Appeals), granting three refund applications and that order acquired finality. The High Court in the writ petition filed by the respondent against the rejection of two refund applications found that the respondent could not be non-suited on the plea of limitation since the excess excise duty had been paid on account of mistake of law and set aside the order of the Collector of Central Excise (Appeals) rejecting two refund applications and by a writ of mandamus directed the refund as claimed subject, however, to verification.

6. In *Salonah Tea Company Ltd. etc. v. Superintendent of Taxes Nowgong and Ors., etc.*, [1988 (33) E.L.T. 249 (S.C.)] : : 1988(33)ELT249(SC) , this Court said :

"Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally as a corollary of the said statement of law it follows that "taxes collected without the authority of law, as in this case, from "a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law."

Dealing with the question of bar of limitation for making a claim for refund of tax or duty paid or collected without the authority of law in such cases, the Court opined :-

"Normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution, the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner. It is true that in some case the period of three years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule."

7. In *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, , this Court, while examining the question as to what is the point of time from which the limitation should be deemed to commence observed that relief in respect of payments made beyond the period of three years may not be granted from the date of filing of the petition, taking into consideration the date when the mistake came to be known to the party concerned. Just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law cannot be permitted to retain the amount, namely because the tax payer was not aware at that time that the recovery being made was without any authority of law. In such cases, there is an obligation on the part of the authority to refund the excess tax recovered to the party, subject of course to the statutory provisions dealing with the refund.

8. We are, therefore, of the opinion that the High Court, while disposing of the writ petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collector, Central Excise (Appeals) to deny them the refund for the period 1-9-1970 to 28-5-1971 and 1-6-1971 to 19-2-1972 was not proper as admittedly the respondent had approached the Assistant Collector Excise soon after coming to know of the judgment in *Voltas case* (supra) and the assessee was not guilty of any laches to claim refund."

27. The Supreme Court further considered the question as to on whom the burden to prove that the incidence of duty has been passed on to the buyer or borne by the assessee himself and the consequences to flow from such failure, in paragraphs 18 to 21 (at pages 15-17), is reflected is below :

"18. Under the amended provisions of Section 11B, claim for refund has to be made by an assessee to the Assistant Collector Central Excise in the prescribed manner, supported by documentary and other evidence, to establish that the claimant had not passed on the burden of the excise duty to any other person and had borne it himself, but with a view to obviate delay, which would result by an order of remand aimed at providing an opportunity to the respondent to establish by any material or documentary evidence before the Assistant Collector Excise, that it had not passed on the incidence of duty to any other person, we directed the respondent to furnish documentary or other evidence, as it may deem appropriate, to establish that the amount of duty of excise in relation to which the refund is claimed was collected from or paid by him and that the incidence of such duty had not been passed on by him to any other person. The respondent has not furnished any documentary or other evidence at all. With the written submissions, the respondent has, however, filed an affidavit in which it has been stated in paragraph 3 as follows :

"Without prejudice to the contention that Sub-section (3), or sub section (2) (d) or any other sub-section of Section 11B of the Central Excises and Salt Act, 1944 (hereinafter referred to as the "Act"), as amended by Central Excises & Customs Laws (Amendment) Act, 1991 (Act 40 of 1991) is not applicable to the present

case, since refund has already been made pursuant to a writ issued by the Delhi High Court under Article 226 of the Constitution of India, it is stated that differential duty, in respect of which refund has already been made to the Respondent company, was not passed on to the customer, as explained in the illustration below. It may be clarified that the differential duty," in the present case, relates to the differential between the duty calculated on the basis of (i) the price at which the respondent Company sold the goods to WDs (1st sale) and (ii) the higher price at which the whole sale dealers resold the goods to Secondary Wholesale Dealers (2nd sale)." (Emphasis ours)

This averment is not at all satisfactory. It does not go to show that the respondent did not pass on the burden of the excess excise duty to any other person. The expression "was not passed on to the customer, as explained in the illustration" is vague and non-specific. It is not stated as to at what rate the duty was collected by the respondent in the present case. The "illustrations" given in the affidavit cannot carry the matter any further; nor can the same be any substitute for a clear and categoric statement of fact that the excess duty was paid by the assessee or collected from it and that its incidence was not passed on by the assessee to any other person. There is no averment, much less a clear and specific one, even to show that the respondent did not collect excise duty at the higher rate (even according to the illustrations) when they sold the goods, since the price was an integrated or cum duty price. The respondent has notified any evidence or material whatsoever to show that the burden of excess excise duty has been borne by them and not passed on to any other person in spite of ample opportunity given by this Court.

19. Section 12B of the Act which was also introduced by the Amending Act 40 of 1991 lays down as follows :-

"Section 12B Presumption that the incidence of duty has been passed on to the buyer. -- Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

This Section, thus creates a rebuttable presumption that every person who has paid excise duty has passed on the burden of the same to the buyers of such goods. The presumption has to be rebutted by the manufacturer who has paid the duty. The burden of proof is on the person claiming the refund to establish that he has paid the duty but not passed on the duty to the buyer of such goods. Since, this Court granted sufficient opportunity to the respondent to furnish such documentary or other evidence as it may wish to produce to establish that it had not passed on the incidence of the excess excise duty to the buyers of such goods and despite the grant of that opportunity, it has failed to produce any such evidence or material and the affidavit filed by it falls completely short of the necessary averments, we would consider it futile to either remand the case to the Assistant Collector Excise or to grant an opportunity to the respondent to file a fresh application before the Assistant Collector Excise u/s 11B(1) and (2) of the

Act to seek refund in the manner known to law by adducing such evidence as is required by the amended provisions of law. The failure of the respondent to produce the necessary evidence before us goes to show that the respondent has failed to rebut the presumption that it had not passed on the burden of the excise duty to any other person as envisaged by Section 12B of the Act (supra).

20. Reliance placed by the respondent on the judgment of this Court in Tata Engineering and Locomotive Company's case (supra) is misplaced. In that case, this Court found, on the basis of the pleading and the material on the record, that TELCO (appellants in the appeal) had not, unlike the present case, recovered the amount paid by them by way of octroi duty from any third person. The Court noticed :-

"The learned counsel for the respondent then contended that the appellants have recovered the amounts paid by them by way of octroi duty from the dealers or the customers to whom they had sold the goods and therefore they are in any case not entitled to get a refund. The argument was that if refund is ordered it would amount to allowing the appellants to unjustly enrich themselves at the cost of the public to whom the burden had already been passed. This argument is based on the ground that in the selling price the Company had merged the octroi duty originally paid as deposit and if a refund is made the company would be getting an additional amount over and above normal price which they would have charged but for the fact that they were initially asked to deposit octroi. There is no evidence that any of the articles sold by the Company is subject to any price control by the government or that the Company had charged any person octroi separately in the bills. Invoices, and the other documents of sale to the outside purchasers produced before us do not also show that any octroi was separately charged and collected by the Company. It may be mentioned that in the rejoinder filed by the appellant in the writ petition they have specifically denied that they "have recovered the amount paid by them by way of octroi duty from the dealers to whom they had sold the goods or that the dealers in turn have recovered the octroi duty from the customers." In view of this the question of unjust enrichment does not arise."

TELCO cases (supra) is thus clearly distinguishable and has no application to the present case.

21. Thus, in view of the amended provision of Section 11B of the Act, since the respondent has failed to establish that it had not passed on the duty of the excess excise duty to any other person, it is not entitled to the refund of the amount claimed by it and we accordingly allow this appeal and set aside the order of the Division Bench of the Delhi High Court directing the refund of Rs. 23,68,686.85, + Rs. 26,21,356.16 while upholding the order of the High Court as regards the question of limitation. Further, in accordance, with the interim order of this Court dated 8-10-1982, we direct the respondent to refund to the appellants the sum of Rs. 23,68,686.85 and Rs. 26,21,356.16 (total: Rs. 49,90,043.01) with 12% interest per annum from the date when the amount was

received by the respondent, within a period of eight weeks from today...."

28. Let us now give a legal fitment to the facts of the instant case, in the light of the various propositions, as above, laid down by superior Courts of jurisdiction - High Court and Supreme Court.

29. Section 27(2)(a) and (b) of the Act is very clear that the claimant is entitled to refund, if such amount of duty is relatable, to the duty paid by the importer (a) if he had not passed on the incidence of such duty to any other person; and (b) the duty on imports made by an individual for his personal use. In the case of Indo-Swiss Synthetic Gem Manufacturing Company Ltd., -- the Company, in its supplemental affidavit stated in detail that silica crucibles were used in the manufacture of synthetic Gems, as refractory goods, which could withstand very high industrial temperature, which was necessary for such process of manufacture. What is further stated therein is that such crucibles were not sold or traded. This sort of a stand, as taken by the Company in the supplemental affidavit had not at all been controverted by the appellants in any manner whatever. Further, certain factors of signal importance got revealed by the inspection report filed by one Vivek C. Khole, Appraiser, Office of the Commissioner of Customs, Customs House, Madras-600 001 at the appellate stage. The details of the said report, penned above on verbatim, throw flood of light as to the user of silica crucibles for the manufacture of synthetic gems. In fact, silica crucibles are not consumed in the manufacture of synthetic gems. To put it otherwise, the duty of customs paid on such imported crucibles does not become a part of the manufacture of the new item, viz., synthetic gem, in which the imported item, that is to say, silica crucibles, is an ingredient. What is further getting revealed is that in the process of manufacture of synthetic gem, the dried double sulphate is taken in quartz cups or silica crucibles, which are kept in muffle furnace at around 1200°C, since such crucibles have the ability to withstand high temperature and high resistance to thermal shock. In that process, nine cups are used for one batch - three cups in each row for three rows. When calcination is taking place, moisture, ammonia gas, sulphur dioxide gas are escaping. After calcination for an hour, the crucibles are allowed to cool for approximately an hour. After removal of alumina powder from those crucibles, they are again filled with double sulphate, which is subjected to calcination. Thus, a crucible is subjected to 5 to 6 charges in a duration of twelve hours. The life of the crucible is stated to be around 100 to 200 charges and thereafter, it will get cracked mainly due to thermal shock, mechanical impact, chemical reaction, manufacturing defect and human error. Once a crucible develops crack, it cannot be used further, since it will break into pieces, thereby getting destroyed and lose its utility without being capable of further use. With the help of Hydrogen and oxygen gases and alumina powder obtained during calcination, single crystals of aluminium are developed. These single crystals are called rough synthetic gem stones.

30. It is thus crystal clear that the imported silica crucibles are captively used for

the manufacture of synthetic gem, and not consumed in the manufacture of synthetic gem, inasmuch as it did not become a part and parcel whether separable or not, and it was captively used only as refractory goods, which could withstand high industrial temperature, which was necessary for such process of manufacture. What is further revealed is that the company had not directly passed on silica crucibles, as imported, to the customers or buyers. In such circumstances, we are of the view that the question of passing on the incidence of duty paid on silica crucibles did not at all arise.

31. No doubt true it is, the conclusion arrived at by us, as above, was reached by learned single Judge. However, we find it difficult to agree with the reasoning of the learned single Judge, and also of his view that the ratio of the decision of the Bombay High Court in Solar Pesticides Pvt. Ltd., (supra) is directly applicable to the present case, as it is possible with the views expressed therein for the reasons we immediately state.

32. In that case, the imported copper scrap had been consumed as a raw material in the manufacture of the end-produce, namely, copper Oxychloride. It is simple economics that customs duty paid on copper scrap in addition to its value becomes a part of the cost of the manufacture of the new item - Copper Oxychloride in which the imported component - copper scrap is an ingredient.

33. In the case on hand (viz., Company - Indo-Swiss Synthetic Gem Manufacturing Company Ltd.), the position is not so, as stated above. When customs duty paid becomes a part of the cost of the manufacture of the new item, it goes without saying that customs duty paid is indirectly passed on to the customer or buyer, inasmuch as the customs duty paid on the raw material or imported goods is included in the price of the finished product. No manufacturer will be charitable enough to exclude customs duty paid on the raw material, in the price of the finished product. Further, the Bombay High Court is of the view that the importer or the person, who paid the duty of customs or excise is entitled to refund of the duty so paid, if he had not directly passed on the incidence of such duty to any other person. We are, however, not persuaded to share such an opinion. The reason is rather obvious. What is contemplated in Section 27(2)(a) of the Act is relatable to passing on the incidence of duty to any other person for the determination of the question of refund claims.

34. Worthy it is to reproduce at this juncture, the said provision in verbatim, so as to understand in a better fashion, the Legislative intent expressed therein. It reads as :

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

(emphasis is ours)

The provision, as above, if read, would connote simpliciter the idea of passing on

the incidence of duty without prescribing restrictions of any kind whatever. To put more explicitly, what it connotes is that passing on the incidence of duty may take place directly or indirectly. It is not as if the Legislature is starving for language in the Legislative exercise undertaken in enacting such a provision. If the Legislative intent was to put any restrictions as respects the manner of passing on the incidence of duty, it was not impossible exercise, and they could have very well placed such restriction by insertion of expressions "directly" or "indirectly" at the appropriate places in the enactment of such a provision. The fact that the express inclusion of such words is absent by itself is indicative of the Legislative intent in not putting any clog or restriction, as respects the passing on the incidence of duty.

35. In the case of SRF Limited (*supra*), there is no pale of controversy that RF solution, which is consumed in the manufacture of dipped solution -which again is used for the manufacture of dipped fabrics - was originally consumed as goods", coming within the direct purview of Section 3 of CESA and subsequently held to be not so, resulting in the collection of excise duty without the sanction of law, during the period from 1-4-1983 to 20-10-1986, amounting to Rs. 5,41,498.67. There is also no dispute regarding the refund claim or that the sum claimed as refund by the petitioner was refundable. The only issue that was raised by the respondent was that the amount claimed as refund by the petitioner should be credited to the Consumer Welfare Fund and not to the petitioner - SRF Limited.

36. No doubt RF solution, which has no shelf-life, is consumed in the manufacture of dipped solution. Again, the dipped solution is consumed in the manufacture of dipped fabrics. The duty of Central Excise paid on RF solution becomes a part of the cost of manufacture of the new item or items, namely, dipped solution and dipped fabrics. Such duty of Central Excise paid is thus passed on indirectly to the customers or buyers by the sale of finished product - dipped fabrics. We have already expressed our view by stating that we are not persuaded to share the opinion expressed by the Bombay High Court, in the case of Solar Pesticides Pvt. Ltd., (*supra*), while considering the question of refund of customs duty paid on silica crucibles captively used for the manufacture of synthetic gems in the case of the company (Indo-Swiss Synthetic Gem Manufacturing Company Limited). We have, however, held that the company is entitled to the refund of claim, not on the rationale of Solar Pesticides Pvt. Ltd. (*supra*), but on a different footing that silica crucibles were captively used for the manufacture of the synthetic gems as refractory goods and consequently, the question of passing on the incidence of customs duty paid did not at all arise for consideration. Whereas in the case of RF solution as the same was consumed in the manufacture of dipped solution, which in turn was used in the manufacture of dipped fabrics, we are of the view that the duty of Central Excise paid during the relevant period by the petitioner was passed on indirectly to the customers or buyers of finished product dipped fabrics. The petitioner - SRF Limited did not, however, place or produce any tangible material to point out that as matter of

fact, it did not at all pass on the incidence of excise duty paid on RF solution to the customers or buyers, during the relevant period by including the said duty in the price of finished product-dipped fabrics.

37. The failure of SRF Limited to produce or place necessary evidence either before the competent authority or before us would go to show that it has failed to rebut the presumption that it had not passed on the burden of duty of excise to any other person, as envisaged by Section 12B of CESA. Such being the case, we are rather constrained to hold that SRF Limited - petitioner is not entitled to claim refund of the duty of excise paid on RF solution during the relevant period, amounting to Rs. 5,41,498.67.

38. Admittedly, in the instant cases, refund claims were pending adjudication before some authority or the other, in the sense of not assuming any finality at the time when the Amendment Act came into force on 20-9-1991. Such being the case, the question as to whether in pari materia provisions adumbrated in Section 11B of CESA and Section 27 of the Act and other provisions, as amended and inserted, with effect from 20-9-1991 are applicable retrospectively to such refund claims has to be necessarily answered with an emphatic "yes", on the face of the law laid down by the Apex Court in ITC Limited (supra). In this view of the matter, we are persuaded to hold that the finding recorded by learned single Judge,

"The provision of like Section 28C cannot be made applicable with reference to imports that were made before amendment of the Act"

is not reflecting the correct legal position.

39. In the case of SRF Limited-petitioner, since the duty of excise on RF solution had been paid "under protest", the question of limitation, as respects refund claims does not at all arise for consideration. But in the case of the company (Indo-Swiss Synthetic Gem Manufacturing Company Ltd.), the question of limitation relatable to refund claims in respect of duty of customs paid under the mistakes of law on silica crucibles imported looms large and requires to be decided, when especially the company did not at all effect the payment of duty of customs during the relevant period "under protest" as had been done by SRF Limited - petitioner. Admittedly, the customs duty paid under mistake of law came to light only on 5-1-1983, the date of order of CEGAT. It is also not in dispute that all the Writ Petitions, namely Writ Petition Nos. 2914, 2915, 2916, 2947 and 2948 of 1984 were filed on 10-3-1984, within a period of about fifteen months from the date of clearance of the goods, as evidenced by the bills of entries filed, about which, we have referred to earlier.

40. In such circumstances, we are not persuaded to hold that there was any laches on the part of the company in knocking at the doors of the writ jurisdiction of this Court under Article 226 of the Constitution of India, when especially, the duty of customs was not payable by the Company under the provisions of the Act, but had, in fact, been paid under a mistake of law and the

company has a right to recover it and there is a corresponding obligation on the part of the Department to refund the excess duty so collected, because the collection in such cases is without the authority of law.

41. The further question, in such a situation, that arises for consideration is as to whether the bar of limitation, as had been provided u/s 27 of the Act, is applicable, in preventing the company from seeking redress under Article 226 of the Constitution of India. There is no difficulty at all for us to answer such a question in favour of the company, on the face of the law laid down by the Apex Court in the case of ITC Limited (*supra*), wherein Their Lordships, after referring to a catena of earlier decisions of the Apex Court said that it has been well-settled that where excess duty was not payable by the party under the provisions of a statute, but, in fact, had been paid under a mistake of law, the party has a right to recover it and there is a corresponding legal obligation on the part of the Government to refund the excess duty so collected, because the collection, in such cases, would be without the authority of law, inasmuch as the payment and recovery of excess excise duty was on account of mutual mistake and in such circumstances, the bar of limitation, as had been provided in Section 11B of CESA is not applicable to an assessee in claiming refund, when especially, there was no laches on his part, in knocking at the doors of the writ jurisdiction of this Court under Article 226 of the Constitution of India.

42. In the instant case of the company, the relevant limitation provision in Section 27 of the Act, which is in *pari materia*, with the provisions in Section 11B of CESA. Therefore, the law laid down by the Apex Court in the case of ITC Limited (*supra*) is applicable on all fours to the instant case of the company and binding on us as the law laid down under Articles 141 of the Constitution of India. In this view of the matter, we are of the opinion that the bar of limitation, as had been provided in Section 27 of the Act cannot at all be put against the company to deny the relief of refund, in the exercise of jurisdiction under Article 226 of the Constitution of India, when especially, as already indicated by us by referring to the fact-situation, there were no laches on the part of the company in knocking at the doors of this Court in its writ jurisdiction, provided the burden that is cast upon its shoulders, that the incidence of duty of customs had either not been passed on to the customers or buyers or borne by it, had been duly discharged, in accordance with the sanguine provisions, adumbrated under Sections 28C and 28D of the Act, as amended by the Amendment Act. It is at this juncture, necessary for us to recapitulate, that we have already recorded a finding that the company had captively used silica crucibles for the manufacture of synthetic gems and therefore, the question of passing on the incidence of duty of customs does not at all arise. On the face of such a finding, it follows - as night follows day - that the company is entitled to the refund of the customs duty paid, during the period in question, as referred to earlier.

43. The last, but not the least, question requiring anxious consideration is relatable to non-exhaustion of the alternative remedy, before ever the doors of

this Court are knocked at in its writ jurisdiction and the consequences to flow therefrom. This sort of a question took a different hue and colour in the case of the Company. The Department did not at all in fact raise such a question directly by stating that the non-availing of the alternative remedy would result in non-suiting the Company. But, what is contended is that unless there is adjudication, as contemplated u/s 27 of the Act, no relief can be granted by way of refund. Such a bone of contention appears, on the face of it, to be tenable. But the utter untenability, taking shelter thereunder, would get exposed, if a deeper scrutiny is made of the relevant statutory provisions, in the light of the fact-situation.

44. To recapitulate, the Company had been importing silica crucibles from 1976 onwards and had been paying duty, as demanded by the Department under a mistaken impression of law and such mistake of law came to light only on 3-1-1983, the date on which CEGAT held that silica crucibles imported are not liable to countervailing duty. The Company, if at all, could file an application for refund, only subsequent to 5-1-1983 before the Assistant Collector of Customs. Such an application, if filed, could not be expected to be entertained, as being filed beyond the statutory period of limitation of six months, even though there is no fault or laches on the part of the Company. There is no conferment of powers on the Assistant Collector of Customs to entertain the application made beyond the period of six months, except in a case, where the duty is paid "under protest". Further, the Assistant Collector, being a statutory authority, cannot act beyond the scope of the provisions of the Act and cannot enlarge the period of limitation. Such being the case, an application for refund, if so filed, would tantamount to nothing but a futile exercise, in the sense of the alternative remedy, not being efficacious, in granting the relief to the Company, although duty of customs on silica crucibles imported had been levied and collected without the authority of law. In such a situation, there is no other go for the Company, except to knock at the doors of this Court under its writ jurisdiction, under Article 226 of the Constitution of India.

45. In the case of SRF Limited-petitioner, position is altogether different. The question herein is relatable to the refund claim of excise duty paid on RF solution, which is consumed in the manufacture of dipped solution, which is again used in the manufacture of dipped fabrics. The petitioner, as indicated earlier, even as early as 1983, contended that RF solution is not "goods" coming within the direct purview of Section 3 of CESA, and hence, not subjected to Central Excise duty. The petitioner was not rest content in making such an objection; but paid the duty of excise "under protest". This controversy was finally settled by the respondent, on remand, by the Appellate Tribunal by its order No. 65/90 dated 25-9-1990, wherein the respondent held that RF solution manufactured and consumed by the petitioner is not "goods" and no duty, therefore, could be leviable on the same.

46. No doubt, the mistake of law came to light only on 25-9-1990, the date of order of the respondent, holding that RF solution is not "goods" and

consequently, no duty is leviable on the same. It is not as if the petitioner paid the duty of excise for the relevant period without any protest and the plain fact is that the duty had been paid "under protest" and such being the case, the bogey of the statutory period of limitation of six months for making an application claiming refund of duty of excise paid under mistake of law cannot at all be put against the petitioner, by the Assistant Collector of Excise for refusing the claim of refund, if an application is made therefor. Of course true it is, such a fact that the petitioner did not perform. But the sorbid fact is that the petitioner, without availing of such alternative remedy, chose to straight away knock at the doors of this Court in its writ jurisdiction, of course, without placing any tangible materials to vouchsafe such a claim, in order to rebut the presumption created u/s 12B of CESA.

47. Further, it is to be pointed out here that the adjudication of the refund claim involves consideration and appreciation of evidence or disputed facts relatable to passing on or otherwise of the incidence of duty of excise paid to the customers or buyers and only when the duty of excise paid had not been passed on to the customers or buyers or borne by the petitioner, the refund sought for could be made, in case the petitioner puts forth satisfactory proof on such aspects or otherwise, it would be presumed that the duty of excise paid had been passed on to the customers or buyers, thereby rendering his claim for refund to face dismal failure. Normally, when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, this Court, in exercise of its discretion, may decline to interfere, until all the statutory remedies are exhausted, particularly when the decision on the relief sought depends upon the appreciation of evidence or disputed facts.

48. But, in the instant case, having entertained the writ, and gone into the merits of the case as it involved interpretation of certain provisions of the Act, we are of the view that by declining to exercise the jurisdiction under Article 226 of the Constitution on the ground of alternative remedy would result in the remedy becoming worse than the disease, when especially the refund of claim is relatable to the period from 1-4-1983 to 20-10-1986. We have already found that the petitioner is not entitled to refund of excise duty, though paid under mistake of law, inasmuch as the petitioner had not placed any tangible materials before Court so far to point out that the duty so paid had either not been passed on to the customers or buyers or borne by it and in such a situation, it is but legitimate to presume that the duty of excise paid had been passed on to the customers, as envisaged u/s 12B of CESA. We are also of the view that to provide a further opportunity to the petitioner, by remanding the matter back to the Assistant Collector of Central Excise or to file a fresh Application for adjudication on such evidence relatable to the refund claims at this stage would be nothing but an exercise in futility. This view we have taken solely on the facts and circumstances of the case as we shall not be understood to have laid down a proposition as to entertaining of writ petitions in a case where an adequate effective alternative remedy is available.

49. For the reasons stated above, the writ appeals are dismissed, however the reasons given and the findings recorded by learned single Judge for allowing the writ petitions are set aside and the order allowing the writ petitions is affirmed on the reasons stated by us. The Writ Petition No. 15237 of 1994 is dismissed. There shall, however, be no order as to costs, in all these proceedings, in the circumstances.