(2008) 09 GUJ CK 0006

In the Gujarat High Court

Case No : Tax Appeal No. 638 of 2006 and Civil Application No. 190 of 2006 in Tax Appeal No. 638 of 2006 and Tax Appeal No''s. 1713 of 2007 and 1047 of 2008

Commissioner of Customs APPELLANT

Vs

Hindalco Industries Ltd. RESPONDENT

Date of Decision : 24-09-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 9B, 9B(1), 9B(5)
Central Excises and Salt Act, 1944 — Section 11A, 11B
Constitution of India, 1950 — Article 265
Customs Act, 1962 — Section 18, 18(1), 18(2), 18(3), 18(4)

Citation : (2008) 09 GUJ CK 0006

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : R.J. Oza, No. 1 in Tax Appeal No. 638 of 2006 and Civil application No. 190 of 2006, Harin P. Raval, in Tax Appeal No. 1713 of 2007 and P.M. Dave, in Tax Appeal No. 1047 of 2008, for the Appellant; D.V. Parikh, in Tax Appeal No. 638 of 2006 and Civil Application No. 190 of 2006, B.L. Narasimhan and Abhishek Anand, in Tax Appeal No. 1713 of 2007, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.

1 In Tax Appeal No. 638 of 2006 the Appellant-Revenue has proposed the following two questions:

(A) Whether in the facts and circumstances of the case, the CESTAT was justified in holding that the refund claim of the Respondent importer could not be rejected by applying the principle of unjust enrichment, on the ground that the principle of unjust enrichment is not applicable to the refunds arising on the finalization of the provisional assessment under the Customs Act, 1962?

(B) Whether in the facts and circumstances of the case, the doctrine of unjust enrichment u/s 27 of the Customs Act, 1962 is applicable to the refunds arising out of finalization of Provisional Assessment u/s 18 of the Customs Act, 1962?

1.1 Tax Appeal No. 1713 of 2007 has been admitted and following three questions have been formulated:

(i) Whether in the facts and circumstances of the case, the Tribunal is justified in holding that the principles of unjust enrichment will not apply to the cases of finalization of provisional assessment prior to the amendment to Section 18 of the Customs Act, 1962 prescribed in the provisions of Section 27(2) of the Customs Act, 1962.

(ii) Whether in the facts and circumstances of the case, the Tribunal is justified in allowing the refund claim on the ground that the finalization was done prior to amendment of Section 18 of the Customs Act, 1962 effective from 13th July, 2006 and, therefore, the doctrine of unjust enrichment would not be applicable?

(iii) Whether in the facts and circumstances of the case, the Tribunal is justified in allowing the appeal by way of remand despite the admitted position that the Respondent had not placed any evidence on record to prove that they had not passed the duty incidence on their customers?

1.2 In Tax Appeal No. 1047 of 2008 the Appellant Assessee has proposed following three questions:

(a) Whether the refund claims filed by the Appellants for total restitution of Rs. 3,49,398/- were hit by the doctrine of unjust enrichment by virtue of amendment of Section 18 of the Customs Act, 1962 w.e.f. 13th July, 2006 ?

(b) Whether the CESTAT, Ahmedabad has been right in law in not following the Judgments of the Hon?ble Supreme Court in cases of Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur, and Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., and instead following the Judgment of the Hon?ble Supreme Court in case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, in the facts of this case?

(c) Whether the Order of the Appellate Tribunal denying refund of the amounts provisionally deposited by the Appellants is legally correct and sustainable in the facts of this case?

2. Tax Appeal Nos. 638 of 2006 and 1047 of 2008 have not yet been formally admitted. The issue in all the three Appeals is common. Hence these two Tax Appeals are admitted and the following common question of law is formulated in all the three Appeals:

Whether on the facts and in the circumstances of the case the principles of unjust enrichment envisaged by Section 27 of the Customs Act, 1962 can be read into provisions of Section 18 of the Act without considering and applying the amendment of Section 18 of the Act with effect from 13th July, 2006 ?

3. For sake of convenience Tax Appeal No. 638 of 2006 is treated as the lead matter. The brief facts are that the Appellant had purchased copper concentrate from M/s. Marc Rich Company Investment A.G., Switzerland. The goods were shipped on 17th February, 2004 and the Appellant filed advance Bill of Entry No. F.96/2003-2004 dated, 20th February, 2004. The said Bill of Entry was provisionally assessed and a duty of Rs. 1,53,19,612/- was paid by TR-6 challan No. 1224/03-04 dated, 21st February, 2004. The provisional assessment was done on the basis of provisional invoice No. CC81223 dated, 17th February, 2004. In the metal trade, it is common knowledge that the final price of the concentrate is calculated by calculating the metal content and the prevalent price of such metal in the LME (London Metal Exchange). The Appellant in this case had contracted with the supplier on these terms which are listed in paragraph Nos. 5 and 6 of the contract dated, 19th January, 2004.

4. After verifying the LME price at the relevant time, the final invoice No. CC8133 dated, 23rd April, 2004 was submitted by the Appellant and the final Bill of Entry No. F-180/2003-2004 dated, 22nd February, 2004 was submitted. On the basis of the aforesaid final invoice, the total duty payable was only Rs. 1,37,13,076/-. Thus an amount of Rs. 16,06,536/- became refundable to the Appellant. However, the Appellant had already availed CENVAT credit for the amount of Rs. 12,38,065/- paid as additional duty of Customs (CVD) and therefore, only Rs. 3,68,471/- was refundable.

5. The Adjudicating Authority vide Order-In-Original No. SRT/CUS/REF/12/2005 dated, 5th May, 2005 held, that the Respondent-Assessee was entitled to refund and the refund was sanctioned, but the Assessee had not discharged the burden of showing that the incidence of duty had not been passed on to the customers and therefore, the presumption of unjust enrichment stood unrebutted. The Adjudicating Authority, therefore, credited the sum of Rs. 3,68,471/- to the Consumer Welfare Fund.

6. The matter was carried in Appeal before Commissioner (Appeals) who vide Appellate Order held, that the doctrine of unjust enrichment will not be applicable and the Order of the Adjudicating Authority to credit the amount of refund to the Consumer Welfare Fund could not be sustained. This Order has been confirmed by the Tribunal vide impugned Order dated, 3rd February, 2006 observing as under:

4. I find that the lower Appellate Authority has passed a very detailed Order while allowing the refund. As regards the decision in the case of Sahakari Khand Udyog Mandal Ltd. (cited supra), its ratio no doubt runs counter to the ratio of the decision in the case of Allied Photographics (cited supra). However, since the decision in the case of Allied Photographics is specific to refund arising out of finalization of provisional assessment and since the same has also been passed by a three Judges Bench of the Hon?ble Supreme Court at an earlier point of time and has not been overruled by a Larger bench of the said Court, I am of the view that the ratio of the said decision is required to be followed in this case in

preference to the ratio of the decision in the case of Sahakari Khand (cited supra). Accordingly, I hold that the bar of unjust enrichment cannot be applied in respect of refund arising out of finalization of provisional assessment under the Customs Law in the absence of any specific amendment to the law as has been done in the case of refunds arising out of finalization of provisional assessment under the excise law. Consequently, the Revenue appeal is rejected.

7. The learned Counsel for Appellant Revenue assailed the impugned Order of Tribunal by pointing out that Section 27 of the Customs Act, 1962 (the Act) refers to refund of duty paid pursuant to an Order of assessment. The term assessment as defined by Section 2(2) of the Act includes provisional assessment and, therefore, any refund of duty, including refund of duty paid by an importer under provisional assessment, is governed by Section 27 of the Act. That provisional assessment is to be made by the Adjudicating Authority if any of the eventualities stated in Section 18(1) of the Act are shown to be existing. That an importer has no vested right to claim refund of duty paid under provisional assessment and unless and until the importer shows that the excess amount of duty paid by the importer under the provisional assessment has not been passed over to any other person no prejudice can be said to have been caused to the importer if such amount of refund is credited to the Consumer Welfare Fund u/s 27(2) of the Act. That doctrine of unjust enrichment is a just and salutary doctrine and no person is entitled to collect duty from the purchaser at one end and also seek refund of the same duty from the Revenue on the ground that such duty has been collected contrary to law. That the Court should not exercise its powers for unjustly benefiting a person. The decision in case of Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., cannot be made applicable as the same was rendered in context of provisions of Central Excise Act, 1944 and the Rules framed thereunder and therefore, the Tribunal had wrongly placed reliance on the said decision. That Mumbai High Court in case of Bussa Overseas and Properties Pvt. Ltd. Vs. Union of India (UOI), is the direct decision on the point under the Act and is applicable to the issue raised in the present Appeals. That the said Judgment of Mumbai High Court has been affirmed by Supreme Court as reported in 2004(164) ELT 177(SC). The learned Counsel has also placed reliance on the following decisions:

[1] Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another,

[2] CCE v. Standard Drums & Barrel Mfg. Co. 2006 TIOL 39 HC MUM CX.

[3] Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others,

[4] Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, 2005(181)ELT328(SC) .

8. As against that the learned Advocate for Respondent-Assessee submitted that the Tribunal was justified in holding that when goods are assessed provisionally u/s 18 of the Act, any refund of duty upon finalization of such assessment had to be granted without any application being required u/s 27 of the Act and,

therefore, principles of unjust enrichment envisaged by Section 27(2) cannot be made applicable. That this finding of the Tribunal is supported by paragraph Nos. 1 and 2 and paragraph No. 95 of the Supreme Court Judgment in the case of Mafatlal Industries Ltd. (supra). The issue stands directly covered by the decision in the case of Allied Photographic India (supra). That there is a difference between claiming of a refund and making of a refund u/s 11B of the Central Excise Act and Rule 9B of the Central Excise Rules respectively when a provisional assessment is finalized. That just as Section 11B of the Central Excise Act and Rule 9B of the Central Excise Rules operate in different fields Sections 27 and 18 of the Act operate in the different fields. That similar view has been taken by Supreme Court in the case of 2001 (73) ECC 553 as affirmed in 2006(200) ELT A138(SC). It was further contended that though Section 11B of the Central Excise Act and Section 27 of the Act were amended together on 1st August, 1998, Rule 9B of the Central Excise Rules was amended only on 25th June, 1999, but correspondingly Section 18 of the Act was not amended, therefore, the law expounded right from the Judgment of Mafatlal Industries (supra) was continuing to hold the field in cases of refund under the Act in relation to provisional assessments. This aspect has been clarified once again by the Apex Court in the case of Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur, That on a conjoint reading of the two decisions of the Apex Court in case of Allied Photographic (supra) and TVS Suzuki (supra) it was apparent that despite 1998 amendment and the 1999 amendment under the Act, refund arising from provisional assessment cannot be withheld on the ground of principle of unjust enrichment being applicable. That Section 18 of the Act incorporates principle of unjust enrichment only with effect from amendment of 13th July, 2006. That the Mumbai High Court Judgments referred to by Revenue cannot be considered as the same are opposed to the principles laid down by the Apex Court.

9. The learned Advocate appearing for Respondent Assessee in Tax Appeal No. 1713 of 2007 apart from reiterating the submissions made by the learned Advocate for the Assessee, as recorded hereinbefore, submitted that Section 18 of the Act was a complete self contained code and had an overriding effect. considering the opening portion of the said Section wherein it is stated:

Notwithstanding anything contained in this Act.

9.1 Referring to Explanation II to Section 27 of the Act it was submitted that the same would apply to a case where after the final assessment and the adjustment, if still the Assessee is not satisfied with the adjustment and claims excess amount as refund. Explanation II will have no application in cases where admittedly after final adjustment, refund is due to the Assessee. This is explained with the following illustration:

Duty paid provisionally Rs. 100

Duty finally assessed Rs. 60

Duty to be refunded Rs. 40

In this case Explanation II will have no application since no claim for refund is made and Rs. 40 is to be refunded since the same is admittedly due.

Duty paid provisionally Rs. 100

Duty finally assessed Rs. 70

According to Assessee correct duty payable Rs. 60

In this case, admitted amount of refund of Rs. 30 would be returned and if the Assessee seeks to claim Rs. 10 also (Rs. 70- Rs. 60) as refund, then Explanation II would apply and the said claim is to be preferred within six months from the date of adjustment of duty. This position is precisely dealt with and explained in the second portion of paragraph No. 104 of Judgment in case of Mafatlal Industries (supra).

9.2 It was further submitted that the distinction sought to be made by Mumbai High Court in Bussa Overseas & Properties Pvt. Ltd. (supra) was incorrect and contrary to the Apex Court Judgment in case of Mafatlal Industries (supra). That Madhya Pradesh High Court in the case of CCE v. Kinetic Motors Co. Ltd. in MCC No. 84 of 2001 vide Order, dated, 23rd February, 2006 had also taken the same view following TVS Suzuki decision (supra). It was, therefore, urged that no case was made out for taking any different view of the matter and the Tribunal?s Order was required to be upheld.

10. The only issue involved in all these Appeals is whether provisions of Section 27 of the Act can be made applicable to refunds arising on finalization of provisional assessments made u/s 18 of the Act prior to 13th July, 2006, because it is an admitted position that by virtue of amendment made effective from 13th July, 2006 to Section 18 of the Act by the Taxation Laws (Amendment) Act, 2006 provisions of Section 27 of the Act apply to provisional assessments also. Though directly the question as to the nature of amendment made to Section 18 of the Act vide Taxation Laws (Amendment) Act, 2006 does not arise yet for the purpose of appreciating the controversy between the parties the said issue would incidentally have to be considered: As to whether the said amendment is substantive in nature or is merely procedural, and would thus apply to pending proceedings?

11. There is no dispute on facts in any of the Appeals. In the case of Mafatlal Industries (supra) the Apex Court has observed:

B.P. Jeevan Reddy (for J.S. Verma, SC Agrawal, himself and A.S. Anand and B.N. Kirpal, JJ).- Significant questions concerning the refund of excise and customs duties collected contrary to law ?in all its shades - arise for consideration in these appeals and writ petitions. They involve the correctness of certain earlier decisions of this Court, concept of unjust enrichment, interpretation of Article 265 of the Constitution of India and of the provisions of the Central Excises and Salt Act, 1944 and the Customs Act at all. As far back as 14th August, 1984, Civil Appeal No. 1794 of 1984 and the connected special leave petitions were referred to a Bench of seven Judges by a Bench of two learned Judges, since the referring Bench doubted the correctness of the five-Judge Bench decision in STO v. Kanhaiya Lal Mukundlal Saraf. When the matter came up before a seven-Judge Bench has followed the decision in Kanhaiya Lal in State of Kerala v. Aluminium Industries Ltd. Accordingly, the matters were directed to be posted before a nine-Judge Bench. Meanwhile, several matters raising identical or connected issues got tagged on. Leave granted in special leave petitions.

11. In the year 1991, Parliament enacted the Central Excises and Customs Law (Amendment) Act, 1991 (being Act 40 of 1991) substantially amending the provisions relating to refund in both the Central Excises and Salt Act and the Customs Act, besides introducing several new provisions therein. Writ petitions challenging the validity of the said amendment are also posted before us. Apart from the validity, the meaning and purport of the amended provisions also falls for consideration. For the sake of convenience, we would refer to the relevant provisions in the Central Excise and Salt Act in as much as the relevant provisions in both the enactments are identical.

Xxx xxx xxx 104. Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of Sub-rule (1). The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that ?when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the Assessee shall pay the deficiency or be entitled to a refund, as the case may be?. Any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under Sub-rule (5) are appealed against? or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed- then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) reagitating the issues already decided under Rule 9B? assuming that such a refund claim lies-and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation.

12 In the case of Allied Photographic the Apex Court was required to answer the question:

Whether a claim for refund after final assessment is governed by Section 11B of the Central Excise Act, 1944?

Upon a reference having been made to a Larger Bench by a two Judges Bench of the Apex Court. The points at issue have been set out in the opening part of paragraph No. 6 of the Judgment. For the present only the first issue is relevant, viz., whether the refund of duty paid under provisional assessment is similar to duty paid under protest as both are ?on account? payments adjustable on finalization of assessment or vacating of protest. After setting out the provisions of Section 11B of the Central Excise Act, it is stated that there is a difference between making of refund and claiming of refund. Thereafter, provisions of Section 11B of the Central Excise Act and Rule 9B of the Central Excise Rules have been analysed. Upon analysis of paragraph No. 104 of the Judgment in case of Mafatlal Industries Ltd. (supra) it is recorded that the said paragraph only states that if refund arises upon finalization of provisional assessment, Section 11B will not apply. In paragraph No. 14 the Apex Court held, that:

The Judgment of this Court in the case of TVS Suzuki Ltd. therefore, supports the view which we have taken hereinabove that refund consequent upon finalization of provisional assessment did not attract the bar of unjust enrichment.

13. In the case of TVS Suzuki Ltd. (supra) the Apex Court recorded:

Shri Verma fairly concedes that the proviso introduced in Sub-rule (5) of Rule 9B cannot be said to be retrospective in operation. He, however, contends that on the date on which the proviso was brought into force, i.e., 25th June, 1999, the refund claim was still pending with the departmental authorities and, therefore, it had to be adjudicated in accordance with the law as it became enforceable from 25th June, 1999. In our view, this contention cannot be accepted. Merely because the departmental authorities took a long time to process the application for refund, the right of the Appellant does not get defeated by the subsequent amendment made in Sub-rule (5) of Rule 9B. The Commissioner of Central Excise and the CEGAT were, therefore, justified in holding that the claim for refund made by the Appellant had to be decided according to the law laid down by this Court in Mafatlal Industries Ltd. (supra) and would not be governed by the proviso to Sub-rule (5) of Rule 9B.

14 In light of the law laid down in the aforesaid decisions by the Apex Court, the Judgment in case of Bussa Overseas & Properties Pvt. Ltd. (supra) rendered by Mumbai High Court cannot be considered to be correct exposition of law, more particularly when the Judgment in case of Allied Photographic India Ltd. (supra) which has been rendered subsequently was not considered. It is equally well-settled that mere rejection of a petition for Special Leave to Appeal cannot be treated as authoritative pronouncement of law by the Apex Court and, therefore, reliance placed by the Revenue on the note appearing in 2004(164) ELT 177 cannot assist the Revenue.

15 Section 18 of the Act as is relevant for the present reads as under:

SECTION 18. Provisional assessment of duty. - (1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in Section 46-

(a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as the case may be; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or

(c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty,

the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then -

(a) in a case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of [the duty finally assessed], the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

16. On a plain reading it becomes apparent that the said Section overrides other provisions of the Act except provisions of Section 46 of the Act and permits provisional assessment of duty in case any of the three contingencies provided by Clauses (a), (b) or (c) under Sub-section (1) of Section 18 of the Act happening; in such an eventuality the proper officer is entitled to provisionally assess the duty leviable on imported goods pending the production of necessary documents, or furnishing of requisite information, or completion of necessary test or enquiry, subject to importer furnishing such security as the proper officer deems fit for the payment of deficiency, if any, between the duty finally assessed and the duty provisionally assessed. Under Sub-section (2) of Section 18 of the Act, it is provided that when duty is assessed finally in accordance with the provisions of the Act then the amount paid shall be adjusted against duty finally assessed, and in case the amount paid falls short of the duty finally assessed, or the amount paid is in excess of the duty finally assessed, the importer shall pay the deficiency, or shall be entitled to the refund, as the case may be.

17. In juxtaposition one may reproduce and consider the amended Section 18 of the Act whereby Sub-sections (3), (4) and (5) have been inserted with effect from 13th July, 2006 by the Taxation Laws (Amendment) Act, 2006. The said provision reads as under:

SECTION 18. Provisional assessment of duty. - (1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in Section 46-

(a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as the case may be; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or

(c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty,

the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then -

(a) in a case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of [the duty finally assessed], the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment Order under Sub-section (2), at the rate fixed by the Central Government u/s 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

(4) Subject the Sub-section (5), if any refundable amount referred to in Clause (a) of Sub-section (2) is not refunded under that Sub-section within three

months from the date of assessment of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government u/s 27A till the date of refund of such amount.

(5) The amount of duty refundable under Sub-section (2) and the interest under Sub-section (4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to -

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, 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]

18 On a plain reading it becomes apparent that Sub-sections (3) and (4) relate to liability to pay interest or entitlement to claim interest consequent upon final assessment Order. However, Sub-section (5) is the material amendment which indicates that the Proviso appearing below Sub-section (2) of Section 27 of the Act has now been incorporated as a part of Section 18 of the Act. On a plain reading the distinction between Section 18 as it stood prior to amendment, i.e., upto 12th July, 2006 and subsequent to the amendment, i.e., with effect from 13th July, 2006 becomes apparent. The difference is stark and revealing and it is not possible to agree with the contention of Revenue that such amendment has to be understood as clarificatory in nature. This is more so, when one reads the amendments made in 1998 and the amendment made in Rule 9B of the Central Excise Rules in 1999 considering the pronouncement of the Apex Court as to the distinction between making of a refund and claiming of a refund; the amendment cannot be considered to be retrospective in nature; and cannot be made applicable to pending proceedings.

19. This can be considered from a slightly different angle. While introducing the Taxation Laws (Amendment) Bill, 2005 (Bill No. 74 of 2005) the Notes on Clauses in relation to Section 18 of the Act indicate that Sub-sections (3), (4) and (5) to Section 18 of the Act, have been inserted to provide for a mechanism to regularise the payments of duty short levied and interest thereon and duties that are to be refunded on finalization of provisional assessment and in this context in the report of the Standing Committee on Finance it has specifically been noted that this amendment became necessary because Section 18 of the Act which provides for provisional assessment of duty presently (i.e.upto 12th July, 2006) does not provide for various issues arising from the finalization of provisional

assessment. Thus it becomes apparent that the amendment in question is substantive in nature when one finds that various provisions have been inserted which were not forming part of the original Section 18 of the Act as it stood upto 12th July, 2006. It is not possible to state that the provisions for payment of interest on duty short levied or entitlement to interest on duty paid in excess of the finally assessed duty can be considered to be clarificatory provisions and in the same vein the newly inserted Sub-section (5) deserves consideration. Thus in effect upto 12th July, 2006 no provision existed in Section 18 of the Act which would permit Revenue to invoke principles of unjust enrichment in relation to duty paid in excess, found to be so, upon finalization of provisional assessment u/s 18 of the Act.

20. Hence, the reference to provisions of Section 27 of the Act which generally deals with claim for refund of duty cannot be of any assistance to the Revenue. Similarly the definition of the term assessment u/s 2(2) of the Act also cannot help the Revenue in light of the specific provisions of Section 18 of the Act which override all other provisions of the Act. The contention that the Court should not permit a person to derive unjust benefit also does not merit acceptance. The Court can only read the provisions and the statute as they stand, and if necessary, interpret the same but the Court cannot legislate. This is a salutary principle of interpretation. Furthermore, as noticed hereinbefore, the Apex Court has in no uncertain terms drawn the distinction between making of refund and claiming of refund. The High Court cannot equate the two in light of the authoritative pronouncement of law by the Apex Court.

21. Therefore, on both counts, in light of the authorities referred to hereinbefore, and on interpretation of provisions of Section 18 of the Act, on finalisation of assessment if any excess duty is found to have been paid at the time of provisional assessment Revenue is bound in law to make the refund without any claim being required to be made by an Assessee. This would be the position in law upto 12th July, 2006 and not thereafter.

22. In the circumstances, on none of the grounds pleaded can the Revenue succeed. Therefore, principles of unjust enrichment found in Section 27 of the Act cannot be read into the provisions of Section 18 of the Act without considering and applying the amendment to Section 18 with effect from 13th July, 2006. The Appeal is accordingly dismissed with no Order as to costs.

OJCA No. 190 OF 2006.

In light of the Order made in the Appeal today, this Civil Application is rejected as having become infructuous. Notice discharged.

TAX APPEAL No. 1713 OF 2007.

In light of the Judgment rendered today in Tax Appeal No. 638 of 2006 between the same parties, this Appeal is accordingly dismissed with no Order as to costs.

TAX APPEAL No. 1047 OF 2008.

It is not possible to read provisions of Section 27 of the Act in unamended Section 18 of the Act as it stood upto 12th July, 2006. The Tribunal was, therefore, in error in applying the principle of unjust enrichment. The Appeal is accordingly allowed for the reasons stated in Judgment of even date rendered in case of Commissioner of Customs v. Hindalco Industries Ltd. in Tax Appeal No. 638 of 2006.

Registry to place copy of this Judgment in all connected matters.

