

(2012) 01 DEL CK 0236
In the Delhi High Court
Case No : CUSAA No. 43 of 2011

Commissioner of Customs

APPELLANT

Vs

Indian Oil Corporation

RESPONDENT

Date of Decision : 09-01-2012

Acts Referred:

Citation : (2012) 189 ECR 169 : (2012) 282 ELT 368

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Satish Kumar, for the Appellant; M P Devnath, Abhishek Anand and Mr. Aditya Bhattacharya, for the Respondent

Judgement

Sanjiv Khanna, J.

CM 19084/2011

Delay of three days in filing of the present appeal is condoned.

Application is disposed of.

CUSAA 43/2011

Having heard the counsel for the parties following substantial question of law is framed :

Whether Customs, Excise and Service Tax Appellate Tribunal is right in holding that refund u/s 18 of the Customs Act should have been made without any application for refund and that Section 18 was applicable and Section 27 of the Customs Act, 1962 was not applicable?

2. With the consent of the counsel for the parties, the matter is taken up for hearing and is being decided by the present order.

3. The respondent imported petroleum crude oil by two bill of entries dated 24.8.1998 and 2.2.1999. The said bill of entries were provisionally assessed

under the Customs Act, 1962 (Act, for short) as the documents regarding FOB value and the freight payable for the crude oil were not available. At the time of provisional assessment, the respondent-assessee had deposited Rs.6,42,02,664/- and Rs.10,23,71,807/- .

4. The two bill of entries mentioned above were finally assessed on 21.6.1999 and 15.6.1999 by the Appellate Commissioner of Customs at Vadinar Port. Final duty assessed was Rs.5,71,84,514/- and Rs.10,12,97,546/- respectively, which entitled the respondent-assessee to refund of Rs.70,18,150/- and Rs.10,74,261/- (total Rs.80,92,411/-).

5. On 21.1.2004, the respondent-assessee filed an application in Form No.22 seeking refund of Rs.80,92,411/- . The application was rejected by the Assistant Commissioner (Refunds) vide order dated 18.3.2004 on the ground that it had been made after four years and seven months and was clearly beyond period of 6 months stipulated u/s 27(1)(b) of the Act. The contention of the respondent-assessee that they had not received the final assessment orders and therefore, they could not file an application for refund, was rejected by the Assistant Commissioner (Refund). The first appeal filed by the respondent-assessee was dismissed. The first appellate authority relied upon decision of the Bombay High court in Bussa Overseas and Properties Pvt. Ltd. Vs. Union of India (UOI), .

6. The respondent-assessee preferred an appeal before the tribunal and the said appeal has been allowed by the impugned order dated 16.3.2011. The tribunal has preferred to follow the view taken by the High Court of Gujarat in Commissioner of Customs Vs. Hindalco Industries Ltd. 2008 (231) ELT 36 (Guj.). In the impugned order, the tribunal has held as under :

(1) The orders dated 21.6.1999 and 15.6.1999 were not communicated to the respondent-assessee. This factual finding is not disputed before us.

(2) Section 18 and not Section 27 of the Act is applicable.

(3) u/s 18, the respondent-assessee was not required to file any application for refund and refund should have been paid suo moto by the appellant.

(4) Principle of unjust enrichment is not applicable as the provisions relating to unjust enrichment were incorporated in Section 18 w.e.f. 13.7.2006 and do not have retrospective effect.

7. Section 18 of the Act after the amendment w.e.f. 13.7.2006 reads as under:

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 livable 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 livable on such goods is assessed finally in accordance with the provisions of this Act, then - (a) in the 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 to 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.]

At this stage we may record that sub-sections 3, 4 and 5 were inserted vide Taxation Laws Amendment Act, 2006 w.e.f. 13.7.2006. Revenue does not claim that these provisions have retrospective operation. The contention, however, is that Section 18 is not applicable but Section 27 of Act is applicable. It is further contended that according to sub-section (2) of Section 27, the refund can be paid to the importer only if it is shown that he had borne the duty and had not passed on the incidence of the duty to any other person.

8. Section 27 of the Act reads as under :

27. CLAIM FOR REFUND OF DUTY. -

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

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

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

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months, from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2) :

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

exempt from payment Of duty by a special order issued under sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order.

[Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction.]

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

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

(2) If, on receipt of any such application, the Assistant Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

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

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

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

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

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

(f) the duty and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify : Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal [, the National Tax Tribunal] or any

Court or in any other provision of this Act or the regulations made there under or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done there under.

(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.

9. Ld. counsel for the appellant has emphasized and referred to Explanation II to Section 27 and has submitted that the limitation period in case duty is paid provisionally is to be computed from the date of adjustment of duty after the final assessment thereafter. The said Explanation was inserted w.e.f. 1.8.1998 by Section 100 of Finance (No.2) Act, 1998.

10. In the case of Bussa Overseas and Properties Pvt. Ltd. (supra), it has been observed as under :

27. The contention of the Petitioners that once the refund is due u/s 18(2), then the Customs authorities are under an obligation to refund the amount is also without any merit because, from a bare perusal of Section 18 of the Customs Act it is seen that no such obligation is cast upon the Customs authorities. Section 18 merely entitles the assessee to get refund if the duty finally determined is less than the duty paid provisionally. Moreover, Section 18 cannot be read in isolation. It has to be read with Section 27 of the Customs Act. Explanation II to Section 27 of the Customs Act (Explanation 1 prior to 1-8-1998) provides that to obtain refund of any duty paid provisionally u/s 18, an application for refund must be made within the period of limitation prescribed therein.

The limitation prescribed u/s 27 of the Customs Act requiring filing of an application for refund of duty arising on finalisation of the provisional assessment in the case of import made by any individual for his personal use or by Government or by any educational research or charitable institution or hospital, is, before the expiry of one year and in any other case before the expiry of six months from the date of adjustment of duty after the final assessment. In other words, the refund of duty arising on finalisation of the provisional assessment is governed by the limitation prescribed u/s 27 of the Customs Act. Therefore, even

though the Petitioners are entitled to the refund on finalisation of the assessment u/s 18, to obtain that refund, the Petitioners are required to make an application within the period of limitation prescribed u/s 27 of the Customs Act. That is the scheme of the Customs Act. If the Customs authorities were under an obligation to refund the amount due u/s 18 of the Act then the Explanation II to Section 27 becomes redundant or nugatory. Therefore, the construction put forth by the Petitioners which runs counter to the express provision of the statute cannot be accepted. In fact, the Apex Court in the case of Mafatlal Industries Ltd. (supra) at Para 99 of its judgment has held that all refund claims except in the case of unconstitutional levy must be filed and adjudicated u/s 27 of the Customs Act. Later on it is held by the Apex Court that even the unconstitutional levy is governed by the principles of unjust enrichment. Therefore, the contention of the Petitioners that Section 27 does not apply to refund due u/s 18 and the Customs authorities are obliged to refund the amount due u/s 18 without the application of Section 27 cannot be accepted.

According to the aforesaid observations and ratio it has been held that if after final assessment it is found that excess payment has been paid by importer, an application must be made u/s 27 of the Act. Compliance with the conditions and requirement of Section 27 of the Act is mandatory. It is stipulated in Explanation II that when duty has been paid provisionally then the period of one year or 6 months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.

11. Gujarat High Court in the case of Hindalco Industries Ltd. (supra) on the other hand has referred to and considered the amendment to Section 18 of the Act whereby sub-Sections 3, 4 and 5 have been inserted from 13.7.2006 and, interalia, held as under :

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.

12. Before we deal with the respective judgments it is important to clarify one aspect. As noticed above, the appellant has not disputed that they did not communicate the two final orders dated 21.6.1999 and 15.6.1999 and therefore, it is not denied that the application if made u/s 27 would not be barred by limitation. The emphasis and issue raised is whether sub-Section (2) to Section 27 i.e. the clause relating to unjust enrichment would be applicable in the

present case. Sub-Section (2) to Section 27 was inserted/incorporated w.e.f. 23.12.1991 by Section 2 of the Customs (Amendment) Act, 1991. The contention of the appellant is that the respondent-assessee must therefore satisfy the conditions stipulated in sub-Section (2) to Section 27 of the Act and accordingly, if it satisfies the requirements and can establish that the incidence of duty was not passed on, they would be entitled to refund under the said Section. Otherwise, the amount of duty refundable has to be transferred to the Consumer Welfare Fund. This is the precise question and the issue which is being determined and decided.

13. The question of unjust enrichment and the constitutional validity of the amendments made in 1991 including insertion of sub-Section (2) to Section 27 were made subject matter of challenge in the Supreme Court and were decided in the case of *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . Explaining analogous provisions in the Central Excise Act/Rules, it was held as under :

104. Rule 9-B 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 9-B will not be governed by Section 11-A or Section 11-B, 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 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B(5) re-agitating the issues already decided under Rule 9-B -assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11-B. It follows logically that position would be the same in the converse situation.

(Emphasis supplied)

14. For the sake of clarity it may be noted that Section 11B and Rule 9B referred to in para 104 are from the Central Excise Act, 1944 and the rules framed under the said Act. The aforesaid Rule and the Section are almost in *pari materia* and similar to Section 18 and Section 27(2) of the Act.

15. Referring to the aforesaid paragraph, the Supreme Court in *Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur*, has held as under :

3. In order to get over the situation arising under Mafatlal Industries Ltd (Supra) vide notification No. 45/99-CE (NT) dated 25.6.1999, an amendment was made in Sub-rule (5) of Rule 9B by adding a proviso thereto. The effect of the proviso is that even after finalisation of the provisional assessment under Rule 9B (5), if it is found that an assessee is entitled to refund, such refund shall not be made to him except in accordance with the procedure established under Sub-section (2) of Section 11B of the Act.

4. There is no dispute that the refund claim in this case was made much prior to the addition of the proviso in Sub-rule (5) of Rule 9B. On the date on which the refund claim was made, the law applicable was the law as declared by this Court in Mafatlal Industries Ltd. (supra) which we have reproduced above. However, it is contended by the Learned Counsel Shri Verma for the department that the claim of refund would be governed by the proviso introduced in Sub-rule (5) of Rule 9B, and that as a consequence, the restrictions in Section 11A and Section 11B with regard to the procedure for refund would apply to the case of the appellant. The same question came up for consideration of this Court in Sinkhai Synthetics and Chemicals Pvt. Ltd. Vs. Collector of Central Excise, . this Court took the view that the case would be governed by the rule laid down in Mafatlal Industries Ltd. (supra) This view has been reiterated in a subsequent judgment of this Court in C.A. No. 2533 of 2001 (Commissioner of Central Excise, Meerut v. Star Paper Mills Limited)upholding the view of the tribunal that the refund claim of the appellant before the court was justified.

5. 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. 25.6.1999, 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 25.6.1999. 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.

(Emphasis supplied)

A reading of the aforesaid paragraph shows that Supreme Court had drawn a distinction between provisional assessment and refund due thereafter to the assessee on final assessment and in cases in which refund becomes due for other reasons like an appellate order or an order of a court. Refund can also become due on a subsequent order passed by the Assessing Officer in the form of rectification, modification etc. In the first category of cases, it was held that Section 11A/11B of the Act would not be applicable and refund provisions would

be covered by Rule 9B and therefore, the provisions of unjust enrichment would not apply. In the second category of cases, the provisions relating to unjust enrichment would apply.

16. This aspect was again examined by the Supreme Court in the case of Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., and it has been held as under :

14. As stated above. Para 104 of the judgment in the case Mafatlal Industries Ltd. (supra) states that if refund arises upon finalisation of provisional assessment, Section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra). In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17-1-1991. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied Para 104 of the judgment of the Constitution Bench in the case of Mafatlal Industries Ltd. (supra), which with respect, had no application. As stated above. Para 104 of the judgment in the case of Mafatlal Industries Ltd. (supra) dealt with refund consequent upon finalisation of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalisation of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of Mafatlal Industries Ltd. (supra). We may also point out that the judgment in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra) is based on the concession made by the Counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned Counsel for the respondent herein placed reliance on the judgment of this Court in the case of TVS Suzuki Ltd. (supra). In that case, application for refund was filed. This was on completion of final assessment. On 9-7-1996, the Department issued a show cause notice as to why the refund claim should not be rejected for non-compliance of Section 11B. By order dated 17-7- 1996, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner (Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of Para 104 of the judgment of this Court in Mafatlal Industries Ltd. (supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B(5). The judgment of this Court in the case of TVS Suzuki Ltd. (supra)/ therefore, supports the view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not

attract the bar of unjust enrichment.

(Emphasis supplied)

17. In a similar matter, the Commissioner of Customs had filed an appeal before the Supreme Court against the decision of the tribunal in the case of Oriental Exports, which is reported in 2001 (73) ECC 553 . The Supreme Court by their order dated 27.4.2006 dismissed the civil appeal no.4231/2001 after referring to the judgment of the Supreme Court in Mafatlal Industries Ltd. (supra), TVS Suzuki Ltd. and Allied Photographic India Ltd. (supra) and held as under:

These appeals have been filed by the Revenue.

The Tribunal, in the impugned order, following its earlier decision, in 1998 (76) ECR 440 has taken the view that the doctrine of unjust enrichment is not applicable to provisional assessment in terms of Section 18 of the Customs Act which is similar to Rule 9B of the Central Excise Rules.

A two-Judge Bench of this Court in Commissioner of C. Ex., Mumbai Vs. Allied Photographics India Ltd., , noticing the inconsistency, doubted the correctness of two decisions rendered by three-Judge Bench of this Court in, i.e. (i) Sinkhai Synthetics and Chemicals Pvt. Ltd. Vs. Collector of Central Excise, and (ii) Commissioner of Central Excise Vs. T.V.S. Suzuki Limited, Hosur, as contrasted to the Constitution Bench decision in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, .

The three-Judge Bench which considered the correctness of the aforesaid two decisions (of three-Judge Bench) has in Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., held that the judgment in Sinkhai Synthetic's case (supra) was per incuriam [para 14 at page 52] and approved the decision in the later case, i.e. TVS Suzuki's case (supra). The three-Judge Bench has also taken the same view, as was taken by the Tribunal, to the effect that the doctrine of unjust enrichment is not applicable to the provisional assessment even after the finalization thereof.

The point in issue in the present case is, thus, squarely covered by the three-Judge Bench decision in Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., . In view of this, the appeals are dismissed and the order passed by the Tribunal is affirmed. No costs.

(Emphasis supplied)

18. We may notice here that Gujarat High Court in the case of Hindalco Industries (supra) has specifically referred to decision in the case of Allied Photographic India Ltd. (supra) but the said case has not been noticed by the Bombay High Court in the case of Bussa Overseas and Properties Pvt. Ltd. (supra). The decision of the Gujarat High Court in the case of Hindalco Industries Ltd. (supra) has been followed by Orissa High Court in C.C.E., C. and S.T. Vs. Pradeep Phosphates Ltd., . The said decision also refers to the three earlier

judgments of the Supreme Court mentioned above.

19. We have considered Explanation II to Section 27(1) and whether in view of the said Explanation, the respondent assessee was required to move an application u/s 27 of the Act and accordingly, the conditions stipulated in sub-section (2) of the Act are applicable. We may now notice here that the two situations, which have been specifically referred to by the Gujarat High Court in the case of Hindalco Industries Ltd.(supra). Two situations are as under :

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).

20. The two situations are relevant and important. In the first situation the assessee has paid provisional duty which gets reduced on final assessment. The assessee, therefore, becomes entitled to refund which is payable in terms of Rule 9B of the Excise Act, 1944 or Section 18 of the Act. For refund on this account, no application is required to be filed u/s 27 of the Act and therefore, sub-Section (2) is not applicable. In the second situation, the assessee becomes entitled to additional refund on account of appellate orders or orders passed by a court. In this situation, the assessee is under an obligation to file an application u/s 27 of the Act, the limitation period accordingly applies and doctrine of unjust enrichment is also applicable. Explanation II to Section 27 of the Act deals with the 3rd category of situations. Such situations may occur after the passing of the final assessment, on account of rectification u/s 154 of the Act or because of any

other reason, as a result of which the final order suffers an amendment or a change and some amount becomes refundable. As far as Section 18 of the Act is concerned, when an amount becomes refundable after a final order is passed, the same has to be refunded immediately and for this purpose the assessee is not required to move an application u/s 27 and accordingly sub-section (2) to Section 27 would not apply. It is in this situation that the legislature has intervened and has now inserted sub-sections (3), (4) and (5) to Section 18 w.e.f. 13.7.2006. These insertions obviously are not applicable to the case in hand as they do not have retrospective effect. It was so held in TVS Suzuki Ltd. (supra) when similar amendments were made in Rule 9B of the Rules passed under the Central Excise Act w.e.f. 25.6.1999. However, in 1999, the legislature did not make corresponding amendment in Section 18 of the Customs Act. These amendments were made w.e.f. 13.7.2006.

21. In view of the aforesaid position the question of law is answered in the affirmative and against the appellant and in favour of the respondent-assessee. The appeal is accordingly disposed of. No costs.