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**(2021) 02 JH CK 0046**  
**In the Jharkhand High Court**  
**Case No : Tax Appeal No. 28 Of 2017**

M/s La Opala RG Ltd.

APPELLANT

Vs

Commissioner of Central Excise & Service Tax, Ranchi

RESPONDENT

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**Date of Decision :** 04-02-2021

**Acts Referred:**

Central Excise Act, 1944 — Section 11B, 11B(2), 11B(3), 11B(5), 12A, 35EE  
Customs Tariff Act, 1975 — Section 3, 3(2), 4, 4A  
Customs Tariff Act, 1985 — Section 3  
Central Excise Rules, 2002 — Rule 16, 18, 19  
Cenvat Credit Rules, 2002 — Rule 3, 16  
Cenvat Credit Rules, 2004 — Rule 2, 3, 3(vii), 4, 5, 7

**Citation :** (2021) 02 JH CK 0046

**Hon'ble Judges :** Aparesh Kumar Singh, J; Anubha Rawat Choudhary, J

**Bench :** Division Bench

**Advocate :** Nirmal Kumar Chowdhary, Ratnesh Kumar

**Final Decision :** Dismissed

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## Judgement

Aparesh Kumar Singh, J

1. Appellant is aggrieved by the order dated 29.05.2017 passed by the Learned Customs, Excise and Service Tax Appellate Tribunal (â??CESTAT'

for short), East Zonal Bench, Kolkata in Excise Appeal No. E/355/2012, whereunder order of the learned Commissioner (Appeals), Central Excise

and Service Tax, Ranchi dated 16.04.2012, by which the Commissioner (Appeals) set aside the order of the Assistant Commissioner, has been

affirmed. The Assistant Commissioner of Central Excise, Central Excise Division, Bokaro had sanctioned the refund claim and directed the appellant

to take credit of the refund amount in their Cenvat Credit Account vide his Order-in-Original No. 04/AC/REFUND/2010 dated 29.09.2010.

2. This appeal has been admitted on the following substantial questions of law:

a. Whether in the facts and circumstances of the case and in law, an application for refund of countervailing duty is maintainable under Section 11B of

the Central Excise Act?

b. Whether in the facts and circumstances of the case, the order passed by learned CESTAT is bad in law and on facts?

Case of the Appellant:

The appellant is a Company within the meaning of Companies Act, 1956 engaged in the manufacture of Excisable goods, Opal Glassware and

Kitchenware falling under Central Excise Sub-heading No. 7013 2900 / 7013 3900 respectively. During the course of business, appellant exported 880

dinner sets (124 pieces) valued at Rs. 33,50,160.00 and 1050 dinner sets (26 pieces) valued at Rs. 11,59,725.00 against ARE-1 No. 01/2009-10 dated

10.06.2009 to M/s Kaspian Kalay Giti, Tehran, Iran under General Bond No. 31/MC-Kol/2009-10 dated 22.04.2009. The buyer vide letter dated

04.10.2009 informed the appellant to take back all the containers as they were not able to clear the same from customs and take delivery. On return

of the goods on Kolkata Port, goods were cleared on payment of countervailing duty (CVD) amounting to Rs. 4,28,424.00 only as allowed by the

Customs authorities vide Bill of Entry No. 518266 dated 19.01.2010. Receipt of the goods in the appellant's factory was intimated to the Superintendent

of Central Excise, Madhupur. Appellant filed a refund claim of CVD at Kolkata Port before the Jurisdictional assessing authority, stating that they are

entitled to take credit of the CVD paid by them on return of the goods under Rule 16 of the Central Excise Rules, 2002 ('C.E.R, 2002' for short) as

they did not claim any export benefit and goods were also cleared under Rule 19 of C.E.R, 2002 on execution of bond and without payment of duty.

On re-importation of the goods, the appellant had paid CVD and hence, they were entitled for refund of the said amount of CVD. The Adjudicating

Authority sanctioned the refund claim and directed the appellant to take credit of the refund amount in their Cenvat Credit vide Order-in-Original

dated 29.09.2010. Department filed an appeal before the Commissioner (Appeals) and the appellant also filed its Cross-Objection. The Commissioner

(Appeals) vide Order-in-Appeal No. 19/RAN/2012 dated 16.04.2012 set aside the order of the Assistant Commissioner and allowed the appeal of the

Department and directed the appellant to pay back the refund amount with appropriate interest. The appellant filed an appeal before the learned

CESTAT against the Order-in-Appeal dated 16.04.2012, stating that they have taken the goods back in their factory and taken the benefits of Rule 16

of Cenvat Credit Rules, 2002. So, they are entitled to avail the Cenvat Credit of the said amount. That Rule 3 of Cenvat Credit Rules, 2002 allowed to

take Cenvat Credit on the countervailing duty. That the Commissioner (Appeals) erred in holding that the refund sanctioned by the Adjudicating

Authority is not sustainable in law. That the findings of the learned Commissioner (Appeals) is based on incorrect appreciation of relevant facts and

materials on record. The Commissioner (Appeals) has erred in not considering and disclosing any reason for denying the appellants' contention in the

Cross-Objection. The applicant had deposited 25% of the duty amount, as per the order of the learned Appellate Tribunal on its stay application. It

was pleaded that since CVD is equivalent to the Central Excise Duty charged only on the importation of the goods, payment of duty at the time of

clearance would be amounting to double payment of central excise duty. It is also averred that Cenvat Credit of CVD is allowed under C.C.R, 2004.

That the re-imported goods were cleared for home consumption after re-packaging on payment of duty which would be treated as inputs under

Cenvat Credit Rules, 2004. Since refund of CVD can be made only under the provisions of Central Excise Act and Rules, therefore, the Adjudicating

Authority sanctioned the refund. The appellant claims to have filed the following documents before the learned Tribunal

(a) Appeal and the Stay Application of the appellant against the Order dated 16.04.2012 passed by the Ld. Commissioner (Appeals) of Central Excise

& Service Tax, Ranchi

(b) Order-in-Original dated 29.09.2010;

(c) Order-in-Appeal 19/RAN/2012 dated 16.04.2012

(d) Memorandum of Cross-Objection of the appellant;

(e) Stay Order of the Tribunal dated 10.09.2012

(f) Final Order of the Tribunal dated 29.05.2017 Learned Tribunal dismissed the appeal upon hearing the counsel for the parties and upon

consideration of the appeal records, holding that the Commissioner (Appeals) rightly observed that the refund claimed under Section 11B is not

maintainable.

3. Learned counsel for the appellant has before us inter-alia made the following submissions:

i. That the learned Tribunal failed to appreciate the fact that the CVD is equivalent to the Central Excise Duty and therefore, appellant is eligible for

taking credit of the CVD under Rule 16 of Central Excise Rules, 2002. ii. That the appellant is eligible for Cenvat Credit of the value equivalent to

CVD amounting to Rs. 4,28,424/- under Rule 16 of C.E.R, 2002 as returned goods is to be treated as input under Cenvat Credit Rules, 2004 which

can be utilized according to the said rules and if such Cenvat credit remains unutilized, it can be refunded to the manufacturer.

iii. That by virtue of Rule 3(vii) of Cenvat Credit Rules, 2004, the Cenvat credit of CVD is allowed. A harmonious reading of the said provisions with

Rule 16 of C.E.R, 2002 would show that there is no good reason why CVD paid by the appellant under section 3 of the Customs Tariff Act, 1975

should not be included in the term 'duty' used in Rule 16 of C.E.R., 2002. Further, CBEC vide its Circular No. 83/2000 dated 18.10.2002 has

clarified that wherever 'duty' appears in Rule 16 of C.E.R., 2002, it is to be construed to having reference to Central Excise or the additional duty

under section 3 of Customs Tariff Act, 1975.

Appellant has relied upon the decision of the Delhi High Court in the case of Commissioner of Central Excise, Delhi-I versus Joint Secretary

(Revisionary Authority) & another [(2012) SCC On-Line Del 2517, para-26 & 27] in support of the proposition that CVD is equivalent to the excise

duty and partakes the character of excise duty. He has further relied upon the case of Commissioner of C. Ex, Gurgaon versus Simplex PharmaPvt.

Ltd. [(2008) SCC On Line P&H 2185] on the plea that the refund claim of countervailing duty is permissible under section 11B of the Central Excise

Act, 1944. It has been held therein that the applicant is eligible for the benefit of Cenvat Credit on the CVD paid by him at the time of import of raw

material and if he had availed the Cenvat credit, then he would have got the refund of the same under the provisions of Section 11B(2). It is submitted

that the learned Tribunal failed to appreciate that if credit/refund is not allowed, the same would lead to double taxation on the said good, one as CVD

under section 3 of the Customs Tariff Act, 1985 and other as Central Excise Duty

paid at the time of home consumption of the said goods.

#### Case of the Respondent

4. On the part of the Revenue, the following stand has been taken.

That the learned Tribunal has passed the impugned order, as per correct interpretation of law. The CVD is a duty of Customs and governed by the

Customs Act. It is levied and collected at Kolkata Customs. The Claimant has submitted refund claim of CVD under the provisions of Section 11B of

Central Excise Act, 1944. That the appellant had exported the consignment to Tehran, under Bond without payment of duty. Since the buyer did not

receive the goods, appellant took back the returned goods on payment of CVD. In reply to para-9 of the Memo of Appeal, it is stated that the

appellant has nowhere mentioned that he had filed refund claim of CVD at Kolkata Port. As per Rule 16 of C.E.R, 2002, when any goods on which

duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the

assessee shall be entitled to take Cenvat Credit of the duty paid thereon, if such goods are received as inputs under the Cenvat Credit Rules, 2004.

5. In the present case, duty was not paid on the goods at the time of removal of the same and the goods were otherwise also fully finished and were

not brought for re-conditioning, refining or remaking etc. Hence, the provisions of Rule 16 of Central Excise Rules, 2002 are not applicable. For the

same reason, provisions of Rule 3 of Cenvat Credit Rules, 2002 are not applicable as the instant goods cannot be considered as input. Moreover, credit

of CVD in this case is not admissible as the imported goods are clearly finished goods and cannot be treated as input under the Cenvat Credit Rules,

2004. Referring to the Notification No. 158/95-Cus dated 14.11.1995, it has been stated at Para-12 of the counter affidavit in reply to para-11 of the

Memo of Appeal that said notification allows goods to be re- imported for repairs / re-conditioning, etc. within three years on the condition that the

said goods are to be re-exported within six months. The appellant at the time of re-import, did not choose to avail this facility and paid full duty of

customs and brought the re-imported goods to their factory. It has thereafter claimed the benefit of Rule 16 of C.E.R, 2002 which is meant for re-

conditioning, etc. Therefore, the benefit of Rule 16 will not be available to him, as the goods were fully manufactured goods and not brought for re-

conditioning, etc. There is no question of allowing Cenvat Credit by treating the re-imported goods as input under Rule 3 of Cenvat Credit Rules, 2002.

Therefore, the question of refund also does not arise. Further, CVD is a customs duty and refund claim is to be filed with the Custom authorities and

not with the Central Excise authorities. Respondent have denied that the Commissioner (Appeals) had not considered the Cross- Objection filed by the

appellant. The learned Tribunal therefore rightly did not find the refund claim maintainable under section 11B of Central Excise Act, 1944.

6. I have considered the submissions of learned counsel for the parties and taken note of the relevant provisions of law as are applicable to the facts

of the present case. Section 11-B of Central Excise Act, 1944 is quoted hereunder for better appreciation:

â??Section 11B. Claim for refund of duty and interest, if any, paid on such duty-

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and

interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of

one year from the relevant date in such form and manner 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 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 (40 of 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) substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the

whole or any part of the duty of excise 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 of excise and interest, if any, paid on such duty as

determined by the Assistant Commissioner of Central Excise or Deputy Commissioner 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 current account maintained with the Commissioner 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 and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest,

if any, paid on such duty to any other person;

(e) the duty of excise 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;

(f) the duty of excise 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 rules made thereunder or any other law for the time being in force, no refund shall be made except as provided

in sub-section (2).

.....?

Section 12 A reads as under:-

Section 12-A. Price of goods to indicate the amount of duty paid thereon.-

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise 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.?

7. As per section 11-B, any person claiming refund of any duty of excise and interest, if any, paid on such duty, may make an application for refund of such duty, before the expiry of one year from the relevant date in such form and manner, 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 and interest, if any, paid 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. The second proviso to section 11-B provides that the limitation of one year shall not apply where such duty and interest, if any, has been paid under protest. Under Section 11-B Sub-section (2) the Adjudicating Authority may, on receipt of such application, instead of crediting it to the fund, refund to the applicant such amount of duty and interest, if any, paid by him, as may be determined, if it relates 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 current account maintained with the Principal Commissioner, Central Excise or Commissioner 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) duty of excise and interest, if any, paid on such duty, paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person; (e) the duty of excise 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; (f) the duty of excise 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. Section



11B(3) is non obstante clause which provides that notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court 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 sub- section (2). The meaning of expression 'refund' and 'relevant date' has also been provided under the explanation under section 11B sub-section (5).

It is relevant to refer to Section 3 of the Customs Tariff Act, 1975 which provides that any article is imported into India shall, in addition, be liable to duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. For the purposes of the appreciation of the case at hand, section 3 of the Customs Tariff Act, 1975 is quoted hereunder:

3. Levy of additional duty equal to excise duty, sales tax, local taxes and other charges.-- (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the 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 value of the imported article: Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

Explanation.-- In this sub-section, the expression 'the excise duty for the time being leviable on a like article if produced or manufactured in India' means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such

duty is leviable at different rates, the highest duty.

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8. A plain reading of the aforesaid provisions makes it clear that additional duty which is equal to excise duty for the time being leviable on a like

article if produced or manufactured in India, is to be levied on any article which is imported into India in addition to the customs duty. In the case of

Star Industries Versus Commissioner of Customs (Imports), Raigad [(2016) 2 SCC 362], it has been held that for the purpose of determining the levy

of CVD under Section 3 of the Customs Tariff Act, it is to be deemed that the product that was imported was manufactured in India and thereafter

rate of Central excise duty leviable thereupon is to be determined. That duty becomes the CVD i.e. the additional duty on the import of the item. In

the case of Ahujasons Shawl Wale Private Limited versus Commissioner of Customs, New Delhi [(2015) 14 SCC 623], Apex Court has held that the

purpose of additional duty, also known as countervailing duty under Section 3, is to protect the domestic market from unhealthy competition.

Customs Tariff Act, 1975 replaces the Indian Tariff Act, 1934 in which section 2A provided for levy of countervailing duty.

For the purpose of appreciating the case of the parties, it is also relevant to quote the provisions of Rule 16 of the Central Excise Rules, 2002.

â??Rule 16. Credit of duty on goods brought to the factory. - (1) Where any goods on which duty had been paid at the time of removal thereof are

brought to any factory for being re-made, refined, re- conditioned or for any

other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilise this credit according to the said rules.

(2) If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the CENVAT credit taken under sub-rule (1) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be.

Explanation. - The amount paid under this sub-rule shall be allowed as CENVAT credit as if it was a duty paid by the manufacturer who removes the goods.

(3) If there is any difficulty in following the provisions of sub-rule (1) and sub-rule (2), the assessee may receive the goods for being re-made, refined, re-conditioned or for any other reason and may remove the goods subsequently subject to such conditions as may be specified by the Principal Commissioner or Commissioner, as the case may be. The instant rule provides that where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take Cenvat credit of the duty paid as if such goods are received as inputs under the Cenvat Credit Rules, 2002 and utilize this credit according to the said rules. Perusal of Rule 16 indicates that the assessee shall be entitled to take Cenvat credit of the duty paid when the goods on which duty has been paid at the time of removal are brought to any factory for being re-made, refined, reconditioned or for any other reason and the assessee shall have to state the particulars of such receipt in his records for the purpose as if such goods are received as inputs under Cenvat Credit Rules, 2004. He has to utilize this credit according to the said rules.

10. Relevant provisions of Cenvat Credit Rules, 2004 which have a bearing upon the instant case are also quoted hereunder:

â??RULE 2. Definitions. -- In these rules, unless the context otherwise requires,

(a) "capital goods" means:-

A.....

B.....

C.....

D.....

(b) "Customs Tariff Act" means the Customs Tariff Act, 1975 (51 of 1975);

.....  
[(k) "input" means -

(i) all goods used in the factory by the manufacturer of the final product; or

(ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used

for providing free warranty for final products; or

(iii) all goods used for generation of electricity or steam [or pumping of water] for captive use; or

(iv) all goods used for providing any [output service, or]; [(v) all capital goods which have a value up to ten thousand rupees per piece.] but excludes -

(A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;

[(B) any goods used for -

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of service portion in the execution of a works

contract or construction service as listed under clause (b) of section 66E of the Act;] [(C) capital goods, except when,-

(i) used as parts or components in the manufacture of a final product; or

(ii) the value of such capital goods is up to ten thousand rupees per piece;] (D) motor vehicles;

(E) any goods, such as food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such

goods are used primarily for personal use or consumption of any employee; and

(F) any goods which have no relationship whatsoever with the

manufacture of a final product.

.....  
RULE 3. CENVAT credit. -- (1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(i).....

(ii) .....

(iii) .....

(iv) .....

(v) .....

(vi).....

(via).....

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i),

(ii), (iii), (iv), (v) [, (vi) and (via)]:

.....  
(4) The CENVAT credit may be utilized for payment of -

(a) any duty of excise on any final product; or

(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(d) an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or

(e) service tax on any output service:

.....  
(5) When inputs or capital goods, on which CENVAT credit has been

taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of

output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be

made under the cover of an invoice referred to in rule 9: .....

RULE 4. Conditions for allowing CENVAT credit. -- (1) The CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs

in the factory of the manufacturer or in the premises of the provider of output service [or in the premises of the job worker, in case goods are sent

directly to the job worker on the direction of the manufacturer or the provider of output service, as the case may be]: Rule 6.

..... Explanation 2. - No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.?

11. From perusal of Rule 3 (vii) of Cenvat Credit Rules, 2004, it is clear that the additional duty leviable under section 3 of the Customs Tariff Act, is

equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv),

(v), (vi) and (via) and are eligible to be taken as Cenvat Credit by a Manufacturer or producer of final products or a provider of output service. Sub-

rule (4) thereof specifies as to where Cenvat Credit may be utilized for payment.

12. Learned counsel for the appellant has by placing reliance upon the decision of Delhi High Court in the case of Commissioner of Central Excise,

Delhi-I (Supra) and that of Punjab & Haryana High Court in the case of Simplex PharmaPvt. Ltd (Supra) has argued that additional duty under

section 3 of the Customs Tariff Act, 1975 is treated as countervailing duty and is permitted to be taken as Cenvat Credit under rule 3 of Cenvat Credit

Rules, 2004. Further, in terms of section 11B of C.E.A, 1944 read with Rule 16 of C.E.R, 2002, appellant is entitled to claim refund of unutilized

Cenvat Credit.

It is true that additional duty levied under section 3 of Customs Tariff Act, 1975 is in the nature of a countervailing duty to protect the interest of the

domestic manufacturers and it is permissible under Cenvat Credit Rules, 2004 for it to be treated as Cenvat Credit. However, any refund of unutilized

Cenvat Credit can be taken if it is permissible within the scope of Rule 16 of C.E.R, 2002 and fulfils the conditions under section 11B of C.E.A, 1944.

As per Cenvat Credit Rules, 2004 such additional duty also known as countervailing duty has to be utilized for payment of any duty of excise on any

final product or an amount equal to Cenvat Credit taken on inputs if such inputs are removed or after being partially processed. Rule 16 of C.E.R,

2002 provides that where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined,

re-conditioned or for any other reason, the assessee shall state the particulars of

such receipt in his records and shall be entitled to take Cenvat credit of the duty paid, as if such goods are received as inputs under the Cenvat Credit Rules, 2004 and utilize this credit according to the said rules. As per Rule 16(2), if the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the CENVAT credit taken under sub-rule (1) and in any other case, the manufacturer shall pay the duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be.

It is also pertinent to refer to Rule 19 of C.E.R., 2002 which provides for export without payment of duty. For better appreciation, Rule 19 of C.E.R., 2002 is extracted hereunder:

â??Rule 19 Export without payment of duty.

(1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Principal Commissioner or Commissioner, as the case may be. (2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Principal Commissioner or Commissioner, as the case may be. (3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.?

13. In the light of the statutory provisions discussed above, in the present case, finished goods were exported against ARE-1 No. 01/2009-10 dated

10.06.2009 under General Bond No. 31/MC-Kol/2009-10 dated 22.04.2009. Goods were returned by the foreign buyer as it could not get clearance of

the Customs and take its delivery. As such, the wholly finished goods were returned back to Kolkata Port. On re-importation of the finished goods,

Customs authorities allowed clearance of the goods on payment of additional duty amounting to Rs. 4,28,424/- vide Bill of Entry No. 518266 dated

09.01.2010. Receipt of such goods in the appellant's factory was also intimated to the Superintendent of Central Excise, Madhupur. Appellant

thereafter claims to have filed a refund claim of CVD paid at Kolkata Port, stating

that they are entitled to take credit amount of CVD paid by them

on return of the goods under Rule 16 of the Central Excise Rules, 2002 as they did not claim any export benefit and the goods were also cleared under

Rule-19 of C.E.R, 2002 on execution of bond and without payment of duty.

14. Respondent in their counter affidavit have categorically stated that the appellant had nowhere stated that they had filed refund claim of CVD at

Kolkata Port. It is the Respondent's case that as per Rule 16 of C.E.R, 2002, when any goods on which duty had been paid at the time of removal

thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall be entitled to take Cenvat

Credit of the duty paid thereon, if such goods are received as inputs under the Cenvat Credit Rules, 2004. However, it is their stand that duty was not

paid on the goods under question at the time of removal of the same. The goods were otherwise also fully finished and were not brought for re-

conditioning, refining or remaking etc. Hence, the provisions of Rule 16 of Central Excise Rules, 2002 are not applicable. Further the provisions of

Rule 3 of Cenvat Credit Rules, 2004 are not applicable in the instant case as the goods under question cannot be considered as inputs. It is the

Respondent's case that credit of CVD in this case is not admissible as the imported goods are clearly finished goods and cannot be input under the

Cenvat Credit Rules, 2004. The appellant while pleading refund of Cenvat Credit under section 11B of C.E.A, 1944 read with Rule 16 of C.E.R, 2002,

has neither categorically stated as to what happened to the goods after receipt in the factory, nor enclosed any document as are required to be

furnished in terms of section 11B, to establish that the amount of duty of excise and interest paid by him had not been passed on by him to any other

person. Evidently, the appellant received the finished goods on re-importation after paying additional duty before the Customs authorities at Kolkata.

As such, finished goods were not within the meaning of 'inputs', as per Rules 3, 4 and 7 of Cenvat Credit Rules, 2004. They were not brought to the

factory for being remade, refined, re-conditioned or for any other reason in terms of Rule 16 of C.E.R, 2002.

15. In the case of Commissioner of Central Excise, Delhi-I (Supra), the question before Delhi High Court was, whether the amendment made in the

Notification No. 12/2007 with effect from 01 st March 2007 were clarificatory or a



substantive amendment and therefore, prospective in nature and not retrospective? The assessee in the said case were manufacturer exporters of stainless steel utensils and had made applications for rebate / refund for countervailing duty or additional duty paid on the inputs utilized for manufacture. Those applications were made under Rule 18 of C.E.R., 2002 read with Notification No. 21/2004-CE(NT) dated 06th September 2004. In some cases, applications were dismissed and other applications were allowed. The matters were taken up in appeals before the Commissioner (Appeals) and were made subject matter of the Revision petitions under Section 35EE of the C.E.A, 1944. The Central Government had held that the Respondent No. 2 - assesseees are entitled to rebate/refund of CVD paid on the inputs. The contention of the Revenue was that CVD paid is not excise duty as such. The Central Excise Act, 1944 is a separate Act and rebate / refund of excise duty on exports is governed by the notification and the language of the notification under which the said rebate/refund can be granted. It was submitted by the Revenue that the Notification No. 21/2004 dated 6th September 2004 postulated and stipulated that the refund / rebate of duty could be claimed but it was restricted to the duty paid under the specified enactments namely, C.E.A, 1944, Additional Duties of Excise (Goods of Special Importance) Act, 1957, Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 and special excise duty collected under the Finance Act. CVD was not specifically stipulated and treated as the duty paid under the Notification No. 41/2001. It was also the case of the Revenue that the Notification No. 21/2004 was amended subsequently by Notification No. 12/2007 effective from 1st March 2007 and with effect from the said date, CVD was specified as one of the duties entitled for rebate. It was contended on behalf of the Revenue that the aforesaid amendment is not retrospective or clarificatory in nature but is prospective and would apply with effect from 1 st March 2007 and not for the period anterior thereto. It was stated that CBEC had clarified that the amendment vide Notification No. 12/2007 CE(NT) dated 01 st March 2007 is prospective and not retrospective vide letter dated 25th February 2008. In these background facts, the question before the learned Division Bench of Delhi High Court was, whether the aforesaid amendment is clarificatory or substantive and therefore, prospective in nature and not retrospective.

The Delhi High Court also took note of the similar issue decided by the Punjab and Haryana High Court in the case of Commissioner of C. Ex, Gurgaon (Supra), also relied upon by the appellant herein. A perusal of para-11 of the judgment makes it clear that from the facts on the record, it was not disputed that countervailing duty amounting to Rs. 9,69,250/- paid by the applicant at the time of import of raw material was in fact duty of excise equivalent to excise duty payable on such raw material, if manufactured in India, and admittedly, the said raw material was consumed in the manufacturing of excisable goods exported out of India. Applicant was admittedly eligible for the benefit of Cenvat Credit on the CVD/additional duty paid by him at the time of import of raw materials and if he had availed the Cenvat Credit, then he would have got the refund of the same under the provisions of Section 11B(2). Eligibility of the applicant for the benefit of Cenvat Credit on the CVD was not disputed by the Revenue. Therefore, it was found that the applicant was entitled to payment/refund of the said amount under Section 11B(2) of the Act. Based on these findings and by placing reliance upon the provisions of Cenvat Credit Rules, it was held that the rebate of countervailing duty paid on inputs/materials used in the manufacture of exported goods is admissible to the applicants under Rule 18 of C.E.R, 2002 read with Notification No. 21/2004 dated 6th September 2004, provided no Cenvat Credit or drawback is availed by the applicants. Learned Division Bench of Delhi High Court noticed the reasoning given by the Joint Secretary in its order and also referred to Rule 18 of C.E.R, 2002, Rule 3 and 5 of Cenvat Credit Rules, 2004 and also the judgment on the nature of additional duty imposed under section 3 of Customs Tariff Act, 1975 and held that the amendment Notification No. 12/2007 fully applied to all cases and there was no discrimination. Even without the aforesaid notification, there was a valid and good case to include and treat CVD as a duty covered by the Notification No. 21/2004. The detailed reasoning and logic in the findings given by the Joint Secretary-Revisionary Authority was appreciated after independent application of mind and found worthy of acceptance. Writ petitions preferred by the Commissioner of Central Excise against the order of Revisionary Authority was dismissed.

16. In the facts and circumstances of the present case, the analysis of the relevant provisions under Section 11B of C.E.A, 1944, Rule 16, 18 and 19

of C.E.R., 2002 and Rule 2, 3, 4, 7 of Cenvat Credit Rules, 2004, discussed above, leave no room of doubt that the receipt of finished goods upon re-importation in the factory of the appellant, as claimed, were not in the form of inputs / raw materials for use in the process of manufacture. As such finished goods were not brought into the factory for being re-made, refined, re-conditioned or for any other reason. If such goods were not inputs or raw materials upon which the assessee was entitled to claim Cenvat Credit upon payment of additional duty (CVD) under Customs Tariff Act, 1975, the assessee could not have claimed refund thereof from the Central Excise Authorities invoking Section 11B of C.E.A, 1944 read with Rule 16 of C.E.R, 2002. The Commissioner (Appeals) in his order dated 16.04.2002 held that credit of CVD in this case is not admissible as the exported goods were finished goods and could not be input under Cenvat Credit Rules, 2004. As such, there was no question of allowing fully manufactured goods inside the factory under Rule 16 as condition of repair / reconditioning, etc. need not be fulfilled in respect of impugned finished goods. When the application of Rule 16 was not available, there was no question of allowing Cenvat Credit as inputs under Rule 3 of Cenvat Credit Rules, 2004 against the impugned goods. Therefore, refund sanction was not sustainable. Learned Tribunal affirmed the order of the Commissioner (Appeals) on the same lines, holding that it was not maintainable under section 11B of C.E.A., 1944.

17. On the basis of the discussions made herein-above, and for the reasons recorded, the first substantial question of law, posed at the outset is answered in the following manner:

That the application for refund of countervailing duty is maintainable under section 11B of Central Excise Act, provided it satisfies the conditions prescribed under Cenvat Credit Rules, 2004 as being treated as inputs and under Rule 16 of CER 2002 such goods / inputs have been brought into the factory for being re-made, refined, re-conditioned or for any other reason by the assessee.

In the facts of the present case, since return of the finished goods in the factory of the appellant could not qualify as inputs and neither were such goods brought into the factory for re-conditioning, re-making and re- packaging, therefore claim of refund before the Central Excise authorities of additional duty (CVD) was rightly held to be not maintainable. The appellant

assessee had not able to establish through accompanying documents and other evidence that such duty has not been passed on by him to any other person, as required under section 11B of Central Excise Act, 1944. Any refund of countervailing duty under section 11B of Central Excise Act, 1944 is maintainable only if the conditions prescribed under Cenvat Credit Rules, 2004 for treating it as inputs are fulfilled and such goods satisfy the conditions prescribed under Rule 16 of C.E.R, 2002.

18. Since in the facts and circumstances of the case, application for refund of countervailing duty by the appellant under section 11B of Central Excise Act, 1944 was not maintainable, the order passed by the learned CESTAT cannot be held to be bad in law and on facts. Question no. 2 is answered accordingly.

19. The Appeal is dismissed. However, no order as to cost (s).