

(2009) 07 CAL CK 0030
In the Calcutta High Court
Case No : CEXA No. 70 of 2008

Usha International Ltd.

APPELLANT

Vs

Commissioner of Central Excise, Kolkata-V and Others

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 9B, 9B(5)

Central Excises and Salt Act, 1944 — Section 11A, 11B, 12A, 12B, 17

Citation : (2009) 2 ILR (Cal) 391

Hon'ble Judges : Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Pranab Kr. Dutta, Atish Dipankar Roy and Kaushik Dey, for the Appellant; Tilak Bose and Mohit Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against the judgment and/or order dated May 7, 2008 passed by the Customs, Excise & Service Tax Appellate Tribunal, Kolkata in appeal No. EDM-584/04 u/s 35G of the Central Excise Act, 1944 (hereinafter referred to as "CESTAT").

2. The appeal was admitted on 23rd September, 2008 on the following substantial questions of law:

a) When a position of law is well settled as a result of judicial pronouncement of the Hon'ble Supreme Court whether it would amount to judicial impropriety or adventurism for the learned Tribunal to ignore the settled decisions and then to pass a judicial order which is contrary thereto?

b) Whether the learned Tribunal erred in law in not appreciating that the law as laid down by the Hon'ble Supreme Court of India that in case of provisional assessment if any duty is due or is to be refunded upon final assessment then that will not be guided by Section 11A or 11B as the case may be excepting those claim which arose as a result of any appellate proceedings against such

assessment?

c) Whether, the learned Tribunal erred in law in not appreciating that the order dated 20.12.2000 was the order of final assessment and vide that order it was held that an excess amount of Rs. 23,37,762.35 was deposited and as such applying the law as laid down by the Hon'ble Supreme Court of India getting refund of that excess amount the provisions of Section 11B will not apply and as such the bar of unjust enrichment cannot be applicable in the instant case as has been held in the case of Timken passed by the same Tribunal earlier?

3. The facts of the case briefly are as follows:

During 1st October, 1975 and 30th September, 1983, the Appellant had been manufacturing electric fans cleared on provisional basis under Rule 9B of the erstwhile Central Excise Rules, 1944 as the jurisdictional Superintendent of Central Excise and the Assistant Commissioner raised disputes as to the calculation of duty of Central Excise to be paid by the Appellant in respect of the fans.

4. On February 13, 1985 the Assistant Commissioner passed the assessment order in respect of finalizing and/or approving the price list at Rs. 70.71 lacs as amount payable by the Appellant.

5. On June 12, 1987 the Appellate Commissioner in appeal preferred by the Appellant against the said order dated February 13, 1985 directed re-finalization of the assessment after taking into consideration the observation made in the said order in appeal. During the pendency of the said appeal before Appellate Commissioner the Department asked to Appellant to deposit Rs. 9.76 lacs on ad hoc basis which the Appellant did and also deposited a further sum of Rs. 23 lacs which was directed by the High Court after the Appellant moved a petition challenging the order of dismissal of its stay application initially by the Appellate Commissioner.

6. On February 6, 1997, the CESTA in an appeal preferred by the department against the said order of the Appellate Commissioner refused to set aside the same and modified the order to the extent of certain further adjustments to be taken into consideration while re-finalizing the assessment as directed by the Appellate Commissioner.

7. On December 20, 2000, the Assistant Commissioner pursuant to the order of the Appellate Commissioner as modified by the learned CESTAT, re-finalized the assessment and came to the finding the Appellant had paid Rs. 56,14,262.35p in excess as duty at the provisional stage of which Rs. 32,76,500/- should be refunded but the balance which was paid under Rule 9B cannot be refunded due to the provision of unjust enrichment.

8. The Appellate Commissioner refused to intervene and rejected the appeal filed by the Appellant against the said order dated December 20, 2000.

9. Being aggrieved, appeal was preferred before the learned CESTAT, in turn CESTAT refused to intervene with the said order of the lower authority without considering the fact stated clearly in the written submission as pointed out on behalf of the Appellant that the Constitutional Bench of the Supreme Court have held that the doctrine of "unjust enrichment" will not apply in case of finalization of provisional assessment under Rule 9B and that the learned CESTAT having been followed the Constitutional Bench of Supreme Court have held in terms of the statutory definition that assessment includes re-assessment.

10. Being aggrieved, the Appellant preferred this instant appeal before the High Court. It is the case of the Appellant; the Appellant cleared the goods upon payment of duty provisionally.

11. Mr. Pronab Kumar Dutta, learned Advocate appearing on behalf of the Appellant, contended before us that the order of the Appellate Commissioner was modified by the CESTAT vide order dated February 6, 1997, to the extent of disallowance a certain deductions allowed by the Collector (Appeals). The Assistant Commissioner while deciding the case of 20th December, 2000 to which our attention was drawn by Mr. Dutta and he specifically drew our attention to the followings:

1. Finalization of Provisional Assessment for the deductions claimed from the wholesale prices by M/s The Jay Engineering Works Ltd., during the period from 1.10.75 to 30.9.83.

2. Finalization of case proceedings for claim of refund of Rs. 56,14,262,35.

3. S.C. Notice under C. No. V(33) 15/1/IV/ 84(7) dt. 5.1.84 & C. No. V(33)15/I/ IV/84/ Pt.I/1346 dt.8.3.84 & C. No. V(84) 187/ Refund/Cal H/97/294(T)dt. 20.2.98

12. He also further our attention to Clause - 5 at page 92 of the Paper Book which reads as follows:

The price in Part II related to supplies to Govt. Agencies. The price lists in Part VII were related for sales through M/s. Usha Sales Ltd. and sales through their Unit. At the material time the goods were cleared under Rule 9B under Provisional Assessment.

13. He also drew our attention to paragraph C - 1 at page 96 of the Paper Book which reads as follows:

I am proceeding to finalise the provisional assessment pertaining to period 1.10.75 to 30.9.83. During the said period the assessment was provisional as already discussed in the orders of Assistant Collector, Collector (Appeals) and Tribunal Orders.

14. He also drew our attention to paragraphs 9 and 10 at page 97 of the Paper Book which reads as follows:

9. Thus the refund due to the Assessee works out as under:

a) Duty Paid

1. Differential Duty paid on account of related person issue Rs. 82,35,313.79
Differential Duty paid on other discount, Freight,

2. Turnover Tax, Gift Discount & 2nd Destination Freight Rs. 63,18,408.10

Total Rs. 1,45,53,721.89

b) Duty not Paid

Different duty payable to the department on account of Publicity, Selling Expenses, Interest on Stock Secondary Packing & Purchase Tax not paid by the Assessee at the time of clearance of goods

Rs. 1,22,15,959.54

c) Net Refund Paid (a-b) Rs. 23,37,762.35

10. In addition to this refund they had already deposited an adhoc amount of Rs. 32,76,500.00 and thus there is a total refund claim of Rs. 56,14,262.35.

15. It is necessary for us to quote Clause 27 at page 99 of the paper book which reads as follows:

It is not disputed that in the instant case there was a provisional Assessment of the goods during the relevant period.

16. He submitted that the Assistant Commissioner had proceeded to finalize the provisional assessment made under Rule 9B. He further submitted that in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*,) in paragraph 95 at page 325 that while finalizing provisional assessment something extract is found to be paid, then returning of such amount would not be guided by the provisions of refund u/s 11B. 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. As a consequence, the concept of unjust enrichment cannot be considered while returning the excess money since refund u/s 11B requires the Assessee to satisfy that the burden of tax has not been passed on the ultimate consumers.

17. He further submitted that the said Bench of the learned Tribunal passing the instant order under appeal have followed the decision of *Timken India Ltd. v. Commissioner of Customs, Kolkata 2007 (217) ELT. 197* of the Apex Court as referred to hereinabove for appeal in an identical situation that refund should not be guided by the concept of unjust enrichment.

18. He further submitted that the Respondent authority have disallowed the instant demand on the ground that the Appellant has failed to produce any proof/ documentary evidence, that duty has not been passed on as per Section 12B.

19. It is to be presumed by Mr. Dutta that the incidence of duty has been passed on. This stand of the authorities is fallacious since the period in question involved during October 1, 1975 till September 30, 1983 is much prior to 1991 when the provisions of Section 12B was inserted in the said Central Excise Act.

20. He further submitted that in *Mafatlal Industries Ltd.*¹ (supra), it has been held that the requirement for enclosing the documents referred to in Section 12A is obligatory only where the claim of refund pertains to the period subsequent to the commencement of 1991 (Amendment) Act. The said decision of the Constitutional Bench has also been followed specifically by three Judges' Bench of the Apex Court in the case of *Commissioner of C. Ex., Mumbai-II v. Allied Photographics India Ltd.*, 2004 (166) E.T.T. 3 (S.C.)

21. Mr. Dutta further pointed out that the learned CESTAT has dismissed the appeal without dealing with the decision in the case of *Timken India Ltd. v. Commissioner of Customs, Kolkata* (supra) in clear violation of natural justice.

22. On the contrary, Mr. Tilak Bose, learned Advocate, appearing on behalf of the Respondent/department submitted that in case of a provisional assessment, the ground of "unjust enrichment" cannot be taken. He further submitted that the concept of "unjust enrichment" is nothing but an indirect tax. He submitted that the tax paid in by a third party and collected by the seller is the duty of the said Collector to deposit this amount. Therefore, the refund should be made only to the person.

23. In the instant case according to him the Appellant merely acted as a Collector. In fact, the Appellant did not suffer in any manner whatsoever. The Appellant merely calculated the tax and paid the same on behalf of the buyer to the authorities. Therefore, according to him, no refund could be granted in favour of the Appellant.

24. He also drew our attention to the decisions of *Mafatlal Industries Ltd. v. Union of India* (supra); *Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs*, ; *SRF Ltd. Vs. Assistant Collector of Central Excise, Trichy*, in support of his such contention.

25. According to Mr. Bose, the Appellant could not have the right to get refund of the said amount. It appears to us that in the scheme of the Act, Section 17 states the assessment of duty which has to be made in respect of import and export.

26. In Section 18 of the said Act, if there is any difficulty to overcome certain difficulties, over-riding provision has been made in the said Act and provision has been made in Section 18 for provisional assessment of duty. The provisional assessment is resorted to the situations specifically enumerated by Sub-section (1) of Section 18. The Assessing Authority has a right to direct that the duty leviable on the goods imported be assessed provisionally if the importer or exporter furnishes such security as the Assessing Authority deems fit for

payment of the deficiency, if any, between the duties finally assessed and the duty provisionally assessed. Such provisional assessment would reach its finality in terms of Sub-section (2) of Section 18 read with all other applicable provisions of the said Act. While making final assessment u/s 18 (2), any duty paid in terms of order of provisional assessment, falling short or any excess of duty finally assessed, an importer or exporter is obliged to pay deficiency or entitled to refund of the excess as the case may be. Refund arising u/s 18 (2) have been expressly directed to be made by the self-contained provisions of that Section like earlier Rule 9B of Central Excise Rules, 1944.

27. For the purpose of determination of an assessment, whether is provisional or tentative or final, it is necessary to look at the whole of the documents and it is not permissible to dissect various parts thereof into water-tight compartment as held in the case of D.N. Kohli, Collector of Central Excise, Bombay Vs. Krishna Silicate and Glass Works and Another,

28. A provisional assessment of duty under Central Excise Act, 1944 or Customs Act, 1962 and the rules made thereunder read with relative Finance Act can only be made in accordance with the statutory provisions. Therefore, it is made clear that provisional assessment under Customs Act, 1962 can only be made in accordance with the provisions of Section 18 (1) of the said Act. Such a provisional assessment is a statutory one and must be within four corner of the said provisions. A final assessment could not be made without being clothed or invested with validity after carrying out the obligation to make an assessment to justify it. In other words, the process of assessment that really determines whether the levy is short and prior to that any payment or collection of tax are made it should be nothing but to be known as provisional. Therefore, the assessment has to be done by proof of the actual steps which are required to be taken in the matter.

29. It is necessary for us to quote Clause 4.6 of the paper book, which is reproduced hereunder:

4.6: It was observed by the Hon"ble Supreme Court in the case of Commnr. Central Excise and Customs, Mumbai and Others Vs. I.T.C. Ltd. and Others,) in para 21 at page 537 of the reported judgment that a provisional assessment is made in terms of Rule 9B of Central Excise Act, 1944, inter alia, that at the instance of the Assessee. Such a recourse is resorted to only when the condition laid down therein are satisfied, viz., where the Assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty of any excisable goods. In Para 22 of the said judgment, the Hon"ble Court held that where as provisional duty is levied in terms of Sub-rule (1) of Rule 9B, final assessment is contemplated under Sub-rule (5) thereof, by reason of which the duty provisionally assessed shall be adjusted against the duty finally assessed and in the event, the duty provisionally assessed fall short of or is in excess of the duty finally assessed, the Assessee will pay the deficiency or will be entitled to a refund, as the case may be, ultimately, thus the liability of the

assessee would depend upon the undertaking of exercises by the assessing officer to complete the assessment proceeding as contemplated under the Rules.

30. It is necessary for us to quote Rule 9B of the Central Excise Rules, 1944 which has been specifically stated about provisional assessment.

9B: Provisional assessment to duty (1) Notwithstanding anything contained in these rules

(a) Where the Assessee is unable to determine the value of excisable goods in terms of Section 4 of the Act on account of nonavailability of any document or any information; or

(b) Where the Assessee is unable to determine the correct classification of the goods while filing the declaration under Rule 173B;

The said Assessee may request the proper officer in writing giving the reasons for provisional assessment to duty, and the proper officer may direct after such inquiry as he deems fit, that the duty leviable on such goods shall be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the Assessee) as may be indicated by him, if such Assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of difference between the amount of duty as provisionally assessed and as finally assessed:

Provided that all clearances in respect of excisable goods covered under such request by the Assessee submitted with the proper officer under the dated acknowledgment shall be deemed to be cleared as provisionally assessed to duty at such rate or at such value as declared by the Assessee, till the date when the direction of the proper officer is issued and communicated to the Assessee:

Provided further that the proper officer where he is satisfied that the self-assessment made by the Assessee is not in order, he may direct him to resort to provisional assessment and on receipt of such directions the Assessee shall comply with such directions.

[(2) * * * *]

(3) The Commissioner may permit the assessee to enter into a general bond in the proper form with such surety or sufficient security in such amount or under such conditions as the [Commissioner] approves for assessment of any goods provisionally from time to time:

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the [Commissioner], may in his discretion, deemed a fresh bond and may, if the security furnished for a bond is not adequate, demand additional security

(4) 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 not so assessed.

(5) 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.]

(6) Notwithstanding the provisions of self-assessment in this rule, in cases of provisional assessment, the final assessment shall be made by the proper officer."

31. In case of a provisional assessment under Rule 9B of the Central Excise Rules 1944, it is necessary to establish that the clearances were made on provisional basis, there should be first of all an order under Rule 9B of the Rules and then material to show that the goods were cleared on the basis of the said provisional basis and payment of duty was also made on the basis of the said provisional classifications. The issuance of notice/show-cause notice for a provisional assessment u/s 18 of the Act is necessary, if any, of the circumstances prescribed by Sub-section (1) of Section 18 exists. Through the process of issue of notice, each party knows existence of a particular circumstance prescribed by Section 18 (1) of the Act warranting a provisional assessment. This process, that is provisional assessment, is done pending final assessment and in the course of provisional assessment, the Assessing Authority may direct that the duty leviable may be assessed provisionally subject to furnishing such security as the authority may deem fit and proper for the payment of deficiency, if any, between the duty finally assessed and the duty provisionally assessed. This has already been discussed by the Supreme Court in case of Metal Forgings and Another Vs. Union of India (UOI) and Others,

32. He also drew our attention in page 120 of Clauses 4.6, 4.7, 4.8 and 4.9 (paper book) which reads as follows:

4.6: It was observed by the Hon''ble Supreme Court in the case of Commnr. Central Excise and Customs, Mumbai and Others Vs. I.T.C. Ltd. and Others, in para 21 at page 537 of the reported judgment that a provisional assessment is made in terms of Rule 9B of Central Excise Act, 1944, inter alia, that at the instance of the Assessee. Such a recourse is reported to only when the condition laid down therein are satisfied, viz, where the Assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty of any excisable goods. In para 22 of the said judgment, the Hon''ble Court held that where as provisional duty is levied in terms of Sub-rule (1) of Rule 9B, final assessment is contemplated under Sub-rule (5) thereof, by reason of which the duty provisionally assessed shall be adjusted against the duty finally assessed and in the event, the duty provisionally assessed fall short of or is in excess of the duty finally assessed, the assessee will pay the deficiency or will be entitled to a refund, as the case may be, ultimately, thus the liability of the

Assessee would depend upon the undertaking of exercise by the assessing officer to complete the assessment proceeding as contemplated under the Rules.

4.7: Claim for refund is governed by Section 27 of the Act and such claim is subject to a presumption enacted in Section 28D of the Act, which states that every person who has paid the duty on any goods under the Act shall, unless, contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyers of such goods. Section 27(1) underwent an amendment w.e.f 20-9-1991 by Section 10 of the Central Excise and Customs Laws (Amendment) Act, 1991 (40 of 1991) of legislature that a refund governed by that Sub-section shall meet the test of unjust enrichment.

4.8: In *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*,] decided on 19.12.1996, Hon'ble Supreme Court held that "that any recoveries or refund 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 order passed under Sub-rule (5) are appealed against or questioned in a writ petition or still, 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) re-agitating the issue 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 converse situation.

4.9: Hon'ble Supreme Court following the ration laid down in *Mafatlal Industries Ltd. case (supra)*, in the case of *Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd.*, decided on 18-3-2004 held that assessment means determination of tax liability and entitlement to refund would be known only when duty is finally adjusted (Para 7 of judgment). In para 11 of the judgment it was held that in Para 104 of *Mafatlal Industries Ltd. judgment - Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, the Hon'ble Court stated that if refund arises upon finalization of provisional assessment, Section 11B will not apply and any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or 11B, as the case may be. IN Para 12 of the judgment in *Allied Photographics case (supra)* it was held that Section 11B and Rule 9B operate in different spheres and, consequently, in para 104 of the judgment in *Mafatlal case (supra)* it was held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. Accordingly, it was held that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issues, then such claim would attract Section 11B. This is because when the Assessee makes an independent refund claim after final order under Rule 9B(5), such application represents a claim for refund and it would not come in the

category of making of refund and therefore, the bar of unjust enrichment would apply. In para 7 of Allied Photographics judgment it was therefore held that Rule 9B of Central Excise Rules, 1944 was a complete code itself. On compliance with the conditions therein, the proper officer was duty bound to refund the duty without requiring the Assessee to make a separate refund application. The Hon''ble Court in Para 14 of Allied Photographics case (supra) further held that judgment in Mafatlal's case stated the proposition of law that if refund arises upon finalization of provisional assessment, Section 11B will not apply. It was therefore held in Para 14 that refund arising consequent upon finalization of provisional assessment does not attract the bar of unjust enrichment. While deciding the case of Allied Photographics'' case, the Apex Court also affirmed its decision in Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur, In TVS Suzuki's case, refund on finalization of provisional assessment accrued to the Assessee in the year 1996 and refund was claimed by making an application on July 5, 1996 and that was prior to the amendment of Section 11B on August 1, 1998 by Act 21 of 1998. Repelling argument of Revenue that during pendency of the claim for refund dated July 5, 1996 and that was prior to the amendment of Section 11B on August 1, 1998 by Act 21 of 1998. Repelling argument of Revenue that during pendency of the claim for refund dated July 5, 1996, the amendment to Rule 9B (5) had come into force with effect from June 25, 1999 and, therefore, the pending refund application dated July 5, 1996, has to be decided as per the amended Rule 9B(5) "The Hon''ble Supreme Court held that merely because the departmental authorities took a long time to process the application for refund, the right of the Assessee therein does not get defeated by subsequent amendment to Rule 9B (5). The principles laid down in Allied Photographics case (supra) was followed by Hon''ble Supreme Court in CC v. Oriental Exports 2006 (200) E.L.T. A138."

33. The doctrine of "unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. It occurs when a person retains money or benefits which is in justice, equity and good conscience, belongs to someone else. A right of recover under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity in holding the case of Fibrosa v. Fairbrain (1942) 2 A.E.R. 122.

34. Therefore, it is clear that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in case of Saliakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise and Customs (supra) page 328 where the Supreme Court has observed:

Irrespective of applicability of Section 11B of the Act, the doctrine of unjust enrichment can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the Petitioner/Appellant to show that he has

paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss.

35. The question arises in this case whether the term "assessment" includes re-assessment as defined by Section 2(2) of the Act. It appears that the duty was earlier paid by the Appellant in terms of assessment made provisionally u/s 18(1) of the Act. The provisional assessment reached to finality by an order u/s 18 (2) of the Act, determining tax liability and gave rise to entitlement to refund which could only be known when duty was finally adjusted following the ratio laid down in the judgment reported in the case of Commissioner of C. Ex., Mumbai-II v. Allied Photographics India Ltd., (supra) where the Court held as follows:

The third question arises is whether refund arising by order dated 10-12-1999 which was a final assessment order under Section-18(2) of the Act as aforesaid shall meet test of unjust enrichment. This issue is no more in res integra in view of ratio laid down by Hon"ble Supreme Court in Allied Photographics Ltd. case (supra) and subsequently followed in Civil Appeal No. 4231 of 2001 in the case of CC v. Oriental Exports - 2006 (200) E.L.T A138 affirming decisions of Tribunal in the case of 2001 (73) ECC 553 holding that Three-judges Bench in Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., had 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 finalization thereof.

36. It is necessary for us to quote paragraph - 6, 7 & Section 11B.

Para - 6: The points at issue in this civil appeal are - whether refund of duty paid provisional assessment is similar to duty paid under protest as both are "On Account" payments adjustable on finalization of assessment or vacating of protest ? Secondly, in the course of such adjustment or vacation of protest, if any amount is found payable by the Department to the manufacture, is it open to the purchaser to contend that he (the purchaser) has stepped into the shoes of the manufacturer seeking refund of "on account payment" and, therefore, he was not bound to comply with Section 11B of the said Act. In this civil appeal, we have to deal with the law governing refund during the disputed period from 1974 to 1984. To resolve the dispute herein, we quote hereinbelow Section 11B of the said Act as also Rule 9B of the Central Excise Rules, 1944 as it stood prior to Central Excise and Customs (Amendment) Act, 40 of 1991:

7.: Before analyzing Section 11B, it is important to note that there is a difference between making of refund and claiming of refund. Section 11B was inserted in the said Act w.e.f. 17-11-1980. Under Sub-clause (e) to Explanation B to Section 11B(1), where assessment was made provisionally the relevant date for commencement of limitation of six months was the date of adjustment of duty as final assessment. Entitlement to refund would thus be known only when duty was finally adjusted. Sub-clause (e) referred to limitation in cases covered by Rule 9B which dealt with duty paid under provisional assessment. The said rule

started with a non-obstante clause. Rule 9B(l)(a) to (c) indicated the circumstances in which the proper officer would allow provisional assessment. Rule 9B(5) dealt with adjustment of provisionally assessed duty against finally assessed duty. The said Rule 9B was a complete code by itself. On compliance with the conditions therein, the proper officer was duty bound to refund the duty without requiring the Assessee to make a separate refund application. The said rule, therefore, provided for making of refund. On the other hand, Section 11B(1) dealt with claiming of refund by the person who has paid duty on his own accord. In this connection, Section 4 of the Act is relevant. In the case of *Bombay Tyre (supra)* it has been held that Section 3 of the Act refers to levy of duty whereas Section 4 dealt with assessment. Assessment means determination of the tax liability. Under the Act, duty was payable by the manufacturer on his own account. Hence, u/s 11B(1), such a person had to claim refund by making an application within six months from the relevant date except in cases where duty was paid under protest in terms of the proviso. However, even in such cases, the person claiming refund had to pay the duty under protest in terms of prescribed rules. A bare reading of Section 11B(1), therefore, shows that it refers to claim for refund as against making of refund by the proper officer under Rule 9B."

"Section 11B: Claim for refund of duty. (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date:

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

Explanation - For the purpose of this section,

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

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

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

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

(iii) If the goods are exported by post, the date of dispatch of goods by the Post Officer concerned to a place outside India;

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

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

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

(e) in a case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

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

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfy that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provision of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no Court shall have any jurisdiction in respect of such claim.

37. He also drew our attention in the case of Timken India Ltd.² (supra), wherein the learned Tribunal following the decision of the Supreme Court held as follows:

Clause 6.4 at page - 125 (paper book):

The third question arises is whether refund arising by order dated 10-12-1999 which was a final assessment order u/s 18(2) of the Act as aforesaid shall meet test of unjust enrichment. This issue is no more in res Integra in view of ratio laid down by Hon'ble Supreme Court in Allied Photographics Ltd. case (supra) and subsequently followed in Civil Appeal No. 4231 of 2001 in the case of CC v. Oriental Exports - 2006 (200) E.L.T. A138 affirming decisions of Tribunal in the case of 2001 (73) ECC 553 holding that Three-judges Bench in Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., had 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 finalization thereof.

38. Accordingly, after considering the said decisions of the Apex Court, we have come to the conclusion that after the completion of the final argument, the refund claim was rejected on the ground of unjust enrichment.

39. Mr. Pranab Kumar Dutta, learned Advocate who appearing on behalf of the Appellant, contended that the refund claim was never disputed by the Department and the tax burden can only be passed after final assessment. At the time of provisional assessment, burden was not shifted by the manufacturer to the consumer. On the contrary, it was submitted that the Appellant had collected the duty from its buyers, therefore, any refund shall unduly enrich the Appellant.

40. The Learned Tribunal holds that although it is not disputed that the refund have arisen by an order dated 20th December, 2000 and the provisional assessment had reached under its finality and there is any dispute in the question of finality of the assessment. The show-cause notice was only issued on 28th of February, 1991 to test the claim of the refund on the adjacent of the principle of unjust claim and the Tribunal dismissed the appeal on the ground that the Appellant failed to satisfy that it had not realized the duty on its buyers in respect of the refund claimed in the material period. As it appears in the case of *Timken India Ltd.*,² (supra), as well as in the three Judges' Bench of the Apex Court it has been held that the buyer of unjust enrichment was not applicable in cases of refund consequent upon adjustment upon Rule 9B (5) but, it appears to us that in the instant case it is the duty of the Appellant as has been rightly pointed out that has not been able to make out a case that the duties paid by the Appellant from its buyer has submitted by the revenue would not be contracted by the Appellant by furnishing any evidence which can call for an interference concurrent finding of the Learned Authorities below. Therefore, in our considered opinion following the decision of the three Judges' Bench has held in paragraph - 18 which is reproduced hereunder:

para-18: Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Hence, even on merits, the Respondent has failed to make out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the Respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact.

41. He drew our attention to the decision in the case of *Mafatlal Industries Ltd. v. Union of India* (supra) wherein the Supreme Court held that refund of tax/duty wrongfully paid can be claimed on the basis of doctrine of equity and a person demanding such restitution must plead and prove that he had paid such tax/duty and had suffered loss/injury. The burden is on the Petitioner to prove that the

tax/duty paid by him is not passed on to customers or third party and that he is entitled to restitution.

42. He also drew our attention to the decision in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, , Writ Petition (C) No. 567 of 1994, dated January 20, 2005 wherein the Supreme Court held that the Constitution Bench of Uttar Pradesh Tax on Luxuries Act, 1995 as also other State Acts was challenged on the ground of legislative competence of the State Legislatures were not competent to impose luxury tax on tobacco and tobacco products and declared such Acts were ultra vires.

43. In that case (Godfrey Phillips (supra) the Apex Court further observed as follows:

47. In the circumstances, speaking through Constitution Bench, one of us, (Ruma Pal, J.) stated; "Following the principles in M/s. Somaiya Organics (India) Ltd. Vs. State of Uttar Pradesh and Another, while striking down the impugned Acts we do not think it appropriate to allow any refund of taxes already paid under the impugned Acts. Bank guarantees if any furnished by the assesses will stand discharged.

It was stated on behalf of the State Governments that after obtaining interim orders from this Court against recovery of luxury tax, the Appellants continued to charge such tax from consumers / customers. It is alleged that they did not pay such tax to respective State Governments. It was, therefore, submitted that if the Appellants are allowed to retain the amounts collected by them towards luxury tax from consumers, it would amount to "unjust enrichment" by them. In our opinion, the submission is well founded and deserves to be upheld. If the Appellants have collected any amount towards luxury tax from consumers/ customers after obtaining interim orders from this Court, they will pay the said amounts to the respective State Governments."

48. From the above discussion, it is clear that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the Petitioner/Appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss.

44. In the present case and on the given facts, in our opinion and following the test laid down by the Apex Court the Appellant has to prove that the amount of which relief is sought, Appellant has not passed on the burden in the consumers and if such relief is not granted Appellant would suffer loss. Following such test

we hold that Appellant is not entitled to claim any amount on the given facts.

45. In these circumstances, in our considered opinion, refusal to grant benefit to the Appellant cannot be held arbitrary, unreasonable or unequitable

46. He also drew our attention to the decision in the case of SRF LTD. v. Asst. Collector of C. Ex., Trichy (supra) wherein the Three Judges' Bench held as follows:

7. Secondly, assuming it to be a case of unconstitutional levy still the Appellant would not be entitled to refund in terms of law settled by the Mafatlal Industries, case. Even in that eventuality it has to be established that incidence of duty has not been passed on to others. IT has been held that whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the requirement that the burden of duty has not been passed on to others. It was not submitted before us that this requirement had been fulfilled by the Appellant. Thus looking from any angle, the Appellant is not entitled to refund.

47. In our considered opinion, we do not find that the Appellant has been able to make out a case for refund and hence, we uphold the decision of the CESTA and dismiss this appeal.

48. Urgent Xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Sankar Prasad Mitra, J: I agree