

Cce Vs. Siv Industries

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Feb-13-2004

Reported in : (2004)(95)ECC377

Judge : S Peeran, R K Jeet

Appellant : Cce

Respondent : Siv Industries

Judgement :

1. This is a Revenue appeal alongwith cross appeal of the assessee against common Order-in-Appeal No. 278/2001 (CBE) GVN dated 20.11.2001 passed by the Commissioner (Appeals) Trichy. By this order, the Commissioner has allowed refund of Rs. 88,26,360. The Revenue is aggrieved with this grant of refund on the ground that it is hit by unjust enrichment and hence grant of refund is not sustainable. The Commissioner by the same order has rejected the refund of Rs. 16,19,602 on the ground that assessee did not produce any duty paid document for proof of payment of duty. This has been challenged by the assessee by a cross appeal. There is two days delay in filing the cross appeal which has been explained and therefore the application for COD is allowed.

2. The short facts of the case are that appellants are manufacturers of viscose staple fibre and rayon filament yarn. They filed refund application dated 17.11.94 for Rs. 1,04,81,884. They claimed the above refund as a result of order of Commissioner (Appeals) Trichy in Appeal No. 92/94 (TRY) dated 11.10.94. The

refund was claimed on the ground that they had paid duty of Rs. 5,48,02,096 whereas duty payable was Rs. 4,43,20,212 only and there is excess amount of Rs. 1,04,81,884. The assesseees were granted permission to set up a 100% EOU vide letter indent dated 19.12.91 by Secretariat for Industrial Approvals, Ministry of Industry, Govt. of India. On 8.9.93, they made an application to the Secretary, Ministry of Commerce, Govt. of India and sought debonding of its unit from 100% EOU; i.e. withdrawal from 100% EOU scheme and the debonding was permitted with effect from 15.11.93. At the time of debonding the dispute has arisen as to whether duty on the finished goods lying in stock is to be paid under main Section 3(1) of CESA, 1944 or under proviso to Section 3(1) of CESA 1944. The appellant have contended that they had to pay duty at the time of debonding under main Section 3(1) of CESA, 1944 on the finished goods. The department issued show cause notice on this issue and the same was confirmed by the AC vide his Order-in-Original No. 5/94 dated 31.3.94 in favour of the department. Against the said order, the assessee went on appeal to CCE Trichy who by his Order-in-Appeal No. 92/94 dated 11.10.94 decided that duty is to be paid under main Section 3(1) at the time of debonding.

The department went on appeal against the Order-in-Appeal to CEGAT which had upheld the department's plea and confirmed the OIO of the AC Coonoor Division. Against CEGAT's order, the assessee went on appeal to the Apex Court and the Apex Court vide its order dated 16.3.2000 in Civil Appeal No. 1737 of 1998 dated 16.3.98 set aside the impugned order of CEGAT and restored the order dated 11.10.94 of Commissioner (Appeals) Trichy. The assessee worked out the refund and claimed the same. However, the department issued the show cause notice dated 15.2.2001 through the AC asking the assessee to explain as to why their claim of Rs. 1,04,81,884 should not be rejected as hit by limitation and why the presumption of law as per Section 12B that incidence of duty had been passed on to the consumers should not be confirmed and why the amount involved should not be credited to the Consumer Welfare Fund as per Section 11B of CEA, 1944. The AC after due consideration rejected the refund, holding it as time barred and hit by limitation and principles of natural justice.

3. On appeal, the Commissioner (Appeals) noted the documents which clearly indicated the assessments to be provisional and that the same had been paid under protest. He had also noted that payment pertained to duty paid under Section 3(1) of CEA by which the element of customs duty was not payable and recovered in terms of Apex Court's judgment, After due consideration of the entire material on record, he held that the claim for refund pertained only to amounts paid in respect of clearances which had been much earlier to the date of payment and duty had been paid from the funds of the assessee and they were not hit by unjust enrichment and element of duty had not been passed on to the consumers. The findings recorded by the Commissioner in paras 3 & 4 are reproduced herein below : "3. I have given my careful consideration to the facts and circumstances of the case and the submissions made by the appellant.

The question to be decided in this case is whether duty has to be paid under main Section 3(1) of the CEA, 44 or under proviso to Section 3(1) of the CEA with regard to the finished goods lying in stock on 15.11.1993 has been set at rest by the Hon'ble Supreme Court in C.A.No. 1737/1998 dated 10.3.2000 in favour of the appellant. They have produced copy of the order. The Hon'ble Supreme Court has held that : "26. Considering the whole aspect of the matter we are of the opinion that the Tribunal was not right in holding that duty is to be levied in terms of the proviso to Section 3(1) of the Central Excise Act, 1944. We, therefore, set aside the impugned judgment of the Tribunal and restore that of the Collector of Central Excise, dated October 11, 1994. The appeal is accordingly allowed. There shall be no order as to costs." Even prior to the above order of the Hon'ble Supreme Court, the appellant filed a refund claim in pursuance of OIA No. 92/94 dated 11.10.94 of the Collector (Appeals) for refund of Rs. 1,04,81,884 on 17.11.1994. The lower authority rejected their refund claim holding that they have not filed the claim within six months from the date of payment of duty and also they have not paid the duty under protest. The finding of the Assistant Commissioner that refund claim should have been filed within six months from the date of paying the duty is incorrect and contrary to the ruling of the Hon'ble Supreme Court. The Hon'ble Supreme Court in the Case of Mafatlal Industries Ltd., 2002 (83) ECC 85 (SC) : 7997 (89) ELT 247 (SC) in para 83 as held as follows: "83. It is then pointed out by the learned Counsel for the petitioners-appellants that if the above interpretation is placed

upon amended Section 11B, a curious consequence follow. It is submitted that a claim for refund has to be filed within six months from the relevant date according to Section 11B and the expression "relevant date" has been defined in Clause (B) of the Explanation appended to Sub-section (1) of Section 11B to mean the date of payment of duty in cases other than those falling under Clauses (a), (b), (c) and (e) of the said Explanation. It is submitted that Clauses (a) to (e) deal with certain specific situations whereas the one applicable in most cases is the date of payment. It is submitted that the appellate/revision proceedings or for that matter proceedings in High Court/Supreme Court take a number of years and by the time the claimant succeeds and asks for refund his claim will be barred, it will be thrown out on the ground that it has not been filed within six months from the date of payment of duty. We think that the entire edifice of this argument is erected upon an incomplete reading of Section 11B. The second proviso to Section 11B (as amended in 1.991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest".

Now, where a person proposes to contest his liability by way of appeal revision or in the higher courts, he would naturally pay the duty, whenever he does under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to Sub-section (1) of Section 11B alongwith the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned Counsel." "140.....Alternatively, It may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc., stated in Section 11B(2) read with Section 11B(3) will not apply to such cases." A reading of the relevant portion of the above judgment would show that the finding of the Assistant Commissioner that refund claim should have been filed within six months from the date of payment of duty is erroneous and contrary to settled position of law. The Hon'ble Supreme Court has clearly held that where a person contests the levy of duty, it is deemed that the duty has been paid under protest. In the present case the appellant has not only paid the duty under protest but also contested the issue up to the Hon'ble Supreme Court. By the above judgment it may be seen that the Assistant

Commissioner failed to appreciate the settled legal position. Moreover out of the total amount, the appellant paid Rs. 88,26,360 vide TR6 Challan No. 49/93-94 under protest on 26.2.1994 towards duty on finished goods, which were lying in stock on 15.11.1993. In this connection the appellant had written a letter dated 24.2.1994 and the copies were endorsed to the Assistant Commissioner of Central Excise, Coonoor Division and the Superintendent of Central Excise, Mettupalayam. In the above said letter addressed to the Commissioner it was clearly stated that the appellant would be paying duty under protest. Endorsement has also been made on the TR6 Challan to the effect that duty has been paid under protest. Even in their letter dated 17.11.93 the appellant had indicated that payment is made under protest. While so, it is incorrect to hold that the duty was not paid under protest. The appellant paid duty to the tune of Rs. 88,26,360 on 26.2.1994 under protest for the goods cleared prior to 26.2.1994. The appellant vide letter dated 15.2.1994 addressed to the Assistant Commissioner had stated that even though the assessment is provisional they would be paying duty under protest. Similarly the appellant vide their letter dated 24.2.94 had clearly informed the Commissioner of Central Excise, Coimbatore, the Assistant Commissioner of Central Excise, Mettupalayam and the Superintendent of Central Excise, Mettupalayam that duty would be paid under protest. The Hon'ble Tribunal in the case of Punjab Beverages (P) Ltd. v. CCE, 2000 (37) RLT 469 (CEGAT) in para 5 held as follows: "5..... It has been held by the Tribunal in the case of Easter Industries (supra) that where the duty is paid by making debit entries in PLA, subsequent to the date of clearance of the goods, Central Excise, presumption of Section 12B of the Act to the effect that incidence of duty has been passed on to the buyer will not be attracted. The learned DR has also fairly conceded this point. Following the ratio of the Tribunal's decision in the case of Hindustan Tin Works Ltd. referred to above, we hold that non-production of documents by the appellants will not come in their way of getting the refund of the duty. We, therefore, hold that the appellants are entitled to get the refund of the duty amounting to Rs. 1,40,113.06,....." The above decision is squarely applicable to appellant's case since they had made payment of duty of Rs. 88,26,360 subsequent to clearance of the goods. They also filed a certificate from the Chartered Accountant that the amount was not realized from the customers. In the case of Easter Industries Ltd.

v. CCE, 1999 (35) RLT 696 the Hon'ble Tribunal has held that the presumptions made in Section 12B can be only to the extent of the duty assessed and paid at the time of clearance of the goods and not of duties subsequently collected unless there is some positive evidence to the effect produced by the department. In the present case there is no finding that the appellant has realized the customs duties from their customers. In the present case the appellant filed an appeal against the order of the Assistant Commissioner and immediately after the appeal was allowed by the Commissioner (Appeals) in their favour a refund claim was filed. It is a settled position of law that once an appellant authority has allowed the appeal with consequential relief the question of time bar does not arise. This view has been echoed in the case of Omega Allays Castings Pvt. Ltd., 2000 (121) ELT 336.

The above view is further strengthened by the fact that the appellant had paid the duty under protest. With regard to payment of duty to the tune of Rs. 88,26,360 on 26.2.94 the appellant had clearly mentioned that duty is paid under protest. The goods were cleared between 23.11.93 to 9.3.94. They made the payment of 88,26,360 since the department insisted that unless they make payment of the same, they will not be allowed the clearance of VSF. They cleared 1510.45 MTs of VSF prior to 26.2.94 and from 26.2.94 to 9.3.94 they cleared 528.317 MTs of VSF manufactured out of EOU unit and in stock as on the date of de-bonding that is 15.11.1993. The company has paid the amount of Rs. 88,28,560 being the differential duty calculated at the rate of US\$ 1.1 per kg. of fibre on the stock as on 15.11.1993 vide TR6 challan. In respect of clearances effect from 26.2.1994 to 9.3.1994 the company has produced the relevant gate passes evidencing the clearance which shows only excise duty both BED and AED has been paid and no customs duty has been calculated. They have produced all the copies of the gate passes and also copy of the PLA account showing the debit of BED and AED in respect of all the clearances. This shows that the company has not collected any customs duty. Once the duty is paid under protest the question of limitation may not arise. They have produced details that they are selling their goods only at a loss. The Tribunal in the case of U.P. Twiga Fiber Glass Ltd., 2000 (116) ELT 537 (T) has held that there is no question of realization of the Central Excise duty from the customers. Therefore, applying the above judgment, there is no question of unjust enrichment in this case since the duty was paid after the 3/4th clearances of

the goods took place.

Similar view was expressed by the Hon'ble Tribunal in the case Motorola India Ltd., 1999 (32) RLT 932 that the assumption as to unjust enrichment under Section 12B does not arise when the goods are sold at a price lower than that on which the duty was paid. The lower authority has gone by the ordinary presumption that the burden of duty has been passed on to the buyers, even though the goods were sold at less than cost price and the duty was paid after the clearance of goods took place. The learned counsel drew my attention to the fact that Rs. 88 lakhs towards customs duty was paid much after the clearance of the goods. There were no supplementary bills raised to the buyers and the selling price of these products remained the same. An amount of Rs. 15 has been paid under GP1 No. 104 dated 23.11.93 to 27.2.94. An amount of Rs. 35,907 was paid vide TRS challan No. 17/98 & 18/98 dated 15.11.93. For Rs. 16,19,602 the lower authority has rejected the refund claim since the appellant has not produced any duty paid document for the proof of payment of duty. The refund was sought on the ground that they had paid higher rate of duty than what is payable. I find from the records that the duty element has been passed on to the customers pertaining to this amount. Hence, the appellant are not eligible for refund of the amount of Rs. 16,19,617 paid. For the rest of the amount of Rs. 88,26,360 after the detailed discussion above, I hold that these are not hit by time bar and unjust enrichment. So they are entitled for the refund of Rs. 88,26,360.

4. In view of the above discussion, the order passed by the lower authority is modified to the above extent and he is directed to grant refund of Rs. 88,26,360."

4. We have heard Shri K. Veeraraghavan, Central Govt. Addl. Standing Counsel and Shri K. Sankararaman, Ld. Counsel for the respondent-assessee.

5. The department filed invoices and the GPs to show that assessee had paid BED & AED and the refund pertained to this. Ld. Central Govt.

Standing Counsel filed written brief to explain this ground and argued accordingly. However, it was shown by the Ld. Advocate that invoices produces by the department pertained only to payment of BED & AED which was not the subject matter of dispute and the refund claim does not pertain to this aspect of the matter:

6. Arguing further by the Ld. Advocate it was submitted that what was claimed as refund pertained to customs duty element paid on the final product which was conclusively held to be not payable by the Apex Court in this very matter which went up to Apex Court. Counsel pointed out through various documents that the clearances were of provisional and duty had been paid under protest. It was brought to our notice two letters addressed to CCE clarifying him that clearances were of provisional and in terms of discussion they had, they were agreeable to deposit Rs. 86,28,400 on EOU stock of 2035 MT by their letter dated 24.2.94 and also they produced the working sheet which showed payments pertaining to the excise duty element CVD had already been made and it was customs duty element which was being sought as refund. It was pointed out that there was no dispute regarding this aspect of the matter and the Revenue cannot at this stage take up the argument that BED & AED is subject matter of the refund.

7. Ld. Counsel also placed a huge paper book to show that documents were available with the Commissioner (Appeals) for grant of refund even pertaining to amount of Rs. 16,19,617 which was legitimately due to them. This amount had not been recovered from the customers and the payments had all been done much after the goods had been cleared from the stock and there was no occasion for collecting the amounts from the customers. It was also argued that the case was not hit by unjust enrichment and the subsequent amendment brought out to Section 12B is not applicable as it pertained to a period much earlier to the promulgation of Section 12B of the Act. It was pointed out that Tribunal in the case of CCE v. T. V.S.Suzuki Ltd., 2001 (135) ELT 140 clearly held that bar of unjust enrichment is not available in case of refund arising out of adjustment of duty paid on finalisation of provisional assessment where such claim pertains to period prior to insertion of proviso to Sub-rule (5) of Rule 9B of Central Excise Rules, 1994. He pointed out that proviso to Section 11B is not applicable as all the assessments were provisional and duty had been paid under protest. Ld. Counsel relied on the judgment of Smithkline Beechem Consumer Healthcare Ltd. v. CCE, Guntur, 2001 (137) ELT 125 (T) which followed the Tribunal's ruling rendered in the case of CCE v. TVS Suzuki Ltd. (supra) and other judgments. Further reliance was also made on judgment of CCE v. Tamilnadu Pharmaceuticals Ltd., 2001(47) RLT 709(CEGAT-Che.).

8. We have carefully considered the submissions made by both sides and have perused various records. The dispute pertaining to levy of duty under Section 3(1) of the Act or under proviso to Section 3(1) of the Act had reached finality by the Hon'ble Apex Court holding in assessee's own case for the period in dispute that the levy has to be under Section 3(1) of the Act. Hence, the refund claim was lodged by the appellants in respect of those payments made after the clearances from the stocks and pertaining only to the customs duty element of the payments. There is no claim for refund of AED & BED. Therefore, the argument raised by the Standing Counsel on the basis of GPs produced is totally mis-conceived and not applicable to the facts of the case. The Commissioner (Appeals) has clearly gone in great detail about various aspects of the refund pertaining to the amount of Rs. 88,26,360 and has categorically held that duty pertained to customs duty element which was not recoverable in terms of Section 3(1) of the Act. The party wrote to Commissioner of Central Excise, Coimbatore the following letter: We thank you for the courtesy extended to the undersigned and Mr. S. Vasudevan this morning when we took up the issue of clearance of fibre from VSF3. During the discussion we had requested -- (1) production from 8.12.93 to be released for sale in the domestic sale (DTA) on payment of normal excise duty as per Central Excise tariff.

(2) As already requested in our letter dated 15.2.94 in respect of 1507 MT customs duty at the rate of US \$ 1.10 amounting to Rs. 26.86 may be considered provisionally and on which basis we are agreeable to make payment of Rs. 86,28,400 on EOU stock of 2035 MT. We are effecting payment of the above sum today under protest.

(3) We have also requested the Collector to release the balance of EOU stock of 535 tonnes on payment of normal excise duty on clearance.

The Collector is requested to pass necessary orders for the implementation of the above.

9. They also paid duty under protest and intimated the same to the AC vide their letter dated 1.4.94 making it clear that they have arrived at the differential duty calculated @ 1.1 US Dollar per kg of fibre on the stock as on 15.11.93. The said letter addressed to AC is extracted herein below : The Assistant Collector of

Central Excise, Coonoor Division 16-B, Mount Pleasant Road, COONOOR. With reference to the above order we would like to point out the following: 1. We have paid the Differential Duty calculated @ 1.1 US Dollar per kg of Fibre on the stock as on 15.11.93. Vide TR. 6 Challan No. 49/93-94 dated. 26.2.94 which amounts to Rs. 88,26,360. Request to please refer our letter No. S/FPS/10238/94 dated 26.2.94.

2. Also we have paid the short amount demanded by the Department and communicated to us for the difference Vide Lr. No. C. No. VIII/48/3/93 CUS. Dt. 14.2.94 on the indigenous Capital goods in the event of Debonding, which amounts to Rs. 28,25,631 Vide TR 6 Challan No. 55/93-94 dated 17.3.94.

We have also communicated this payment to you vide our letter No. S/FPS/10858/94 dt. 17.3.94 and also mentioned that Rs. 42,563 is of revenue nature erroneously demanded by the department for which liability. We paid on 15.11.93.

We request you to take consideration of the above-said points and issue a corrigendum to the Order dated 31.3.94.

10. Assessee also filed details of Differential Duty worked out by them which is also extracted below: DETAILS OF DIFFERENTIAL DUTY OF RS. 88,26,360 PAID TO EXCISE DEPARTMENT VIDE OUR TR-6 CHALLAN NO. 49/93-94 DATED 26.2.1994 Customs Duty at 40% advalorem of 1.1 US\$ per kg. of Fibre being the imported price on that date.

The Exchange rate being applied is at 1.1 US\$ 31.55 per kg. which is equivalent to Rs. 34.71 for 1.1 US\$ At 40% advalorem duty will come to 13.88 Counter veiling duty 13.00 -----As per Section 3(1) Excise Duty paid, 14.95 Basis Excise Duty Rs. 13 per kg, AED Difference (26.88-22.62) 4.26 ----- We have paid for the entire quantity of 2035 tons which is in stock as on 15.11.93 amounting to Rs. 88,26,360 11. From this calculation shown, it is very clear that duty was paid only after the clearances were made in 1993 and duty pertained only to customs duty portion of the final product which the department is agitating. However, the Apex Court clarified this portion of the duty being not payable on the final product and hence

the Commissioner (Appeals) has rightly upheld their contention. We have carefully considered all the records and find that there was provisional assessment in the matter and that the claim pertained only to customs duty element on the final product on which the department had insisted on depositing the same. Therefore, there is no infirmity in the Commissioner (Appeals) order and the Revenue appeal is rejected.

12. Insofar as the assessee's claim is concerned, we find that the assessee has produced enormous documents to sustain their claim. The Commissioner had noted that the appellants had paid duty under protest and filed necessary documents to sustain their claim. In view of the fact that appellants have produced all the documents to show that refund pertaining to Rs. 16,19,617 is eligible and also that a portion of demand i.e. Rs. 2,10,489 is towards goods exported to Bangladesh for which they had filed refund claim within the time limit and the letter of AC dated 9.2.95 clearly admits that this claim is included in the refund claim. Therefore, the authorities ought to have considered the claim of the assessee pertaining to this amount and granted refund of the same. As the documents having not been seen, it is but proper, we remand the matter to Commissioner (Appeals), to readjudicate on the assessee's claim of Rs. 16,19,617 after examining all the documents grant refund as in our considered opinion the provisions of unjust enrichment would not apply to the facts of this case. Thus, the assessee's cross appeal is remanded to Commissioner (Appeals) for de novo consideration.

13. I have perused the order proposed by my learned brother and I am not able to agree with his view that the Revenue appeal is to be dismissed and the assessee's appeal is to be remanded. Therefore, I proceed to record a separate order.

14. The Assesseees are manufacturers of Viscos Staple Fibre and Rayon Filament Yarn. They had switched over from 100% EOU after de-bonding after obtaining due permission from the competent authority. They had paid duty on the goods lying in stock at the time of de-bonding of the unit on 15.11.1993 and the duty was demanded by Order-in-Original No.5/94 dated 31.3.94 wherein the Assistant

Commissioner demanded duty on the goods lying on stock as on 15.11.1993, against which the party filed appeal before the Commissioner (Appeals) who decided the case in their favour vide Order-in-Appeal No. 92/94 dated 11.10.94 and thereafter the party had filed refund claim for Rs. 1,04,81,884 on 17.11.94. Aggrieved by the said order the Revenue filed appeal before the CEGAT and CEGAT decided the matter against the party and consequently the party moved the Hon'ble Supreme Court and the Supreme Court decided the case in their favour whereby the following questions that arose at the time of de-bonding of the unit has been settled by the judgment of the Hon'ble Apex Court vide judgment in the Civil Appeal No. 1737 of 1998 dated 16.3.98.

"Whether duty is leviable under the Main Section 3(1) of the CE Act, 1944 and not in terms of the proviso to Section 3(1) of the Act? The Hon'ble Supreme Court has answered this question that duty is leviable under the main Section 3(1) of the CE Act, 1944.

15. In this case, the total amount of refund amount claimed by the assessee was for Rs. 1,04,81,884. Out of this amount the Commissioner (Appeals) allowed the refund to the tune of Rs. 88,26,360 and rejected the refund claim for the amount of Rs. 16,19,617. The assessee has claimed the refund on the ground that they had paid duty of Rs. 5,48,02,096 as against the duty which was payable was Rs. 4,43,20,212.

The Revenue is aggrieved by the order of rejection of Rs. 88,26,360 while the assessee is aggrieved by the order of rejection of portion of their refund claim to the tune of Rs, 16,19,617 by the Commissioner (Appeals).

16. The only issue that arises for consideration in the appeal is whether the doctrine of unjust enrichment would come into play in view of the judgment of the Hon'ble Apex Court in the matter of Mafatlal Industries v. UOI, 2002 (83) ECC 85 (SC) : 1997 (89) ELT 247 wherein in para 95, the Apex Court has held as under: "Rule 9B provides for provisional assessment in situations specified in Clauses (a) (b) and (c) of Sub-rule (1). The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed.

Sub-rule (3) 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 refund as the case may be. Any recoveries or refunds consequent on 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 orders passed under Sub-rule (5) are appealed against or questioned in a writ petition or a 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 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 the converse situation" It would therefore be seen that what the Hon'ble Apex Court has clarified by the judgment as reproduced is that: (a) in case of provisional assessments, the ingredients of Section 11A or Section 11B will not come into play.

(b) However, in the case of a refund arising as a result of any orders passed under Sub-rule (5) or as a consequence of a writ petition or suit, the refund would be governed by Section 11B of the Act.

17. As discussed in para 14 above, the Assistant Commissioner demanded duty on the goods lying in stock as on 15.11.1993 vide his Order-in-Original No. 5/94 dated 31.3.94. Aggrieved by this order, the party filed appeal before the Commissioner (Appeals) who decided the case in their favour vide Order-in-Appeal No. 92/94 dated 11.10.94 and thereafter the respondents-assessee had filed the refund claim for Rs. 1,04,81,884 on 17.11.94. Aggrieved by the said order, the Revenue filed appeal before the CEGAT and CEGAT decided the matter against the respondents-assessee and in favour of the Revenue. The respondents-assessee aggrieved by this order of CEGAT moved the Hon'ble Apex Court and the Hon'ble Apex Court decided the case in favour of the respondents-

assessee by, holding that duty is leviable under main Section 3(1) of the CE Act, 1944 and restored the order of the Commissioner (Appeals). Thus, the assessee became finally eligible to refund as a consequence of the judgment of the Hon'ble Supreme Court.

Therefore, it has to be examined whether in terms of the judgment of the Hon'ble Apex Court in the case of *Mafatlal v. UOI*, vide para 95 which we have reproduced above, Section 11B would come into operation.

In the instant case, the judgment of the Hon'ble Apex Court related to whether the duty will be leviable under the Main Section 3(1) of the CE Act, 1944 or in terms of the proviso to Section 3(1) of the Act and the Hon'ble Supreme Court has ruled that duty shall be payable under the main Section 3(1) and thus the doubt has been set at rest by the pronouncement of the Hon'ble Supreme Court as noted above. Further as regards the claim of refund for an amount of Rs. 88,26,360 which amount was paid by the assessee on 26.2.94, since payment of duty under protest was made on 26.2.1994 vide TR Challan No. 49/93-94, as contended by the appellants, incidence of duty has been passed on to the buyers and this fact is supported by the invoice produced.

18. So far as passing on of the burden of duty to customers by the assessee is concerned, I note that in this case, invoices were produced by the assessee which categorically indicated that the price mentioned in the invoice is inclusive of Customs duty, Excise and also taxes. The revenue has also taken the plea that even the invoices from depot to the consumer also speak about the customs duty and as such there is a clear passing of the duty so as to attract provisions of Section 1113 of the CE Act, 1944. It was also contended by the Revenue that it was for the assessee to discharge the burden of proof that incidence of duty was not passed on to the customers which burden has not been discharged. The learned Counsel for the respondents-assessee on the other hand submitted that although invoices show that the price is inclusive of customs and Central Excise duty on inputs at Rs. 7.67 per kg and on Fibre at 14.95 kg as per the order of the Assistant Commissioner dated 20.11.93, but there is no actual passing of the incidence of duty to the consumers. This plea cannot be countenanced for the

simple reason that if there was no intention to pass on the incidence of duty, there was no necessity to mention the incidence of duty in the invoice and in any case it was for the assessee to prove that incidence of duty was not passed on to the customers. It is also not the case of the assessee that they have come out with any cost construction method to indicate the price levelling. They have also taken the plea that there is a certificate from the Chartered Accountant to the effect that duty amount was not realized from the customers. I observe that the Hon'ble High Court of Delhi in the case of M/s Jaipur Polyspin Ltd., 2001 (134) ELT 346 (Del) has held that Certificate given by Chartered Accountant cannot be interpreted as proof of non-passing of burden of duty to the consumers. The burden has to be discharged by bringing in acceptable evidence, I would also like to advert to the observations made by the Hon'ble Supreme Court in the case of Mafatlal Industries (supra) wherein in para 91 thereof the Court has observed as under: "that Ordinarily no manufacturer will sell his products at less than the cost-price plus duty. He cannot survive in the business if he does so. Only in cases of distress sales, such a thing is understandable but distress sales are not normal feature and cannot, therefore, constitute a basis for judging the validity or reasonableness of a provision. Similarly, no one will ordinarily pass on less excise duty than what is eligible and payable. A Manufacturer may dip into his profits but would not further dip into the excise duty component. He will do so only in the case of a distress sale again. Just because duty is not separately shown in the invoice price, it does not follow therefrom that the manufacturer is absorbing the duty himself".

19. Learned Brother in para 11 of his order has noted that duty was paid only after clearance of the goods and duty pertained only to the customs duty portion. This finding reached by learned brother is not factually correct since even according to the working out statement produced by the assessee himself and which is extracted on page 16 of the order recorded by the learned brother, it is clearly stated that assessee had paid both customs component and Excise component duty and not customs duty alone and the duty was paid on 15.11.93, 27.2.94, 3.3.94 and 26.2.94, that is, much before dispute was settled by the Hon'ble Apex Court on 10.3.2000. Therefore, the plea that what was paid by the assessee was customs duty only and the dispute pertained only to customs duty component is

not factually correct. In any event, what is to be seen is whether duty burden has been passed on to the customers.

The invoices indicated both Customs and Central Excise duties having been passed on to the buyers. What is relevant is whether the assessee has passed on the duty burden to the buyers or not and whether the assessee became eligible to the refund as a result of decision in the assessee's favour on a civil appeal or by a suit or writ petition.

Admittedly in this case, the assessee has failed to discharge the burden cast on them that the burden of duty has not been passed on to the customers. Secondly the assessee became eligible to the refund as a result of the judgment of the Hon'ble Apex Court, inasmuch as in the present case the refund claim was made after an order in their favour by the Commissioner (Appeals), which was set aside by the Tribunal and which on appeal before the Apex Court was ruled in favour of the assessee. The Hon'ble Court in the matter of SRF Ltd. v. Assistant Collector of Central Excise, Trichy, 2001 (78) ECC 668 (SC) : 2001 (134) ELT 324 (SC) has held that even if levy of duty is unconstitutional, it has to be established that incidence of duty has not been passed on to the others. It was also held therein that whether the claim for restitution is treated as a constitutional imperative, 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 the others. While holding so, the Hon'ble Apex Court has referred to their earlier judgment in the case of Mafatlal Industries, 2002 (83) ECC 85 (SC) : 1997 (89) ELT 247 (SC). In view of my discussion above, I am of the considered opinion that there is merit in the appeal filed by the Revenue and I allow the Revenue appeal by setting aside the impugned order. Consequently, the Cross Appeal filed by the assessee fails and is dismissed.

In view of the difference of opinion, the following questions arise for determination by the third Member.

Whether the appeal filed by the revenue is required to be rejected and the cross-appeal filed by the assessee is required to be remanded to Commissioner (Appeals) for de novo consideration as held by Member (J) Whether the appeal

filed by the revenue is required to be allowed by dismissing the cross-appeal, filed by the assessee as held by Member (T) E/148/02, E/COD/189/02&E./CR/46/02 20. I have perused the records and considered the submissions made by both sides with regard to the question referred above.

21. There is no dispute that the refund claim arises from the finalisation of provisional assessment. Although the departmental authorities, including the appellate authorities, decided the issue involved in the provisional assessment against the assessee, they succeeded before the Apex Court. Nevertheless, the refund results from the finalisation of provisional assessment. It is the contention of the Ld. Counsel representing the assessee that the issue remains settled in favour of the assessee under the judgments of the Apex Court in the cases of Commissioner v. T.V.S. Suzuki Ltd., 2003 (89) ECC 1 (SC) : 2003 (156) ELT 161 (SC) and Sinkhai Synthetics & Chemicals Pvt. Ltd. v.CCE, Aurangabad, 2002 (83) ECC 5 (SC) : 2002 (143) ELT 17 (SC). As against this, the Ld. Counsel appearing for the revenue points out that the decision of the Apex Court in Sinkhai Synthetics & Chemicals Pvt.

Ltd. v. CCE Aurangabad remains referred to a Larger Bench in the case of CCE Mumbai v. Allied Photographic India Ltd., 2004 (163) ELT 401 (SC).

22. The legal position emerging from the decisions of the Hon'ble Supreme Court in the case of Commissioner v. T.V.S. Suzuki Ltd., 2003 (89) ECC 1 (SC) : 2003 (156) ELT 161 (SC) and Sinkhai Synthetics & Chemicals Pvt. Ltd. is that refunds arising from duty payments under provisional assessment or under protest are not covered by the provisions relating to unjust enrichment contained in Section 11B of the Central Excise Act, 1944. The correctness of this view has been doubted by another Division Bench of the Apex Court in the case of CCE Mumbai v. Allied Photographic India Ltd., and the issue referred to the Larger Bench. Such a reference does not affect the binding nature of law stated in the judgments in the cases of Sinkhai Synthetics & Chemicals Pvt. Ltd. and T.V.S. Suzuki Ltd., The appellant's claim for refund of Rs. 88,26,360 remains covered by these decisions. Therefore, I am in agreement with the view taken by the Ld. Member (J) that this amount is required to be refunded to the appellants.

23. With regard to the remaining amount of Rs. 16,19,617, it is to be noted that part of the duty relates to goods which had been exported, the refund of which would not attract provisions of unjust enrichment.

Refund claim was rejected, including of such amount, by the Lower authorities on the ground that the appellant has not produced any proof of payment of duty. The Division Bench has noted that the fact of payment of duty remains evidenced by documents. It is also to be noted that the Commissioner (Appeals) has observed in his order that "I find from the records that the duty element has been passed on to the customers". It is unlikely that the duty, which was passed on, was not paid to the revenue. In these circumstances, I am in agreement with the Ld. Member (J) that this matter is also required to go back to the Commissioner (Appeals) for due verification of records as to the fact of payment of duty and for passing a fresh order. Thus, I am in agreement with Ld. M (J) on this issue also.

24. During the hearing before me, the Ld. Counsel for the assessee also raised a ground that the appellant's claim would be due even if the claim is considered after applying the provisions of unjust enrichment inasmuch as a matter of fact, the refund amount claimed had not been passed on to the buyers of the goods. However, I am not going into that aspect of the matter, since that issue does not form a part of the reference made to the third member.

25. Having answered the reference as above, I return the appeal and cross objection to the Division Bench, which passed the original order, for passing their final orders.

In terms of majority order, the revenue's appeal is rejected and the cross appeal filed by assessee is required to be remanded to the Commissioner (Appeals) for due verification of records as to the fact of payment of duty and for passing a fresh order.