सीमाशुल्क(अपील) आयुक्तकाकार्यालय,

OFFICE OF THE COMMISSIONER OF CUSTOMS (APPEALS),अहमदाबाद AHMEDABAD,

चौथी मंज़िल 4th Floor, हडकोभवनHUDCO Bhavan, ईश्वर भुवन रोड़ IshwarBhuvan Road,

नवरंगपुरा Navrangpura, अहमदाबाद Ahmedabad – 380 009

दूरभाषक्रमांक Tel. No. 079-26589281

DIN - 20250771MN00007757F6

क	फ़ाइलसंख्या FILE NO.	S/49-108-112/CUS/JMN/2025-26
ख	अपीलआदेशसंख्या ORDER-IN-APPEAL NO. (सीमाशुल्कअधिनियम, 1962 कीधारा 128ककेअंतर्गत) (UNDER SECTION 128A OF THE CUSTOMS ACT, 1962):	JMN-CUSTM-000-APP-139 to 143-25-26
ग	पारितकर्ता PASSED BY	Shri Amit Gupta Commissioner of Customs (Appeals), Ahmedabad
घ	दिनांक DATE	14.07.2025
ङ	उदभूतअपीलआदेशकीसं. वदिनांक ARISING OUT OF ORDER-IN-ORIGINAL NO.	As per Table A of the order
च	अपीलआदेशजारीकरनेकीदिनांक ORDER-IN-APPEAL ISSUED ON:	14.07.2025
छ	अपीलकर्ताकानामवपता NAME AND ADDRESS OF THE APPELLANT:	M/s Diamond Industries Ship Breaking Pvt. Ltd., Plot No. 84, Alang Ship Recycling Yard, Alang, Dist - Bhavnagar.

1.	यहप्रतिउसव्यक्तिकेनिजीउपयोगकेलिएमुफ्तमेंदीजातीहैजिनकेनामयहजारीकियागयाहै.
	This copy is granted free of cost for the private use of the person to whom it is issued.
2.	सीमाशुल्कअधिनियम 1962 कीधारा 129 डीडी (1) (यथासंशोधित) केअधीननिम्नलिखितश्रेणियोंकेमामलोंकेसम्बन्धमेंकोईव्यक्तिइसआदेशसेअपनेकोआहतमहसूसकरताहोतोइसआदेशकीप्राप्तिकीतारीखसे 3 महीनेकेअंदरअपरसचिव/संयुक्तसचिव (आवेदनसंशोधन),वित्तमंत्रालय, (राजस्वविभाग) संसदमार्ग,नईदिल्लीकोपुनरीक्षणआवेदनप्रस्तुतकरसकतेहै.

	Under Section 129 DD(1) of the Customs Act, 1962 (as amended), in respect of the following categories of cases, any person aggrieved by this order can prefer a Revision Application to The Additional Secretary/Joint Secretary (Revision Application), Ministry of Finance, (Department of Revenue) Parliament Street, New Delhi within 3 months from the date of communication of the order.	
	निम्नलिखितसम्बन्धितआदेश/Order relating to :	
(क)	बैगेज़केरूपमेंआयातितकोईमाल.	
(a)	any goods imported on baggage.	
(ख)	भारतमेंआयातकरनेहेतुकिसीवाहनमेंलादागयालेकिनभारतमेंउनकेगन्तव्यस्थानपरउतारेनगएमालयाउसगन्तव्य स्थानपरउतारेजानेकेलिएअपेक्षितमालउतारेनजानेपरयाउसगन्तव्यस्थानपरउतारेगएमालकीमात्रामेंअपेक्षितमालसे कमीहो.	
(b)	any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination.	
(ग)	सीमाशुल्कअधिनियम, 1962 केअध्यायX तथाउसकेअधीनबनाएगएनियमोंकेतहतशुल्कवापसीकीअदायगी.	
(c)	Payment of drawback as provided in Chapter X of Customs Act, 1962 and the rules made thereunder.	
3.	पुनरीक्षणआवेदनपत्रसंगतनियमावलीमेंविनिर्दिष्टप्रारूपमेंप्रस्तुतकरनाहोगाजिसके अन्तर्गतउसकीजांचकीजाएगी औरउसकेसाथनिम्नलिखितकागजातसंलग्नहोनेचाहिए :	
	The revision application should be in such form and shall be verified in such manner as may be specified in the relevant rules and should be accompanied by :	
(क)	कोर्टफीएक्ट,1870केमदसं. 6 अनुसूची 1 केअधीननिर्धारितकिएगएअनुसारइसआदेशकी 4 प्रतियां,जिसकीएकप्रतिमेंपचासपैसेकीन्यायालयशुल्कटिकटलगाहोनाचाहिए.	
(a)	4 copies of this order, bearing Court Fee Stamp of paise fifty only in one copy as prescribed under Schedule 1 item 6 of the Court Fee Act, 1870.	
(ख)	सम्बद्धदस्तावेज़ोंकेअलावासाथमूलआदेशकी 4 प्रतियां,यदिहो	
(b)	4 copies of the Order-in-Original, in addition to relevant documents, if any	
(ग)	पुनरीक्षणकेलिएआवेदनकी 4 प्रतियां	
(c)	4 copies of the Application for Revision.	
(घ)	पुनरीक्षणआवेदनदायरकरनेकेलिएसीमाशुल्कअधिनियम, 1962 (यथासंशोधित) मेंनिर्धारितफीसजोअन्यरसीद,फीस,दण्ड,जब्तीऔरविविधमदोंकेशीर्षकेअधीनआताहैमेंरु. 200/- (रूपएदोसौमात्र)यारु.1000/-(रूपएएकहज़ारमात्र),जैसाभीमामलाहो,सेसम्बन्धितभुगतानकेप्रमाणिकचलानटी.आर.6 कीदोप्रतियां. यदिशुल्क,मांगागयाब्याज,लगायागयादंडकीराशिऔररूपएएकलाखयाउससेकमहोतोऐसेफीसकेरूपमेंरु.200/- औरयदिएकलाखसेअधिकहोतोफीसकेरूपमेंरु.1000/-	
(d)	The duplicate copy of the T.R.6 challan evidencing payment of Rs.200/- (Rupees two Hundred only) or Rs. 1,000/- (Rupees one thousand only) as the case may be, under the Head of other receipts, fees, fines, forfeitures and Miscellaneous Items being the fee prescribed in the Customs Act, 1962 (as amended) for filing a Revision Application. If the amount of duty and interest demanded, fine or penalty levied is one lakh rupees or less, fees as Rs.200/- and if it is more than one lakh rupees, the fee is Rs.1000/-.	
4.	मदसं. 2 केअधीनसूचितमामलोंकेअलावाअन्यमामलोंकेसम्बंन्धमेंयदिकोईव्यक्तिइसआदेशसेआहतमहसूसकरताहोतोवेसी माशुल्कअधिनियम 1962 कीधारा 129 ए (1) केअधीनफॉर्मसी.ए.-3 मेंसीमाशुल्क,केन्द्रीयउत्पादशुल्कऔरसेवाकरअपीलअधिकरणकेसमक्षनिम्नलिखितपतेपरअपीलकरसकतेहैं	
	In respect of cases other than these mentioned under item 2 above, any person aggrieved by this order can file an appeal under Section 129 A(1) of the Customs Act, 1962 in form C.A.-3 before the Customs, Excise and Service Tax Appellate Tribunal at the following address :	
	सीमाशुल्क, केंद्रीयउत्पादशुल्कवसेवाकरअपीलियअधिकरण,पश्चिमीक्षेत्रीयपीठ	**Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench**

	दूसरीमंज़िल,बहुमालीभवन,निकटगिरधरनगरपुल,असारवा,अहमदाबाद-380016	2nd Floor, Bahumali Bhavan, Nr.Girdhar Nagar Bridge, Asarwa, Ahmedabad-380 016
5.	सीमाशुल्कअधिनियम, 1962 कीधारा 129 ए (6) केअधीन,सीमाशुल्कअधिनियम, 1962 कीधारा 129 ए(1)केअधीनअपीलकेसाथनिम्नलिखितशुल्कसंलग्नहोनेचाहिए-	
	Under Section 129 A (6) of the Customs Act, 1962 an appeal under Section 129 A (1) of the Customs Act, 1962 shall be accompanied by a fee of -	
(क)	अपीलसेसम्बन्धितमामलेमेंजहांकिसीसीमाशुल्कअधिकारीद्वारामांगागयाशुल्कऔरव्याजतथालगायागयादंडकीरकमपाँचलाखरूपएयाउससेकमहोतोएकहज़ाररुपए.	
(a)	where the amount of duty and interest demanded and penalty levied by any officer of Customs in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;	
(ख)	अपीलसेसम्बन्धितमामलेमेंजहांकिसीसीमाशुल्कअधिकारीद्वारामांगागयाशुल्कऔरव्याजतथालगायागयादंडकीरकमपाँचलाखरूपएसेअधिकहोलेकिनरुपयेपचासलाखसेअधिकनहोतो;पांचहज़ाररुपए	
(b)	where the amount of duty and interest demanded and penalty levied by any officer of Customs in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees ;	
(ग)	अपीलसेसम्बन्धितमामलेमेंजहांकिसीसीमाशुल्कअधिकारीद्वारामांगागयाशुल्कऔरव्याजतथालगायागयादंडकीरकमपचासलाखरूपएसेअधिकहोतो;दसहज़ाररुपए.	
(c)	where the amount of duty and interest demanded and penalty levied by any officer of Customs in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees	
(घ)	इसआदेशकेविरुद्धअधिकरणकेसामने,मांगेगएशुल्कके 10% अदाकरनेपर,जहांशुल्कयाशुल्कएवंदंडविवादमेंहैं,यादंडके 10%अदाकरनेपर,जहांकेवलदंडविवादमेंहै,अपीलरखाजाएगा।	
(d)	An appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.	
6.	उक्तअधिनियमकीधारा 129 (ए) केअन्तर्गतअपीलप्राधिकरणकेसमक्षदायरप्रत्येकआवेदनपत्र- (क) रोकआदेशकेलिएयागलतियोंकोसुधारनेकेलिएयाकिसीअन्यप्रयोजनकेलिएकिएगएअपील : - अथवा (ख) अपीलयाआवेदनपत्रकाप्रत्यावर्तनकेलिएदायरआवेदनकेसाथरुपयेपाँचसौकाशुल्कभीसंलग्नहोनेचाहिए.	
	Under section 129 (a) of the said Act, every application made before the Appellate Tribunal- (a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or (b) for restoration of an appeal or an application shall be accompanied by a fee of five Hundred rupees.	

ORDER-IN-APPEAL

Five appeals have been filed by M/s Diamond Industries Ship Breaking Pvt. Ltd., Plot No. 84, Alang Ship Recycling Yard, Alang, Dist - Bhavnagar (hereinafter referred to as "the appellant") in terms of Section 128 of the Customs Act, 1962 against the Orders-in-Original (Details as per Table-A) (hereinafter referred to as "the impugned orders") passed by the Assistant Commissioner, Customs Division, Bhavnagar (hereinafter referred to as "the adjudicating authority").

Table A

Sr. No	Appeal No	Bill of Entry No. &Date	FAO No. & Date	OIO No. &Date	Amount of Refund (in Rs) credited to the Consumer Welfare Fund
01	S/49-108/CUS/JMN/2025-26	4237424/08.06.2021	664/2529662/SBY/2023-24/04.03.2024/06.03.2024	538/CUS-REF/2024-25/21.04.2025	1,42,167
02	S/49-109/CUS/JMN/2025-26	SBY/258/2013-14/15.02.2014	1211/SBY/2024-25/06.12.2024	551/CUS-REF/2024-25/28.04.2025	7,38,018
03	S/49-110/CUS/JMN/2025-26	7833720/11.03.2022	1024/2602649/SBY/2024-25/11.07.2024/15.07.2024	539/CUS-REF/2024-25/21.04.2025	2,69,107
04	S/49-111/CUS/JMN/2025-26	3504087/09.04.2021	726/25/SBY/814120 23-24/20.03.2024/28.03.2024	540/CUS-REF/2024-25/21.04.2025	87,927
05	S/49-112/CUS/JMN/2025-26	4755928/22.02.2023	786/2536237/SBY/2023-24/20.03.2024	550/CUS-REF/2024-25/28.04.2025	5,71,550

2. Briefly stated, facts of the case are that the appellant, having their Ship Recycling Yard at Plot No. 84, Alang Ship Recycling Yard, Alang, Dist - Bhavnagar, had imported vessels for breaking up/recycling and filed Bills of Entry as detailed in Table A above under Section 46 of the Customs Act, 1962. They had self-assessed the goods viz. Vessels for breaking under

CTH 89.08, Bunkers under CTH 27.10 & Consumables under CTH 98.05 and paid the assessed customs duty.

2.1 There were some dispute with regard to assessment of customs duty on the Fuel and Oil (Fuel Oil, Marine Gas Oil, Lub. Oil) contained in Bunker Tanks inside/outside the engine room of the vessel. The appellant claimed that Fuel and Oil contained in Bunker Tanks inside/outside the engine room of the vessel was to be assessed to duty under CTSH 89.08 of the Customs Tariff Act, 1975 along with the vessel. The Department was of a view that Fuel and Oil contained in Bunker Tanks were to be assessed to duty under respective CTH i.e., Chapter 27. Thereafter, the Bills of Entry were assessed provisionally for want of original documents.

2.2 Further, the Hon'ble CESTAT, Ahmedabad, vide its Order No. A/11792-11851/2022, dated 17.10.2022/01.12.2022 had held that the oil contained in the Bunkers Tanks in the engine room of the vessel is to be assessed to duty under CTH 8908, along with the vessel for breaking up. Further, in view of the aforesaid order of the Hon'ble CESTAT, the Assistant Commissioner, Customs Division, Bhavnagar vide Final Assessment Orders as detailed in Table A above held that Bunker Tanks containing oil are to treated as part of vessel's machinery and the Oils contained in them are to be classified under CTH 8908 along with the vessel, as covered under Para 2(b) of Circular No. 37/96 – Cus, dated 03.07.1996. The Bills of Entry was finally assessed vide Final Assessment Orders as detailed in Table A above passed by the Assistant Commissioner, Customs Division, Bhavnagar. Consequently, the appellant had filed refund claims which were decided vide the impugned orders.

2.3 The appellant during adjudication had submitted a copy of Certificate issued by C.A. M/s Talraja & Talreja wherein it is stated that Rs. Nil has been shown as receivable from Customs department under heading of current assets or other current assets or loans and advances in balance sheet for the year in which Bill of Entry has been filed and Rs. Nil has been carried forward in the audit report in the subsequent financial years till date. The appellant was requested to produce C.A. Certificate in the format provided along with the documentary evidence to verify that the refund amount claimed were shown as 'amount receivable' in the books of account and that the incidence of duty (claimed as refund) had not been passed on to any other person. However, the appellant submitted that unjust enrichment is not applicable in their case and relied upon following case laws: -

(i) 2017 (348) E.L.T. 537 (Tri. -Chennai)

(ii) 2015 (327) E.L.T. 13 (Mad)

(iii) 2018 (360) E.L.T. A 204 (Bom)

(iv) 2020 (371) E.L.T. 542 (Chan)

(v) 2022(60) G.S.T.L. 48 (Del).

2.4 The adjudicating authority found that the case laws were not relevant in the issue as far as clause of unjust enrichment is concerned. The adjudicating authority also found that that when the element of any duty paid on any goods is debited to Purchase Account which is forming part of the Profit & Loss Account, as a cardinal accounting principles, the said element of duty becomes a part of the cost of the goods. As such, whenever such goods are sold at a later stage to the buyers/ customers, the Sales Price fetched for such goods is considered as inclusive of the element of duty paid thereon such goods. Accordingly, here in the case, it was observed that the incidence of Customs duty paid at the time of import of goods is passed on to the buyers/ customers at the time of its sales in the form of Sales Price. The adjudicating authority also observed that once the amount of Customs Duty paid is debited as cost to purchase under Profit & Loss Account and non-fulfillment of obligatory condition of Section 28C would be sufficient enough to conclude that Sales Price of the goods bear entire Customs Duty paid on such goods. Under such circumstances, the grant of refund of Customs Duty would tantamount to receipt of refund of customs duty from customers as well as from exchequer, which will get the claimant unjustly enriched. Thereafter, the adjudicating authority relying upon the Final Order No. A/30122-30123/2023, dated 01.06.2023 passed by the Hon'ble CESTAT, Hyderabad in the case of Sachdev Overseas Fitness Pvt. Ltd & Nityasach Fitness Pvt. Ltd has sanctioned the refund claims as detailed in the Table A above in terms of Section 27 of the Customs Act, 1962 and credited the same to the Consumer Welfare Fund.

3. Being aggrieved with the impugned Orders, the appellant have filed the present appeals contending as under;

- The act of crediting the sanctioned refund amount in to the so called Consumer Welfare Fund of the department is not genuine and correct. The appellant had sold out the disputed stock of bunkers at very less price prevailing at the time and sale/ removal of disputed bunkers and too, before starting of hot breaking activities upon the vessel under reference. The appellant had sold out the disputed stock of bunker under cover of various Sales Invoices which had been issued at the very less price than considered the same at the time of provisional assessment of the bill of entry. Thus, in the present case, the question

of importing the concept of as to why the sanctioned refund amount should not credited in to the Consumer Welfare Fund, is not coming in to picture.

- The whole purchase price of the ship under reference had never been increased decreased at any stage i.e. either at the time of Provisional Assessment or making the Final Assessment on the very ground that the purchase price/transaction value as considered by the department had not either decreased or increased so far as the transaction of the vessel under reference has been made in US Dollar as agreed upon in the above referred MOA. The sanctioned refund claim has been wrongfully credited in to the so called Welfare Fund.
- The ground considered for crediting in to the Welfare Fund appears to have been consider/taken in pursuance of the respective assessed Income Tax Return. This Income Tax Return has no direct nexus with the crediting such sanctioned refund amount in to the so called Welfare Fund. The appellant had sold out the disputed stock of bunker at very low price and this price has direct nexus with the crediting such sanctioned refund amount in the above Welfare Fund. This Welfare Fund has a special character in understating of concept of crediting in to so called Welfare Fund and having no nexus with the present refund claim for this contention the appellant fully apprised that in the present case, the concept of crediting such sanctioned refund amount appears not to have been true, correct and genuine but imported without any authority of law. This gross Income Tax value is nothing but pertaining to Commercial Business carried out by the Appellant in or in relation to the ends of sales of such goods in the open market.
- The department had also erred in making provisional assessment by wrongfully converting such value of the bunker in US Dollar at the time of making provisional assessment and accordingly no nexus with the calculation of such refund amount and this calculation in Rupees was also inclusive of the purchased price of the ship. This price in US Dollar appears to have been wrongfully considered in making credit of the sanction refund amount to the Welfare Fund read with such concept of transaction value. From these submissions, it is clear that the appellant had not collected the incidence of duty from such purchaser of the disputed stock of bunkers which had been started to sale in to the local market after fulfilling the provisions of Section 46 of the Customs Act, 1962. Therefore, the act of Adjudicating Authority in crediting the sanctioned refund amount in to the so called Welfare Fund is not true correct and proper but to be set aside.

- In this regard, the appellant relied upon the various settled case laws wherein the concerned authority has clearly held that "in such cases", the question of unjust enrichment" does not arise.
  (i) 2015 (327) ELT 13 (Mad); Commissioner of C. Ex., Chennai-I,
  (ii) 2017 (348) ELT 537 (Tri. -Chennai); Mennekes Electric India P. Ltd. v/s Commissioner of Cus., Chennai-II
  (iii) 2018 (360) ELT A204 (Bom.); Commissioner v/s Tata Motors Ltd
  (iv) 2020 (371) ELT 542 (Chan); Gaurav Enterprises v/s Commissioner of Customs Amritsar
  (v) 2022 (60) G.S.T.L. 48 (Del); Rambagh Palace Hotel Pvt. Ltd. v/s Commissioner ofC. Ex. & GST, Jaipur
  (vi) 2013 (294) E. L. T. 320 (Tri- Bang.) in case of VXL Instruments Ltd. v/s Commissioner of Customs, Banglore
  (vii) 2015 (317) E.L.T. 637 (Tri. Del) in case of Business Overseas Corporation v/s C. C. (Import & General), New Delhi
  (viii) 2017 (48) S. T. R. 298 (Del) in case of Munch Food Products Ltd. v/s Commissioner

In view of the above stated grounds of appeal it is clearly establish that in the present case, the question of invoking the concept of unjust enrichment does not arise. Therefore, the sanctioned amount of refund claim has wrongly credited to the consumer welfare fund.

PERSONAL HEARING

4. Shri Rahul Gajera, Advocate, appeared for personal hearing 25.06.2025 in physical mode. He reiterated the submissions made at the time of filing appeal and also submitted a common written submission wherein he submitted that:

- It is evident from the Bill of Entry and the Appellant's Sales Invoices, that the price at which the Appellant sold the imported Bunkers is much below the import price/value of the Bunkers on which the duty was assessed. Therefore, the Appellant has not been able to even recover the import price of the Bunkers, much less the duty paid thereon. Consequently, the question of the Appellant having passed on and recovered from the buyers, the duty paid on the Bunkers does not arise. Clearly, the burden of the said duty has been borne by the Appellant and has not been passed on to the buyers. A perusal of the Appellant's Sales Invoices would show that the Appellant has only recovered the GST payable on the local sales and not the import duty paid on the Bunkers.

- It is settled law as laid down in the following judgments that debit of the duty amount to expenses, without corresponding addition in the import price to arrive at the local sale price, means that Appellant has absorbed and borne the said amounts and it cannot lead to the conclusion that the Appellant has passed on the incidence thereof. The appellant relied upon the following case laws:

  (i) CCE v Flow Tech Power-2006 (202) ELT 404 (Mad): Para 3

  (ii) Elantas Beck India Ltd v CCE – 2016 (339) ELT 325 (Tri. - Mumbai): Para 5

  (iii) Birla Corporation Ltd v CCE – 2008 (231) ELT 482: Para 5

  (iv) Bharat Kumar Indrasen Trading P. Ltd v CC-2018 (2) TMI 1574: Paras 7 and 8.

  (v) Shyam Coach Engineers v CCE – 2024 (1) TMI 245: Paras 5.7, 5.8 and 6.

  In the present case, not only has the Appellant not added the duty amount to the import price to arrive at the local sale price, but in fact, the local sale price is even below the import price on which the duty is assessed. Consequently, as laid down in the aforesaid judgments, merely because the duty was debited to expenses, it cannot be said that the incidence thereof was passed on to the buyers.

- The decision in Pr. Commr of CC v Sachdev Overseas Fitness P. ltd and Nityasach Fitness P. Ltd- 2023 (6) TMI 161-CESTAT-Hyderabad relied upon by the Assistant Commissioner is that of a Single Member of the Tribunal, whereas the decisions referred to herein above are of the Hon'ble High Court and Division benches of the Tribunal. Moreover, in the said decision relied upon by the Assistant Commissioner, unlike the present case, it was not the case of the importer had imported goods has been sold below the import price. The said decision, therefore, cannot beapplied to the present case.

- The amount excess deposited during the provisional assessment/pendency of a classification dispute is a revenue deposit, and not a final payment of duty. The refund of such revenue deposits is not governed by Section 27 of the Customs Act, 1962, and hence refund cannot be denied on the ground of applicability of doctrine of unjust enrichment provided therein.

- It is submitted that in the cases where duty on fuel and oil were deposited without lodging a formal protest, the finalization of assessments was nevertheless carried out pursuant to the judgment of the Hon'ble Supreme Court in the case of Mahalaxmi Ship Breakers by which issue of classification was put to rest in favour of ship breaking units. Therefore, excess amount arising out of such final assessment should be treated as payments made under mistake of law and such amounts do not retain the character of duty, and the bar of unjust enrichment under Section 27 would not apply to such deposits.

- It is a common practice that fuel and oil available on board of ship are necessarily required to be removed for the purpose of hazardless and efficient operation of ship breaking. It is submitted that bar of unjust enrichment do not apply to such items removed below cost as a distressed sale.

- The above proposition of law is well settled by various judgments. The appellant craves leave to submit the same during hearing.

DISCUSSION AND FINDINGS

5. I have gone through the facts of the case available on record and the submissions made in the grounds of appeal as well as those made during hearing. The issue to be decided in the present appeal is whether the impugned orders passed by the adjudicating authority crediting the amount of sanctioned refund to the Consumer Welfare Fund, in the facts and circumstances of the case, is legal and proper or otherwise.

5.1 It is observed that the appellant had imported vessels for breaking up/recycling and filed Bills of Entry as detailed in Table A above under Section 46 of the Customs Act. 1962. There was dispute in respect of classification of Fuel and Oil (Fuel Oil, Marine Gas Oil, Lub Oil), which was settled by the Hon'ble CESTAT, Ahmedabad, vide its Orders A/11792-11851/2022, dated 17.10.2022/01.12.2022 wherein it was held that the oil contained in the Bunkers Tanks in the engine room of the vessel is to be assessed to duty under CTH 8908, along with the vessel for breaking up. The Bills of Entry were assessed provisionally. Subsequently, the Bills of Entry were finally assessed vide Final Assessment Orders as detailed in Table A above passed by the Assistant Commissioner, Customs Division, Bhavnagar in terms of Hon'ble CESTAT, Ahmedabad, Orders dated 17.10.2022/01.12.2022. Consequently, the appellant had filed refund claims along with Certificate issued by CA M/s Talreja & Talreja wherein it is stated that Rs. Nil has been shown as receivable from Customs

department under heading of current assets or other current assets or loans and advances in balance sheet for the year in which Bill of Entry has been filed and Rs. Nil has been carried forward in the audit report in the subsequent financial years till date. The CA certificate submitted by the appellant neither disclosed the details of the supporting documents on the basis of which such certificate was issued nor financial records viz. copy of Audited Balance Sheet, Sales Invoices etc. had been provided as per the Board Circular No. 07/2008, dated 28.05.2008 wherein it has been stressed upon the need to go through the details of audited Balance Sheet and other related financial records, certificate of CA etc., to verify as to whether the burden of duty and interest as the case may be, has not been passed on to any other person as for the doctrine of unjust enrichment. It is observed that there is no dispute regarding eligibility of the appellant for refund on merit. The only dispute is whether the appellant has crossed the bar of unjust enrichment so as to decide whether the amount of refund is to be given to the appellant or else to be credited to the Consumer Welfare Fund.

5.2 The adjudicating authority has on scrutiny of the refund claims observed that the C.A. Certificate submitted by the appellant neither disclosed the details of supporting documents on the basis of which such certificate was issued nor financial records viz. copy of Audited Balance Sheet, Sales Invoices etc. were provided. The adjudicating authority has further observed that the Board Circular No. 07/2008, dated 28.05.2008 has stressed upon the need to go through the details of audited Balance Sheet and other related financial records, certificate of CA etc., which are relied upon, to verify as to whether the burden of duty and interest as the case may be, has not been passed on to any other person as for the doctrine of unjust enrichment. The findings of the adjudicating authority in the impugned orders as per appeal listed at Sr. No 01 of Table A is as under:

"I have gone through the case law and Circular cited by the claimant. I find that the case law and Circular are not relevant in the issue as far as clause of unjust enrichment is concerned I find that when the element of any duty paid on any goods is debited to Purchase Account which is forming part of the Profit & Loss Account, as a cardinal accounting principles, then the said element of duty becomes a part of the cost of the goods. As such, whenever such goods are sold at a later stage to the buyers/customers, the Sales Price fetched for such goods is considered as inclusive of the element of duty paid thereon such goods, accordingly, here in the case it is observed that the incidence of Customs duty paid

at the time of import of goods is passed on to the buyers/ customers at the time of its sales in the form of Sales Price. In fact, statutory provision of Section 28C provides for indication of amount of duty paid 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, which is not done by the claimant in the instant case. Once the amount of Customs duty paid is debited as cost to purchase under Profit & Loss and non-fulfillment of obligatory condition of Section 28C would be sufficient enough to conclude that Sales Price of the goods bear entire Customs duty paid on such goods. Under such circumstances, the grant of refund of Customs Duty would tantamount to receipt of refund of customs duty from customers as well as exchequer, which will get the claimant unjustly enriched. [Reliance placed on the Final Order No. A/30122-30123/2023 dated 1.6.2023 passed by the Hyderabad Bench of CESTAT in Departmental Appeals No. 30010- 11/2023 in case of Sachdev Overseas Fitness Pvt Ltd & Nityasach Fitness Pvt Ltd.].

The claimant has submitted a copy of certificate issued by C.A. M/s TALREJA & TALREJA dated 12.02.2025 wherein it is stated that Rs. Nil has been shown as receivable from Customs department under heading of current assets or other current assets or loans and advances in balance sheet for the F.Y. 2021-22 and Rs. Nil has been carried forward in the audit report in the subsequent financial years till date. This implied that the duty paid was shown as expenditure and formed part of Profit and loss account of the claimant. Therefore, as a settled position in law that where the claimant has itself treated the refund amount due as expenditure and not as "claims receivable", the claimant cannot be said to have passed the test of unjust enrichment. Thus the claimant having failed to prove that incidence of customs duty has not been passed on to any other person, the amount of refund instead of being paid to them is liable to be credited to the Consumer Welfare Fund."

Accordingly, the adjudicating authority has sanctioned the refund claims as detailed in the Table A above in terms of Section 27 of the Customs Act, 1962 and credited the same to the consumer welfare fund vide the impugned orders.

5.3 I have perused the relevant Section 27 (1A) and 27 (2) of the Customs Act, 1962 and same is reproduced as under:

(1A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish

that the amount of duty or interest in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty or interest, has not been passed on by him to any other person.

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

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

(a) the [duty and interest, if any, paid on such duty] paid by the importer, [or the exporter, as the case may be] if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

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

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

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

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

(f) the [duty and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

[(g) the duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made where

(i) such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry; or

(ii) the duty actually payable is reflected in the reassessed bill of entry in the case of reassessment:]

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.*

5.4 I have also perused Section 28 D of the Customs Act, 1962 and same is reproduced as under:

"SECTION 28D. Presumption that incidence of duty has been passed on to the buyer. — Every person who has paid the duty on any goods

under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

From plain reading of the above legal provisions, it is clear that the appellant was required to submit documentary evidence to establish that the amount of duty in relation to which the refund is claimed was paid by him and the incidence of the duty has not been passed on by him to any other person. As per Section 28D of the Customs Act, 1962, the burden of proof is on the appellant to establish that they had not passed on the incidence of duty paid. Thus, until and unless the appellant satisfies with the relevant documents, indicating the fact that it has paid the duty and the same has not been passed on to the customers, such a claim cannot be accepted. Therefore, until the contrary is proved, there is a presumption provided under the statute that the duty has been passed on to the buyer.

5.4.1 It is undisputed that the goods in question have been sold to buyers and the transactions are shown as part of Profit and Loss Account. Further, it is observed that the appellant had submitted Certificate issued by M/s Talreja & Talreja wherein it is mentioned that Rs NIL has been shown as receivable from Customs under the head of current assets or loan and advance in the balance sheet for the year in which Bill of Entry has been filed and Rs NIL has been carried forward in the audit reports in the subsequent financial years till date. The CA certificate submitted by the appellant neither disclosed the details of the supporting documents on the basis of which such certificate was issued nor financial records viz. copy of Audited Balance Sheet, Sales Invoices etc. had been provided as per the Board Circular No. 07/2008 dated 28.05.2008 wherein it has been stressed upon the need to go through the details of audited Balance Sheet and other related financial records, certificate of CA etc., to verify as to whether the burden of duty and interest as the case may be, has not been passed on to any other person as for the doctrine of unjust enrichment.

5.5 The details of Certificate dated 12.02.2025 issued by M/s P. M. Talreja & Talreja, C.A., submitted along with appeal listed at Sr. No. 01 of Table A above, is as under:

"I,CA BALRAM TALREJA Address :- "DISHA",206 SAPPHIRE ELEGANCE, Nr.Saint kanwaram chowk, Waghawadi road, Bhavnagar-364001 having duly verified the financial account of DIAMOND INDUSTERIES SHIPBREAKING PVT LTD HAVING having office at 348, Madhav Darshan, Waghawadi road, Bhavnagar and work at 84 ship recycling yard alang sosiya dist Bhavnagar. I have checked their books

of accounts and records of vessel MT FALCON, IMO No. 9123386 imported for breaking/recycling vide Bill of Entry No.4237424 dated 08.06.2021 it is verified that M/S DIAMOND INDUSTERIES SHIPBREAKING PVT LTD have paid total custom duty of Rs. 7,63,92,768/-(including IGST of 6,63,01,896/-) vide Challan no 2035248839 dated 08.06.2021 for import of the said vessel.

It is further verified that out of total customs duty of 7,63,92,768/-, M/S DIAMOND INDUSTERIES SHIPBREAKING PVT LTD have taken input credit of IGST amount of 6,63,01,896/- charged total amount of custom duty of Rs.1,00,90,872/- to profit and loss account as expenditure, and an amount of Rs6,63,01,896/- as receivable from custom department under heading of current assets or other current assets or loan and advances in balance sheet for the financial year 2021-22.it is verified that this receivable amount of rs 00 has been carried forward in the audit reports in the subsequent financial year till date and therefore it is certified incidence of customs duty of Rs 1,42,167/-claimed as refund has not been passed on to any other person."

The Chartered Accountant/appellant has not submitted any documents to substantiate that the incidence of duty claimed as refund has not been passed on by him to any other person and not submitted copy of balance sheet showing the refund claimedas "Custom Duty Receivable". The CA has in the said Certificate made a bald statement that incidence of customs duty paid on the bunker (oils and fuels) by the partnership firm has not been passed on to the buyer of the goods or any other person without any supporting documents such as copy of balance sheet, sales invoices or any other financial documents. Therefore, the CA Certificate produced in this case without supporting documents cannot be considered for discharging the burden of unjust enrichment.

5.6 It is further observed that the Chartered Accountant's Certificate alone is not the conclusive proof of having not passed on the incidence of duty to the customers. A certificate of Chartered Accountant is just a corroborative evidence only as held by the Hon'ble High Court in the case of Commr. of C. EX., Aurangabad Versus Toyota Kirloskar Motors Ltd [2010 (256) E.L.T. 216 (Kar.)]. The Hon'ble High Court's view was not disturbed by the Hon'ble Supreme Court vide [2011 (274) E.L.T. 321 (S.C.)]. Further, in a number of decisions, it has been held that Chartered Accountant's certificates alone is not a sufficient evidence to discharge the burden cast upon the appellant to prove that incidence of duty has not been passed on to the customers. Further, it is the 'incidence of duty' and

not the duty as such which is required to be shown to have not been passed on from the sale record, balance sheets and other related documents. In this regard, I rely upon the following case laws:

(i) Shoppers Stop Ltd. - 2018 (8) G.S.T.L. 47(Mad.)

(ii) BPL Ltd. - 2010 (259) E.L.T. 526 (Mad.)

(iii) Crompton Greaves Ltd. - 2011 (22) S.T.R. 380(Tri. - Mum.)

(iv) UOI v. Solar Pesticides Pvt. Ltd. reported in [2000 (116) E.L.T. 401(S.C.)]

(v) M/s Ispat Industries Ltd Vs Commissioner of Customs (Mumbai) – [2015- TIOL-614-CESTAT-MUM].

5.7 In fact, in the case law of BPL Ltd. – [2010 (259) E.L.T. 526 (Mad.)], the Hon'ble High Court of Madras has distinguished the Judgment in the case of Flow Tech Power- [2006 (202) ELT 404 (Mad)] which has been relied upon by the appellant. The observation of the Hon'ble High Court is as under:

> ***"9.*** *Therefore, considering the above said provisions and applying the same to the facts on hand, we are of the opinion that the Tribunal has committed an error in merely relying upon the certificate produced by the first respondent without taking into consideration of the fact that no evidence has been produced for considering the claim of refund. The Tribunal also relied upon the Judgment of Commissioner of C.Ex., Coimbatore v. Flow Tech Power reported in 2006 (202) E.L.T. 404 (Mad). The said Judgment is not applicable to the present case on hand and the Tribunal has wrongly relied upon the said Judgment. This Court in the said Judgment has clearly held that the certificate issued by the Chartered Accountant along with other evidence such as Profit and Loss Account are sufficient evidence to consider the claim for refund. The said Judgment cannot be construed to lay down the proposition of law that the certificate issued by the Chartered Account would automatically enable the person to get exemption in the absence of any other evidence to support that he is entitled to refund. Hence, on a consideration of the above said Judgment and also on the consideration of the facts involved, we are of the opinion that the appeal will have to be allowed and accordingly the same is allowed and the question of law framed is answered in favour of the revenue."*

5.8 I have also perused the decision of the Hon'ble Tribunal, Hyderabad, vide Final Order No. A/30122-30123/2023, dated 01.06.2023 passed in Departmental Appeals No. 30010-11/2023 in case of Sachdev Overseas Fitness Pvt. Ltd & Nityasach Fitness Pvt. Ltd. relied upon by the

adjudicating authority. The Hon'ble Tribunal, Hyderabad had held that if duty incidence was not passed on then, the same should have been recorded in their receivable account. The amount claimed as refund should be shown as receivables in any of their books of account and merely producing a CA certificate would not suffice to prove that the incidence has not been passed on. The relevant paras are reproduced hereunder:

"12. The issue to be decided is whether, in the facts of the case, the doctrine of unjust enrichment was correctly applied or otherwise. The Department has mainly relied upon statutory provisions whereby certain presumptions are made with regard to passing of incidence of duty unless there is evidence to the contrary. Admittedly, in this case, on reassessment the rate of duty was reduced and as consequence respondents filed refund claims. The Respondents, at that point of time, were aware of the quantum of refund even though they had to go through the procedural requirement of filing refund claim. In fact they have clearly specified the amount of refund which they were eligible as consequence to reassessment also. At this point also they have not shown this amount as receivable in any of their books of account nor any such evidence was produced before the competent authority sanctioning refund to the effect that they had not passed on total amount of applicable Customs Duty to their customers except for the CA's Certificate.

13. The statutory provisions concerning grant of refund and application of unjust enrichment are very clear. The Respondents were required to give clear evidence to the sanctioning authority that they had not collected the duty or had only partially collected the duty instead of full duty by way of any relevant document. They have clearly failed to do so. In fact, the statutory provisions clearly provided for the documents which would show the element of duty in the price and if such documents were produced it would have clearly shown the exact amount of duty included in the price or otherwise. They have not produced any such documents. Therefore, in the absence of any such evidence, merely producing CA certificate would not suffice to shift the burden of presumption for the purpose of Section 27 read with Section 28C of the Customs Act.

14. On the other hand, the learned DR has invited the attention to plethora of cases and especially to the settled position in the case of Ispat Industries Ltd vs Commissioner of Customs (Preventive), Mumbai [2015-TIOL-614-CESTATMum] wherein, inter alia, it was held that if the duty incidence was not passed on then the same should have been

recorded in their receivable account. The other judgments relied upon in support of argument that merely producing a CA certificate would not suffice to prove that the incidence has not been passed on, are as follows:

(i) Commr. of Customs (Exports), Chennai vs BPL Ltd [2010 (259) ELT 526 (Mad.)]

(ii) Shoppers Stop Ltd vs Commr. of Customs (Exports), Chennai [2018 (8) GSTL 47 (Mad.)]

(iii) Hindustan Petroleum Corporation Ltd vs CCE, Mumbai-II [2015 (317) ELT 379 (Tri-Mumbai)]

(iv) Adarsh Kumar Goel and Rajesh Bindal, JJJCT Ltd vs CCE [2006 (202) ELT 773 (P&H)]

(v) Philips Electronics India Ltd vs CCE, Pune-I [2010 (257) ELT 257 (TriMumbai)]

These judgments essentially indicate that the onus is on claimant of refund to produce sufficient and tangible evidence, including CA's certificate, if they so wish, but merely CA's certificate to the effect that the incidence of duty element, in respect of which refund is being claimed, cannot be the basis for conclusive evidence to the same. This is because of the statutory provisions regarding presumption, the Department has to consider that the duty incidence has been passed on and therefore, doctrine of unjust enrichment, as provided for in the statutory provisions would be applicable.

15. In the present case, barring CA certificate, no other evidence has been produced by the Respondents before the Adjudicating Authority. As against this, the Department has clearly brought out certain evidence like the Respondents having not shown this amount as "receivables" in their books of account during the relevant time or not having produced any documents etc., as envisaged under Section 28C of the Customs Act. All these evidence leading to the conclusion that they have treated the duty as an element of expenditure and therefore, forming part of the Profit & Loss account and not as receivables. It is also noted that they were aware that reassessment would lead to refund and they were also aware about the exact amount of refund which would be admissible to them on merits, and despite that they had not shown this amount as receivables in any of their books of account. Therefore, in the facts of the case, they have clearly not been able to clear the bar of unjust enrichment by not having produced sufficient evidence before the original authority."

5.9 Applying the ratio of the aforesaid judgment of the Hon'ble Tribunal, Hyderabad to the facts of this case, it is observed that in the present case also, the appellant has submitted a copy of Certificate issued by C. A. M/s Talreja & Talreja wherein it is mentioned that Rs NIL has been shown as receivable from Customs under the head of current assets or loan and advance in the balance sheet for the year in which Bill of Entry has been filed and Rs NIL has been carried forward in the audit reports in the subsequent financial years till date. The CA certificate submitted by the appellant neither disclosed the details of the supporting documents on the basis of which such certificate was issued nor financial records viz. copy of Audited Balance Sheet, Sales Invoices etc. The CA Certificate was not supported by any financial documents. Thus, the Chartered Accountant Certificate submitted by the appellant also does not support their case. The appellant had not submitted their books of account, or any other documents wherein the amount claimed as refund is shown as receivable. The appellant had not submitted any of their books of account, copy of sales invoices nor any such evidence was produced before the adjudicating authority to the effect that they had not passed on the incidence of Customs duty claimed as refund to their customers. Hence, the appellant has failed to cross the bar of unjust enrichment. In view of the above, I am of the considered view that the adjudicating authority has correctly credited the amount to be refunded to the Consumer Welfare Fund.

5.10 The appellant in their submission contended that the decision in the case of Pr. Commr of CC v Sachdev Overseas Fitness P. Ltd. and Nityasach Fitness P. Ltd- 2023 (6) TMI 161-CESTAT-Hyderabad relied upon by the Assistant Commissioner is that of a Single Member of the Tribunal, whereas the decisions referred to herein above are of the Hon'ble High Court and Division benches of the Tribunal. In this regard I have perused the decision in the case of Pr. Commr of CC v Sachdev Overseas Fitness P. ltd and Nityasach Fitness P. Ltd- [2023 (6) TMI 161-CESTAT-Hyderabad] and observe that this decision has been passed following the decision of Hon'ble Supreme Court, Hon'ble High Court, Division benches and three-member bench of the Hon'ble Tribunal. Further, the decision in the case of Flow Tech Power- [2006 (202) ELT 404 (Mad)] relied upon by the appellant has been distinguished in the case of BPL Ltd. – [2010 (259) E.L.T. 526 (Mad.)]. Thus, the contention raised by the appellant is not sustainable and hence, is rejected.

5.11 I have also perused the decision of Hon'ble Tribunal, Mumbai in the case of Mahendra Engg. & Chemical Products Ltd. Versus Commr. Of C. Ex., Pune – I [2019 (368) ELT 84 (Tri – Mumbai)] wherein the Hon'ble

Tribunal relying on the decision in case of Philips Electronics India Ltd. Vs Commissioner of Central Excise, Pune-I [2010 (257) E.L.T. 257 (Tri. - Mum.)] has categorically held that the only possible way to pass the bar of unjust enrichment is that the disputed tax/duty is not expensed off in the accounts, but booked as 'Receivables'. The relevant para is reproduced as under:

> **"9.** *The refunds under Indirect taxes have to cross the bar of 'Unjust Enrichment'. If the amount of Tax/Duty sought to be refunded has been recovered from the buyers, then the claimant is not entitled to refund. Even if [sic] such amount of tax, though not directly recovered from the client, but has been charged to expenses in the books of accounts, then also it is consistently held that the claimant has indirectly recovered the tax and hence failed to cross the bar of unjust enrichment. The only possible way to pass the bar of unjust enrichment is that the disputed tax/duty is not expensed off in the accounts, but booked as 'Receivables'....."*

5.12 I have also perused the decision of Hon'ble Tribunal, Mumbai in the case of Hindustan Petroleum Corporation Ltd. Versus Commr. of C. Ex., Mumbai - II [2015 (317) ELT 379 (Tri – Mumbai)], which was appealed to High Court and the same is admitted in 2016 (331) ELT A130 (Bombay High Court), wherein the Hon'ble Tribunal relying on the decision of Hon'ble Apex Court in Allied Photographic India Ltd. [2004 (166) E.L.T. 3 (S.C.)] held that if the amount claimed as refund has been treated as expenditure and not as "claims receivable", the appellant cannot be said to have passed the test of unjust enrichment. The relevant Para is reproduced as under:

> *"6.7. In the present case, it is an admitted position that the refund amount due was not reflected in the books of account of HPCL as claims receivable. This implies that the duty paid was shown as current expenditure and formed part of the Profit and Loss account of the assessee. Thus if the claimant himself has treated the refund amount due as expenditure and not as "claims receivable", the claimant cannot said to have passed the test of unjust enrichment. This is the settled position in law. The appellant has also contended that the appellant's goods are sold at prices determined by the Govt. and therefore, it should be presumed that in the absence of a change in price, it should be presumed that the appellant has borne the incidence. Similar argument has been negated by the Hon'ble Apex Court in Allied Photographic India Ltd. [2004 (166) E.L.T. 3(S.C.)], wherein it was held*

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". Therefore, in the present case, the appellant HPCL has failed to cross the bar of unjust enrichment also and hence they are not eligible to claim the refund."

5.13 I have also perused the decision of Hon'ble Tribunal, Ahmedabad in the case of M/s Eagle Corporation Pvt. Ltd. Versus CCE & ST – Rajkot ORDER No. A/11198 / 2018, which was appealed to Hon'ble High Court of Gujarat and the same is admitted and reported at[*2019 (367) E.L.T. A321 (Guj.)*], wherein the Hon'ble Tribunal relying on the decision of in the case of Hindustan Petroleum Corporation Ltd. Vs. CCE, Mumbai-II [2016-TIOL-658-CESTAT-MUM] held that once the refund amount has been shown as an expenditure in the books of accounts, accordingly it enters into the cost of the service, then inevitably the burden of tax is passed on to customers/others, and consequently hit by the principles of unjust enrichment. The relevant Para is reproduced as under:

"7. We find that similar issue has been considered by this Tribunal in identical set of circumstances/ arguments in M/s Rajdhani Travels & ors case (supra). Referring to and relying upon the judgement of the Tribunal in the case of Hindustan Petroleum Corporation Ltd. Vs. CCE, Mumbai-II 2016-TIOL-658-CESTAT-MUM, it has been concluded that once the refund amount has been shown as an expenditure in the books of accounts, accordingly it enters into the cost of the service, then inevitably the burden of tax is passed on to customers/others, and consequently hit by the principles of unjust enrichment.....

8. We do not find any reason to deviate from the aforesaid finding/conclusion of the Tribunal and we have no hesitation in applying the said principle to the facts and circumstances of the present case, which are similar in nature to the aforesaid case. In our considered view, the judgements referred to by the Ld. Chartered Accountant for the Appellant is not applicable to the facts and circumstances of the present case, inasmuch as, the service tax claimed as refund, in those cases, has not been shown/booked in the balance sheet as an expenditure and entered into the cost of the service/goods. In other words, the facts and circumstances involved in the said cases are on a different plank. Therefore, the refund amount of Rs.2,07,92,047/- is hit by the principle of unjust enrichment, and accordingly, the finding of the Ld. Commissioner(Appeals) on this issue is set aside."

5.14 I have also perused the decision in the case of Bajaj Auto Ltd Versus Commissioner of Central Excise, Pune – I [2017 (347) ELT 519 (Tri Mumbai) wherein the Hon'ble Tribunal has held that Unjust enrichment bar not applicable if amount shown in Balance Sheet as receivables from the Department. The relevant para is reproduced as under:

> **"8.** *It can be seen from the adjudication order and the impugned order that appellant is eligible for the refund as claimed by them. The only question that falls for our consideration is whether appellant has crossed the hurdle of unjust enrichment or not. It is undisputed that appellant had shown the amount claimed as refund as receivables in Balance Sheet, with a narration that this amount is due from Revenue Authorities. It is a common knowledge that when the amount is shown as receivables, it is not expensed out in the Balance Sheet, hence will not form a part of the cost of the final product manufactured. Since there is no dispute that the amount of refund sought was shown as receivables, appellant has been able to prove that he has not recovered the same their customer, we hold that the impugned order is unsustainable and liable to be set aside. The impugned order is set aside and appeal is allowed with consequential relief."*

Further, it is observed that similar view has been held in number of cases. Some of which is as under:

(i) Jindal Stainless Ltd Versus Commr. of Cus. & Service Tax, Visakhapatnam [2020 (371) ELT 784 (Tri Hyd)]

(ii) Coromandel International Ltd. Versus C.C. & S.T., Visakhapatnam [2019 (370) ELT 433 (Tri Hyd)]

(iii) Meenakshi Industries Versus Commr. of GST & C. EX., Puducherry [2019 (369) ELT 832 (Tri Chennai)]

(iv) Uniword Telecom Ltd Versus Commissioner of Central Excise, Noida [2017 (358) ELT 666 (Tri All)]

(v) Commissioner of Customs, Tuticorin Versus S. Mathivathani Traders [2016 (344) ELT 329 (Tri Chennai)]

(vi) Akasaka Electronics Ltd Versus Commissioner OF Customs, Mumbai [2016 (343) ELT 362 (Tri Mumbai)]

(vii) C.C.E., Chennai-III Versus Saralee Household& Bodycare India (P) Ltd [2007 (216) ELT 685 (Mad)

5.15 The appellant has further contended that the imported bunkers were sold at a price significantly lower than the import price/value on which the duty was assessed, and therefore, the Appellant has not been able to even recover the import price of the Bunkers, much less the duty

paid thereon. However, it is observed that the appellant has not submitted any documentary evidence indicating the import (cost) price and the actual selling price of the bunkers. In the absence of such critical information, the claim that the bunkers were sold below cost cannot be substantiated. No invoices, sale records, or supporting financial documents have been placed on record to demonstrate that the bunkers were sold at a loss. Therefore, the assertion made by the appellant remains an unsubstantiated and unverified statement, lacking evidential value, and cannot be accepted.

5.16 Further I have perused the Memorandum of agreement dated 14.05.2021 for sale of vessel to the appellant in respect of the appeal listed at Sr. No. 01 of the Table A. The relevant paras related to the sales value of vessel and bunker are reproduced as under:

"01 THE VESSEL M.T. FALCON LIGHT DISPLACEMENT OF 6694.80 M.T. EQUAL TO 6589.40 L.T. BUILT IN 1996, KOREA AT A LUMPSUM PRICE OF USD 4,844,530.00 (UNITED STATES DOLLARS FOUR MILLION EIGHT HUNDRED AND FOURTY FOUR THOUSAND FIVE HUNDRED THIRTY ONLY) INTEREST FREE, HEREINAFTER CALLED THE PURCHASE PRICE, DELIVERY UNDER OWN POWER CI.F. ALANG ANCHORAGE, INDIA.

06 THE VESSEL IS SOLD STRICTLY ON "AS IS" BASIS UNDER OWN POWER AS SUCH, SELLERS ARE NOT RESPONSIBLE FOR ANY ERRORS, OMISSIONS AND/OR OVERALL CONDITION OF THE VESSEL EXCEPT FOR ITEM STATED IN CLAUSE 17. THE VESSEL WITH EVERYTHING BELONGING TO HER SHALL BE DELIVERED AND TAKEN OVER AS SHE IS AT THE TIME OF DELIVERY INCLUDING REMAINING OF BUNKERS, AFTER WHICH THE SELLERS HAVE NO RESPONSIBILITY FOR POSSIBLE FAULTS OR DEFICIENCIES OF ANY DESCRIPTION. ANY ADDITIONAL GENERATORS, ANCHOR, SPARE TAIL SHAFT, SPARE PROPELLOR SPARE BLADE, STORES, SPARES OR ANY OTHER EMERGENCY DECK GENERATOR DECK COMPRESSORS THOUGH NOT MENTIONED IN THE MOA BUT FOUND ON BOARD THE VESSEL WILL BE BUYERS PROPERTY WITHOUT ANY EXTRA COST TO THEM.

17. THE VESSEL IS DESCRIBED AS FOLLOWS:

.....

ANY USED AND UNUSED SPARES, EMERGENCY GENERATORS/DECK - DIESEL GENERATORS/DECK COMPRESSORS / SHIPS MACHINERY OR PART THEREOF SPARE TAIL SHAFT/SPARE ANCHOR/SPARE PROPELLOR/BLADES & ALL TYPE OF BUNKER & ANY OIL IF AVAILABLE

ON BOARD AT THE TIME OF DELIVERY OF THE VESSEL IS PART OF THE VESSEL & THE VALUE OF THE SAME IS INCLUDED IN THE SALE PRICE OF THE VESSEL MENTIONED IN MOA"

5.17 I have also perused the commercial invoice No. 30/2021-22 dated 01.06.2021 for sale of vessel to the appellant in respect of the appeal listed at Sr. No. 01 of the Table A. The details of the invoice are as under:

"THE PURCHASE PRICE OF THE VESSEL IN WORDS AND FIGURES THAT IS USD 4,844,530.00 (UNITED STATES DOLLARS FOUR MILLION EIGHT HUNDRED AND FOURTY FOUR THOUSAND FIVE HUNDRED THIRTY ONLY) INTEREST FREE, CIF ALANG, PAYABLE AT 270 DAYS FROM DATE OF PHYSICAL DELIVERY OF THE SHIP AT ALANG ANCHORAGE AND FULL DESCRIPTION OF THE VESSEL AS PER MOA."

Upon perusal of the Memorandum of Agreement (MOA) dated 14.05.2021 and Commercial Invoice No. 30/2021-22 dated 01.06.2021 for the sale of the vessel to the appellant, it is evident that the vessel was sold for a lump sum CIF price of USD 4844530.00. Further, as per Clauses 6 of the MOA, the vessel is sold strictly on "as is" basis under own power as such, sellers are not responsible for any errors, omissions and/or overall condition of the vessel except for item stated in clause 17. The vessel with everything belonging to her shall be delivered and taken over as she is at the time of delivery including remaining of bunkers, after which the sellers have no responsibility for possible faults or deficiencies of any description. any additional generators, anchor, spare tail shaft, spare propellor spare blade, stores, spares or any other emergency deck generator deck compressors though not mentioned in the MOA but found on board the vessel will be buyers property without any extra cost to them. Accordingly, there is no separate invoice or price breakup for the bunkers in question, and the cost price of the bunkers cannot be independently ascertained. The value declared in the Bill of Entry for the bunker is not the actual transactional value but a notional value assigned solely for the purpose of duty calculation.

5.18 Further, in this regard, I refer to the decision of Hon'ble Supreme Court in the case of Union of India Vs Solar Pesticides Pvt. Ltd. [2000 (116) ELT 401 (SC)] wherein the Hon'ble Supreme Court had held that *"the expression "incidence of such duty" in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly"*. Further, I rely upon the decision of the Hon'ble Tribunal Delhi in the case of JCT Limited Versus Commissioner of Central Excise,

Chandigarh-II [2004 (163) ELT 467 (Tri Del)] affirmed in [2006 (202) ELT 773 (Punjab & Haryana High Court)], wherein the Hon'ble Tribunal had held that decrease in the price of the goods sold by them later on also could not lead to a logical conclusion that they took upon themselves the liability to pay full duty and not to charge from the customers. The decrease in price may have been affected by them on account of various factors and commercial reason. The relevant Para is reproduced hereunder:

> **"7.** *In the case in hand, in our view, the appellants have failed to rebut this statutory presumption by adducing any convincing unimpeachable evidence. The fact that they showed composite price in the invoices does not lead to irresistible conclusion that they had not passed on the incidence of duty to the buyers. These invoices were prepared by them. It is difficult to assume that composite price calculated and recorded by them in the invoices did not include the duty element. Similarly, keeping the price stable even after payment of duty would not lead an irresistible conclusion that they themselves bore the duty burden. This, they may have done by forgoing a part of their profit, in order to face the competitive atmosphere in the market for the sale of their goods. Likewise, the decrease in the price by them later on also could not lead to a logical conclusion that they took upon themselves the liability to pay full excise duty and not to charge from the customers. The decrease in price may have been affected by them on account of various factors and commercial reason. There may be the decrease in the price of the inputs, the cost of production etc. The commercial reason may have also forced them to forgo their profit. But to say that they sold goods in the market at loss after decreasing the prices, would not be legally justiciable also."*

5.19 I also rely upon the decision in the case of Ispat Industries Ltd Vs Commissioner of Customs (Prev), Mumbai [2015-TIOL-614-CESTAT-MUM], wherein the Member (J) held that as the selling price was less than the cost of production therefore passing of duty on the buyer does not arise and therefore the appellant have passed the bar of unjust enrichment. However, the perspective of the Technical Member was contrary to that of the Judicial Member. In view of the difference of opinion between the two Members, the Third Member had held that:

> *"2.6 Therefore, the question for consideration is whether the appellant has crossed the bar of unjust enrichment in this case. The only evidence led by the appellant in this regard is the Cost Accountant/Chartered Accountant certificates. I have perused the certificate dated 25-5-2009 given by the Cost Accountant M/s Dinesh Jain & Co. The said certificate merely states that based on the audited financial statements of Ispat Industries for the respective years contained in the attached statement and further based on the information and explanations furnished to us by the Company, we wish to confirm that the incidence of customs duty has not been passed on by Ispat Industries Ltd. to any other person. In the attached statement the particulars furnished for the various years are - a) operating income from sale of steel products; b) operating expenditure;*

c) operating profit/loss; and d) other income. There is no analysis whatsoever about the cost of production of the steel products sold, the factors that constituted the cost of production, whether the duty incidence on the raw materials was considered while taking the cost of production and other relevant factors. In the absence of any such analysis, the said certificate has no evidentiary value whatsoever and at best, it can be taken as merely inferential. The issue whether duty incidence has been passed on or not is a question of fact and such fact has to be established based on the records maintained as per the accounting standards and the details given therein. If the duty incidence had not been passed on, the same should have been recorded as amounts due from the customs department in the receivables account. It is an admitted position that the records maintained did not reflect the duty paid on the raw materials as the amount due/receivable from the department. In the absence of such an evidence, an inference drawn by the Cost Accountant cannot be said to be reasonable rebuttal of the statutory presumption of passing on of the duty incidence. Whenever a question of fact is to be proved, the same has to be established by following the process known to law. I do not find any such establishment of fact by the appellant in the present case. This Tribunal in a number of decisions has held that Chartered Accountant's certificates is not a sufficient evidence to discharge the burden cast upon the appellants to prove that incidence of duty has not been passed on to the customers. The decision of the Tribunal in Hanil Era Textiles Ltd. [2008 (225) ELT 117] *refers. Similarly, in the case of* JCT Limited [2004 (163) ELT 467 (Tri-Del)] *it was held that Chartered Accountant's Certificate is not sufficient to rebut the statutory presumption of duty incidence having been passed on to the buyers. The said decision was also affirmed by the Hon'ble Punjab & Haryana High Court in the same case reported in [2006 (202) ELT 773 (P&H)]. In view of the aforesaid decisions, I am of the considered view that the appellant has not discharged the statutory obligation cast on him of rebutting the presumption of unjust enrichment in any satisfactory manner acceptable to law. In this view of the matter, I agree with Hon'ble Member (Technical) that the appellant has not crossed the bar of unjust enrichment and therefore, not eligible for the refund."*

5.20 I also rely upon the decision in the case of Commissioner of C. Ex. & Cus., Nashik Versus Raymond Ltd [2015 (316) E.L.T. 129 (Tri. - Mumbai)] wherein the Hon'ble Tribunal relying upon the decision in the case of Mafatlal Industries Ltd. v. Union of India [1997 (89) E.L.T. 247 (S.C.)] held that merely because the respondent sells the goods below cost, it does not mean that the incidence of duty has been passed on and the amount claimed as refund is not shown as 'claims receivable' from the department implying that the incidence has been passed on to the customer. The relevant Para of the judgment is reproduced as under:

***"5.2** We further notice that except for the costing statement of the product which indicates that they have sold the final products below cost, there is no evidence to indicate that the incidence of duty has been borne by the respondent. In the statutory books of accounts and the*

balance sheets maintained by the respondent, the amount claimed as refund is not shown as 'claims receivable' from the department. The respondent has clearly admitted to the fact that the said amount of refund claimed was treated as 'expenditure' and taken to the profit & loss account. If the amount is taken to the profit and loss account, it signifies that the respondent has adjusted the amount in their income while arriving at the net profits thereby implying that the incidence has been passed on to third parties. It is a settled position in law that all claims of refund under Section 11B of the Act has to be granted after satisfying that the bar of unjust enrichment has been crossed and the incidence has been borne by the respondent themselves. Merely because the respondent sells the goods below cost, it does not mean that the incidence of duty has been passed on. Para 91 of the decision of the Apex Court in Mafatlal Industries Ltd. case (supra) is reproduced below, which would clarify the position.

"91. It is next contended that in a competitive atmosphere or for other commercial reasons, it may happen that the manufacturer is obliged to sell his goods at less than its proper price. The suggestion is that the manufacturer may have to forego not only his profit but also part of excise duty and that in such a case levy and collection of full excise duty would cease to be a duty of excise; it will become a tax on income or on business. We are unable to appreciate this argument. Ordinarily, no manufacturer will sell his products at less than the cost-price plus duty: He cannot survive in business if he does so. Only in case of distress sales, such a thing is understandable but distress sales are not a 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 exigible 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 that the manufacturer is not passing on the duty. Nor does it follow therefrom that the manufacturer is absorbing the duty himself. The manner of preparing the invoice is not conclusive. While we cannot visualise all situations, the fact remains that, generally speaking, every manufacturer will sell his goods at something above the cost-price plus duty. There may be a loss-making concern but the loss occurs not because of the levy of the excise duty - which is uniformly levied on all manufacturers of similar goods - but for other reasons. No manufacturer can say with any reasonableness that he cannot survive in business unless he collects the duty from both ends. The requirements complained of (prescribed by Section 11B) is thus beyond, reproach - and so are Sections 12A and 12B. All that Section 12A requires is that 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 relevant documents the amount of such duty which will form part of the price at which the goods are to be sold, while Section 12B raises a presumption of law that until the contrary is proved, every person who has paid the duty of excise on any goods shall be deemed to have passed on the full incidence of such duty to the buyer of such goods. Since the presumption created by Section 12B is a rebuttable presumption of law - and not a conclusive presumption - there is no basis for impugning its validity on the ground of procedural

unreasonableness or otherwise. This presumption is consistent with the general pattern of commercial life. It indeed gives effect to the very essence of an indirect tax like the excise duty/customs duty. In this connection, it is repeatedly pointed out by the learned Counsel for the petitioners-appellants that the levy of duty is upon the manufacturer/assessee and that he cannot disclaim his liability on the ground that he has not passed on the duty. This is undoubtedly true but this again does not affect the validity of Section 12A or 12B. A manufacturer who has not passed on the duty can always prove that fact and if it is found that duty was not leviable on the transaction, he will get back the duty paid. Ordinarily speaking, no manufacturer would take the risk of not passing on the burden of duty. It would not be an exaggeration to say that whenever a manufacturer entertains a doubt, he would pass on the duty, rather than not passing it on. It must be remembered that manufacturer as a class are knowledgeable persons and more often than not have the benefit of legal advice. And until about 1992, at any rate, Indian market was by and large a sellers' market."

In view of the above, I do not find merit in the appellant's contention that, since the imported bunkers were allegedly sold at a price significantly lower than their import value (on which duty was assessed), they were unable to recover even the cost of import and, therefore, the incidence of duty was not passed on to the customer. The appellant has not submitted any purchase invoice for the bunker nor provided sales invoices or other supporting documents along with the appeal to substantiate this claim. In the absence of such evidence, the contention remains unverified and is not legally sustainable. Accordingly, the same is rejected.

5.21 The appellant has further contended that the amount excess deposited during the provisional assessment/pendency of a classification dispute is a revenue deposit, and not a final payment of duty. The refund of such revenue deposits is not governed by Section 27 of the Customs Act, 1962, and hence refund cannot be denied on the ground of applicability of doctrine of unjust enrichment. Further, the excess amount arising out of such final assessment should be treated as payments made under mistake of law and such amounts do not retain the character of duty, and the bar of unjust enrichment under Section 27 would not apply to such deposits. It is observed that the appellant have themselves filed refund under Section 27 of the Customs act, 1962 and therefore all the provisions of Section 27 will apply including the doctrine of unjust enrichment. In this regard I rely upon the decision of Hon'ble Supreme Court in the case of SAHAKARI KHAND UDYOG MANDAL LTD VERSUS COMMISSIONER OF C. EX. & CUS. [2005 (181) E.L.T. 328 (S.C.)] wherein it was held that the doctrine of

'unjust enrichment' is based on equity and irrespective of applicability of Section 11B of the Act, which is pari materia to the Section 27 of the Customs Act, 1962, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. It was further held that 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 and he has not passed on the burden on consumers. The relevant paras are reproduced as under:

"32.The doctrine of 'unjust enrichment', therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of 'unjust enrichment' arises where retention of a benefit is considered contrary to justice or against equity.

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."

5.22 I also rely upon the decision of the Hon'ble Tribunal, Mumbai in the case of LORENZO BESTONSO VERSUS COMMISSIONER OF CUSTOMS, JNCH [2017 (347) E.L.T. 104 (Tri. - Mumbai)], wherein the Honble Tribunal relying upon the decision of Hon'ble Supreme Court in the case of SAHAKARI KHAND UDYOG MANDAL LTD VERSUS COMMISSIONER OF C. EX. & CUS [2005 (181) E.L.T. 328 (S.C.)], held that once the amount was paid as duty irrespective whether it was payable or otherwise, refund of the same has to compulsorily undergo the test of unjust enrichment as provided under Section 27 of Customs Act, 1962. The relevant Para is reproduced as under:

6. *As regard the admissibility of the refund, as of now there is no dispute as the adjudicating authority has sanctioned the refund which has not been challenged by the department, therefore, as regard the sanction of the refund, it attained finality. Now only issue to be decided whether the provision of unjust enrichment is*

applicable or otherwise. The appellant has vehemently argued that amount for which refund is sought for was paid during the investigation therefore, the same is pre-deposit hence the provisions of unjust enrichment are not applicable. Hon'ble Supreme Court in case of Sahakari Khand Udyog (supra) held that even if Section 11B is not applicable unjust enrichment is applicable for reason that person cannot be allowed to retain undue benefit. Relevant para is reproduced below :

> *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.*

It is also observed that in the present case appellant has paid duty, due to dispute in applicability of the notification therefore, it cannot be said that pre-deposit is not duty therefore, unjust enrichment is not applicable. Once the amount was paid as duty irrespective whether it was payable or otherwise, refund of the same has to compulsorily undergo the test of unjust enrichment as provided under Section 27 of Customs Act, 1962. We are, therefore, of the view that in the present case refund is required to be tested under the provisions of unjust enrichment as provided under Section 27.

5.23 I also rely upon the decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India — [1997 (89) E.L.T. 247 (S.C.)] wherein it was held that the doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The relevant para is reproduced as under:

"99(iii) claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. 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 above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutory doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

5.24 Further in respect of the contention of the appellant that the excess amount arising out of final assessment should be treated as mistake of lawand such amounts do not retain the character of duty, and the bar of unjust enrichment under Section 27 would not apply to such deposits. In this regard as discussed in Paras above, I am of the considered view that once the amount was paid as duty irrespective whether it was payable or otherwise, refund of the same has to compulsorily undergo the test of unjust enrichment as provided under Section 27 of Customs Act, 1962. Thus the amount in the present case was paid as duty and hence it has to cross the bar of unjust

enrichment. Further, it is observed that the excess duty was paid on account of dispute (lis) between the appellant and the department regarding classification. This dispute was ultimately settled in favour of the appellant by the Hon'ble Tribunal, Ahmedabad, and the decision was subsequently upheld by the Hon'ble Supreme Court. Therefore, it cannot be contended that the duty was paid under a mistake of law, as the payment arose from an ongoing legal dispute and not from any inadvertent or erroneous understanding of the legal provisions. Further I rely upon the decision of Hon'ble Kerala High Court in the case of SOUTHERN SURFACE FINISHERS VERSUS ASSTT. COMMR. OF C. EX., MUVATTUPUZHA [2019 (28) G.S.T.L. 202 (Ker.)], wherein in on the issue whether duty paid under a mistake of law has to be refunded, in accordance with the Central Excise Act, 1944, specifically under Section 11B thereof. The Hon'ble High Court of Kerala relying on the decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India — [1997 (89) E.L.T. 247 (S.C.)], held that payment under a mistake of law does not create an independent right to refund outside the statutory framework. Further it was held that all refund claims, regardless of the reason (including mistake of law), must be filed within one year from the relevant date as per Section 11B or Section 27 of the Customs Act, 1962. Further, in respect of unjust enrichment it was held that refund is not due if the tax burden has been passed on to the customer and even if the payment was a mistake, refund cannot be granted unless the assessee proves that the incidence of duty/tax was not passed on. The relevant paras of the decision are reproduced as under:

4. The facts in WP (C) No. 18126/2015 are also similar [2015 (39) S.T.R. 706 (Ker.). The petitioner, a Company engaged in providing financial services; paid service tax on services rendered to a recipient located outside India, which again was exempted. A similar application was made under Section 11B of the Central Excise Act, which was rejected for reason of the limitation period having expired. The Learned Single Judge noticed the decision in (1997) 5 SCC 536 = 1997 (89) E.L.T. 247 (S.C.) [Mafatlal Industries Limited & Others v. Union of India & Others]. Three classifications made in the separate judgment of A.M. Ahamadi, C.J, of (i) an unconstitutional levy, (ii) illegal levy and (iii) mistake of law are as follows:

***Class I: "Unconstitutional levy"** - where claims for refund are founded on the ground that the provision of the Excise Act under which the tax was levied is unconstitutional.*

xxx xxx xxx

Class II : "Illegal levy" *- where claims for refund are founded on the ground that there is misinterpretation/ misapplication/ erroneous interpretation of the Excise Act and the Rules framed thereunder.*

xxx xxx xxx

Class III : "Mistake of Law" *- where claims for refund are initiated on the basis of a decision rendered in favour of another assessee holding the levy to be : (1) unconstitutional; or (2) without inherent jurisdiction.*

5. *The Learned Single Judge found that payment of tax made by the assessee with respect to an exempted service, would not fall under any of the categories. The Learned Single Judge found that the levy was purely on account of "(on) mistake of fact in understanding the law" (sic). The reference order indicates that another Learned Single Judge did not agree with the interpretation so placed on facts and the law applicable as had been elaborated upon in Mafatlal Industries Limited (supra).*

6. *We deem it appropriate that Mafatlal Industries Limited (supra) be understood first. The questions framed as available from the majority judgment authored by B.P. Jeevan Reddy, J. were as follows:*

"76. The first question that has to be answered herein is whether Kanhaiya Lal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act; (2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or reopening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable, and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law."

In finding the answer to the first question, the following extracts are necessary. We first extract the finding with respect to sub-section (3) of Section 11B as it now exists :

77. ...It started with a non obstante clause; it took in every kind of refund and every claim for refund and it expressly barred the jurisdiction of courts in respect of such claim. Sub-section (3) of S. 11B, as it now stands, it to the same effect - indeed, more comprehensive and all encompassing. It says,

"(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 in any law for the time being in force, no refund shall be made except as provided in sub-section".

The language could not have been more specific and emphatic. The exclusivity of the provision relating to refund is not only express and unambiguous but is in addition to the general bar arising from the fact that the Act creates new rights and liabilities and also provides forums and procedures for ascertaining and adjudicating those rights and liabilities and all other incidental and ancillary matters, as will be pointed out presently. This is a bar upon a bar - an aspect emphasised in Para 14, and has to be respected so long as it stands. The validity of these provision has never been seriously doubted. Even though in certain writ petitions now before us, validity of the 1991 (Amendment) Act including the amended S. 11B is questioned, no specific reasons have been assigned why a provision of the nature of sub-section (3) of S. 11B (amended) is unconstitutional. Applying the propositions enunciated by a seven Judge Bench of this Court in Kamala Mills, it must be held that S. 11B (both before and after amendments valid and constitutional. In Kamala Mills, this Court upheld the constitutional validity of S. 20 of the Bombay Sales Tax Act (set out hereinbefore) on the ground that the Bombay Act contained adequate provisions for refund, for appeal, revision, rectification of mistake and for condonation for delay in filing appeal/revision. The Court pointed out that had the Bombay Act not provided these remedies and yet barred the resort to civil court, the constitutionality of S. 20 may have been in serious doubt, but since it does provide such remedies, its validity was beyond challenge, To repeat - and it is necessary to do so - so long as S. 11B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., S. 11A and 11B and its allied provisions. Both provisions contain a uniform rule of limitation, viz., six months, with an exception in each case. S.11A and 11B are complimentary to each other. To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz., where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available - except to the limited extent pointed out in Kamala Mills. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The jurisdiction of a civil Court is expressly barred - vide sub-section (5) of S.11B, prior to its amendment in 1991, and sub-section (3) of S.11B, as amended in 1991. ...

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(77) ...Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Art.265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Art.265. In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provisions, it is not permissible to resort to S.72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking S.72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., R.11 and S.11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in R.11/S.11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with R.11 or S.11B. as the case may be. in the forums provided by the Act. No suit can be filed for refund of duty invoking S.72 of the Contract Act. So far as the jurisdiction of the High Court under Art.226 - or for that matter, the jurisdiction for this Court under Art.32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Art.226/Art.32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

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79. We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quite. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/ revision, fails and then keeps quiet (Situation would be the same where he fights upto High Court and failing therein, he keeps quiet.). The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of misconstruction, misapplication or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case of another person has made him aware of the mistake of law and, therefore, he is

entitled to refund of the duty paid by him? Can he invoke S.72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading S.72 of the Contract Act along with S.17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law.

With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long at that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. ...

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(79) ...Once this is so, it is ununderstandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for reopening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of Central Excise Act also constitute "law" within the context of Bombay Sales tax Act and the meaning of Art.265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article. In short, no claim for refund is permissible except under and in accordance with R.11 and S.11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. ...

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(79) ...We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with R.11/S.11B and under no other provision and in no other forum.

His Lordship then summarized the majority view as follows in paragraph 108 of the judgment.

108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Art. 226 and of this Court under Art.32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of S.11B. This is for the reason that the power under Art.226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including S.11B of Central Excises and Salt Act and S.27 of the Customs Act do constitute "law" within the meaning of Art.265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. S.11B of the Central Excises and Salt Act and S.27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and give effect to. S.72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal - which is not a departmental organ - but to this Court, which is a civil court.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : where a

person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it. Such a claim is maintainable both by virtue of the declaration contained in Art.265 of the Constitution of India and also by virtue of S.72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of sub-section (1) of S.17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. It other words, a claim of this nature is not contemplated by the said enactments and is outside of their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. 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 above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition. The doctrine of unjust enrichment is a just and salutory doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to' the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to

prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. S.72 of the Contract Act, or for that matter S.17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

(v) Art.265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Art.38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner - plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) S.72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

(viii) The decision of this Court in Income Tax Officer Benaras v. Kanhaiyalal Mukundlal Saraf [1959] SCR 1350 must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiyalal have also been wrongly decided to the above extent. This declaration - or the law laid down in Propositions (i) to (vii) above - shall not however entitle the State to recover to taxes/duties already refunded and in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

(x) By virtue of sub-section (3) to S.11B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of S 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Art.226 of the Constitution - or of this Court under Art. 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of S. 11B. This is for the reason that the power under Art.226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Art.226 is conceived to serve the ends of law and not to transgress them.

(xi) S. 11B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners, 1992 (4) SCC 389 and Union of India v. I.T.C., 1993 Suppl. (4) SCC 326 have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be reopened and / or governed by S.11B(3) (as amended by the 1991 (Amendment) Act). This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) S.11B does provide for the purchase making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that S.11B is a device to retain the illegally collected taxes by the State. This is equally true of S.27 of the Customs Act, 1962.

8. *B.L. Hansaria, J. concurred with K.S. Paripoornan, J., Suhas C. Sen, J. wrote a dissenting judgment, holding the amended provisions to be a mere device and a cloak to confiscate the property of the taxpayer; but concurred with K.S. Paripoornan, J. on the question of an action by way of suit or writ petition being maintainable. Ahmadi C.J., though concurring with B.P. Jeevan Reddy, J. expressed a different view on two aspects. In cases of the levy being held to be unconstitutional or void for lack of inherent jurisdiction, the claim of refund as tax paid under mistake of law, was held to be outside the ambit of the Excise Act and the limitation applicable was held to be that specified under Section 17(1)(c) of the Limitation Act. The other aspect on which dissent is expressed, was with respect to an assessee's challenge to the constitutionality having failed and later, the view being reversed. In*

such cases Ahmadi, C.J., was of the opinion that the assessee's remedy cannot be held to be foreclosed and he should be left to legal remedies of review etc. of the earlier order.

9. *The Learned Single Judge who referred the matter, rightly noticed the different views expressed, which however on the question of mistake of law and the manner in which refund has to be applied for; we have to concede to the majority view of five Learned Judges. From the above extracts, it has to be noticed that Justice B.P. Jeevan Reddy in his majority judgment; concurred to by a majority of five out of nine, held the refund to be possible only under the provisions of the Act. We need only refer to the category of payment under a mistake of law. We do not agree with the Learned Single Judge that the facts of the case discussed in WP (C) No. 18126/2015 do not fall under any of the categories. A payment made on a mistaken understanding of law finding the levy to be exigible for the services rendered, would be a levy made or paid under mistake of law and not one categorized as an unconstitutional levy or illegal levy. We cannot agree with the elastic interpretation made by the Learned Single Judge that the case would be one on account of mistake of fact in understanding the law. The mistake committed by the assessee may be one on law or on facts; the remedy would be only under the statute. Here we are not concerned with a case as specifically noticed in Mafatlal Industries Limited (supra) of an assessee trying to take advantage of a verdict in another case. Here the assessee had paid the tax without demur and later realised that actually there was no levy under the provisions of the statute. However, that again is a mistake of law as understood by the assessee and for refund, the assessee has to avail the remedy under the provisions of the statute and concede to the limitation provided therein.*

10. *B.P. Jeevan Reddy, J. after elaborate discussion, finds the Excise Act to be a self contained enactment with provisions for collecting taxes which are due according to law and also for refunding the taxes collected contrary to law, which has to be under Sections 11A and 11B. Both provisions were found to contain a uniform rule of limitation, namely six months at that time and then one year and now two years. Relying on the decision in AIR 1965 SC 1942 [Kamala Mills Ltd. v. State of Bombay], it was held that where a statute creates "a special right or a liability and also provides the procedure for the determination of the right or liability, by the Tribunals constituted in that behalf and provides further that all questions above the said right and liability shall be determined by the Tribunal so constituted, the resort to Civil Court is not available, except to the limited extent pointed out in Kamala Mills Ltd. (supra). Central Excise Act having provided specifically for refund, which provision also expressly declared that no refund shall be made except in accordance therewith, the jurisdiction of the Civil Court was found to be expressly barred. It was held that once the constitutionality of the provisions of the Act, including the provisions relating to refund is beyond question, then any and every ground, including violation of principles of natural justice and infraction of fundamental principles of judicial procedure has to be urged under the provisions in the Act, obviating the necessity of a suit or a writ petition in matters relating to a refund. The only exception provided was when there was a declaration of unconstitutionality of the provisions of the*

Act, in which event, a refund claimed could be otherwise than under Section 11B. We, specifically, emphasise the underlined portion in paragraph 79 of the cited decision as extracted hereinabove. The earlier view that the limitation was three years from the date of discovery of mistake of law was specifically differed from, since the refund had to be under the remedy as provided in the statute, which prescribed a limitation.

11. *At the risk of repetition, here, the assessees paid up the tax and later realised that they are entitled to exemption. Going by the majority judgment, in Mafatlal Industries Limited (supra), we have to find such cases being subjected to the rigour of limitation as provided under Section 11B. The limitation, in the relevant period, being one year, there could be no refund application maintained after that period. We, hence, find the order impugned in the writ petitions to be proper and we dismiss the writ petitions. We hold that the judgment dated 6-7-2015 in WP (C) No. 18126/2015 [2015 (39) S.T.R. 706 (Ker.)] [M/s. Geojit BNP Paribas Financial Services Ltd. v. Commissioner of Central Excise] is not good law, going by the binding precedent in Mafatlal Industries Limited (supra). The writ petitions would stand dismissed answering the reference in favour of the Revenue and against the assessees. No costs.*

5.25 Further I also rely upon the decision of Hon'ble Tribunal, Bangalore, in the case of KIRTHI CONSTRUCTIONS VERSUS COMMISSIONER OF C. EX. & S.T., MANGALORE [2016 (43) S.T.R. 301 (Tri. - Bang.)], wherein the Tribunal, Bangalore, relying on the decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India — [1997 (89) E.L.T. 247 (S.C.)], held that all claims of refund except levies held to be unconstitutional are to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 and subject to the claimant establishing that the burden of duty has not been passed on to the third party. The relevant paras are reproduced as under:

"6. *The appellant has claimed that as they paid service tax by mistake of law they deserve to be granted the refund of the said service tax. This order is holding that such activities/transactions and the services provided by the appellant are not liable for payment of service tax; the claim of refund, therefore, is required to be examined as per the provisions of law of service tax on the subject of refund. Here the appellant argues that as the tax has been paid mistakenly, time-bar limitation is not applicable. Learned AR for the Revenue has vehemently argued that provisions of law concerning the sanction of refund under Service Tax law would be applicable and he has cited in support various decisions of Hon'ble Supreme Court as well as CESTAT, Bangalore. It is made clear that when the refund claim is to be examined, it would be necessary for the claim to pass all the tests including the time limitation of one year as well as satisfying the criterion that the liability of service tax was not passed on to the buyers i.e. passing the test of no gain by 'unjust enrichment'. The*

Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. (supra) has clearly held that all claims of refund except levies held to be unconstitutional are to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 and subject to the claimant establishing that the burden of duty has not been passed on to the third party. Hon'ble Supreme Court in this case has inter alia pronounced as follows :

70. Re : (II) :..... All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith.

7. *From the above it is clear that the service in question is not liable for payment of service tax and the appellant's claim for refund would deserve examination and consideration as per the provisions of law as applicable during the relevant period. It is made clear that service is definitely under the exclusion category and not liabile for payment of service tax. This appeal is allowed by way of remand to the original adjudicating authority for examination and consideration of refund claim under the provisions of refund claims wherein the adjudicating authority will also examine the claim under both the criteria i.e. time bar as well as 'unjust enrichment'. It is also directed that the original adjudicating authority decide the subject claim within three months of receipt of this order."*

5.26 Further, I have carefully gone through all the case laws submitted by the appellant in written submission earlier during personal hearing and find that facts and circumstances in all the case are not at par with the present case and therefore distinguishable. It is further observed that decision in the case CCE v Flow Tech Power- [2006 (202) ELT 404 (Mad)] relied upon by the appellant is in respect of composite price fixed by the Ministry of Agriculture and the same has been distinguished in the case of BPL Ltd. – [2010 (259) E.L.T. 526 (Mad.)]. Similarly, in the case Elantas Beck India Ltd v CCE – [2016 (339) ELT 325 (Tri Mumbai)] deals with the issue of Excise Duty paid on the intermediate product on the insistence of department. Further, in the case of Birla Corporation Ltd v CCE – [2008 (231) ELT 482 (Tri Mumbai)] and Shyam Coach Engineers v [CCE – 2024 (1) TMI 245] refund was allowed only on the basis of Chartered Accountant Certificate that the incidence of duty has not been passed on to the customers. It is further observed that the Hon'ble CESTAT, Ahmedabad in the in the case of Varsha Plastics Pvt.

Ltd. Vs Commissioner of Customs, Kandla [2019 (368) ELT 996 (Tri-Ahmd)] has held similar view that the CA Certificate is not a concluding document that shows the incidence of duty was not passed on but is based on the books of account. In absence of any books of account for the relevant period showing the amount claimed as refund as receivable, the CA Certificate cannot alone help the appellant to overcome the aspect of unjust enrichment as held above in Para 5.6. Thus, the case laws relied upon by the appellant are not applicable to the present case.

5.27 Further the Hon'ble Supreme Court in the case of Sahakari Khand Udyog Mandali Ltd Vs Commissioner of C. Ex. & Cus [2005 (181) ELT 328 (SC)] has held that before claiming a relief of refund, it is necessary for the appellant to show that he has paid the amount for which relief is sought and he has not passed on the burden on consumers. Further, the Hon'ble Supreme Court in the case of Union of India Vs Solar Pesticides Pvt. Ltd. [2000 (116) ELT 401 (SC)] has held that *"the expression "incidence of such duty" in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly"*. The burden of proof is on the appellant to establish that they had not passed on the incidence of duty paid. Therefore, until the contrary is proved, there is a presumption provided under the statute that the duty has been passed on to the buyer. Therefore, the appellant in the present case has failed to cross the bar of unjust enrichment.

5.28 From the above, I am of the considered view that had the incidence of duty not been passed on, the same ought to have been reflected in the appellant's Balance Sheet under 'Receivables' as amounts due from the Customs Department. It is well established that the burden of proof lies on the appellant to demonstrate that the incidence of duty has not been passed on to the buyer or end customer. In this regard, the Chartered Accountant's certificate, though not placed on record, is not sufficient by itself to discharge this burden. Such a certificate is merely corroborative in nature and must be supported by primary evidence such as accounting records, sale invoices, and other relevant financial documents. Further, the subsequent reduction in the sale price of the goods by the appellant does not, by itself, establish that the appellant absorbed the duty burden. A mere price reduction does not lead to the logical conclusion that the appellant bore the duty liability without passing it on to the

customer. Moreover, once the amount has been paid as duty whether correctly or erroneously, including on account of a mistake of law the claim for refund is subject to the mandatory test of unjust enrichment under Section 27 of the Customs Act, 1962. In view of the failure to provide sufficient evidence to overcome the bar of unjust enrichment, I am of the considered opinion that the appellant has not made out a case for refund. Accordingly, the appeals filed by the appellant are liable to be rejected.

6. In view of the above, I do not find any infirmity with the impugned orders and the same is upheld. The appeals filed by the appellant are dismissed.

(AMIT GUPTA)
COMMISSIONER (APPEALS)
CUSTOMS, AHMEDABAD.

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1. The Chief Commissioner of Customs Gujarat, Customs House, Ahmedabad.
2. The Commissioner of Customs, Customs (Prev), Jamnagar.
3. The Deputy/Assistant Commissioner of Customs, Customs Division, Bhavnagar.
4. Guard File