Union Of India And Others vs I.T.C. Limited on 16 July, 1993

Equivalent citations: AIR1993SC2135, 1995(50)ECC44, 1993ECR5(SC), 1993(67)ELT3(SC), JT1993(4)SC250, 1993(3)SCALE169, 1993SUPP(4)SCC326, [1993]SUPP1SCR272, AIR 1993 SUPREME COURT 2135, 1993 AIR SCW 2523, (1993) 4 JT 250 (SC), 1993 (4) SCC(SUPP) 326, 1993 SCC (SUPP) 4 326, (1993) 67 ELT 3, (1993) 48 ECR 5

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Bench: Kuldip Singh

ORDER

DR. A.S. Anand, J.

1. This appeal, by special leave, is directed against the judgment and order of the High Court of Delhi in Civil Writ No. 971 of 1978 dated 12.4.1982.

2. The respondent, carries on the business of manufacturing and selling cigarettes and smoking tobacco at its five cigarette factories including one at Saharanpur in the State of U.P. The respondent sells its products to whole-sale buyers or dealers who make further sales to secondary whole sellers from where the products reach the retailers and the consumers. During the period September 1, 1970, to February 28, 1973, the respondents followed the self removal procedure laid down in Chapter VII A of the Central Excise Rules on payment of excise duty, as the manufacture of cigarettes affects excise duty under the Central Excise & Salt Act, 1944 (hereinafter the Act). The case of the respondent in the writ petition was that under a mistake of law regarding the true interpretation of Section 4(a) of the Act, it cleared its products but paid excess excise duty under the impression that the prices charged by the whole sale dealers to the secondary whole sellers would form the correct basis of assessment and not the price at which goods were sold to whole sale dealers. Consequent upon the judgment of this Court in the case of A.K. Roy v. Voltas Limited , wherein it was held that under Section 4(a) of the Act, the value for the purpose of assessment is required to be determined on the basis of the price at which the manufacturer sells the products to the whole sale dealers and not the price at which the whole sale dealers further make a sale of the product to secondary whole sellers, the respondents filed five applications before the appropriate authority under the Act seeking refund of the excess excise duty paid under mistake of law. Two applications pertained to the period 1.9.70 to 28.5.71 and 1.6.71 to 19.2.72 involving refund of Rs. 23,68,686.85 and 26,21,356.16 respectively, The other three applications, related to the period 20.2.72 to 28.2.73. The Assistant Collector of Central Excise by his order dated 9.10.73 rejected all

the five applications. The respondent preferred appeals before the Collector of Central Excise (Appeals). The Appellate Collector by an order dated 30.12.75, allowed the appeals arising out of the three refund applications relating to the period 20.2.72 to 28.2.73, and set aside the orders passed by the Assistant Collector and ordered consequential relief in favour of the respondent by directing the refund of the excess excise duty paid. The appeals pertaining to the refund applications for Rs. 23,68,686.85 and Rs. 26,21,356.16 for the period 1.9.70 to 28.5.71 and 1.6.71 to 19.2.72 respectively were however, rejected by the Collector (Appeals) on the ground that the same were barred by the time. The respondents did not take the matter further under the state but instead filed W.P. No. 971 of 1976 seeking quashing of the order of the Collector of Central Excise (Appeals) dated 30.12.75 and also sought a direction by way of mandamus for refund of the sum of Rs. 49,90,043.01 with interest @ 12% per annum thereon. The Division Bench of the High Court came to the conclusion that on account of a mistake of law, excess excise duty had been paid by the respondent and received by the Department. The Bench held that there was a legal obligation on the, part of the Government to return the excess excise duty received/recovered by it since the same was not payable by the party. Relaying upon there earlier judgment in Chemicals and Plastics and Anr. v. Union of India and Ors. CWP No. 147/79 decided on 10.7.79, the Division Bench allowed the writ petition filed by the respondents herein and held that the respondent could not be non-suited on the ground of limitation. The Court set aside the order of the Collector Central Excise (Appeals) and directed the Department to refund the sum of Rs. 49,90,043.01 to the respondent. The Bench observed:

> The duty of excise can be which is levied in accordance with the act and any money which is realised in excess of what is permissible in law would be a realisation made outside the provisions of the Act. The payment of the excess excise duty which has been made by the petitioners for the period September 1, 1970 to February 19, 1972 cannot be legally termed as payment of excise duty authorised by law as the authorities under the Act themselves did not treat the excess duty in identical circumstances paid for the subsequent period from February 20,1972 to February 28,1973, as authorised by law. The excess excise duty was not payable by the petitioners under the Act and there is a corresponding legal right in the petitioners to recover it. This right cannot be defeated by a mere limitation in the Act or the Rules when the collection is without the authority of law.

3. The Department was directed to refund to the respondent the sum of Rs. 23,68,686.85 plus Rs 26,21,356.1.6 "or such other lesser sum as may be found on verification to be due" within a period of six months from the date of the judgment i.e. April 12,1982. Aggrieved, by the judgment of the High Court, the Department filed special leave petition and on 8.10.82 special leave was granted. In the stay application filed by the Union of India, the Bench directed the appellant to pay to the respondent the amount which it was required to refund under the impugned judgment within a period of six weeks of the respondent furnishing bank guarantee to the Collector of Central Excise, Meerut for the said amount and that in case, the respondent fails in this appeals, it shall refund the amount with interest @ 12% per annum to the appellants.

4. On 15.4.93, when the case came up for hearing before us, learned Counsel for the appellants raised the plea based on Section 11B, as amended by the Amendment Act 40 of 1991, to deny refund

to the respondent. After hearing learned Counsel for the parties, we directed the respondent to furnish documentary or other evidence as the respondent may deem appropriate to establish that the amount of duty of excise in relation to which the refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person. The appeal was directed to be posted for hearing on 10.5.93. The respondents did not file any documentary or other evidence nor even an affidavit stating that the incidence of duty of excise in relation to which the refund was being claimed had not been passed on to any other person. The arguments were heard finally on 14.5.93 and the judgment was reserved, though liberty was granted to learned Counsel for the parties to file written submissions if any in support of their arguments. The respondent filed written submissions on 31.5.93. Alongwith the written submissions an affidavit was also filed. No other material or documentary evidence, to establish that the burden of excess excise duty had been borne by it and not passed on to any other person, was filed. The Union of India filed there written submissions on 21.6.93.

5. We have given our careful considerations to the arguments made at the Bar and those contained in the written submissions.

6. The appellants do not dispute that for the purpose of determining assessable value, it is the price at which the manufacturers sell the products to the wholesale dealers and not the price at which the wholesale dealer make further sale to the secondary whole sellers which is to be taken into account. The High Court found on the basis of the material on te record, that the appellants had received from the respondent the duty of excise in excess of what was admissible in law, because of a wrong interpretation placed by the respondent on the provisions of Section 4 of the Act. The respondent realised the mistake after this Court in Voltas case (supra) laid down the correct basis for assessment in such cases. It has been settled by this Court that where excess duty was not payable by the party under the provisions of a statute but had in fact been paid under a mistake of law, the party has a right to recover it and there is a corresponding legal obligation on the part of the Government to refund the excess duty to collected because the collection in such cases would be without the authority of law. The payment and recovery of excess excise duty was thus on account of a mutual mistake. The Collector Central Excise (Appeals) accepted this position and allowed three refund applications but rejected the two applications as barred by limitation. The Department did not question the order of the Collector Central Excise (Appeals) granting three refund applications and that order acquired finality. The High Court in the writ petition filed by the respondent against the rejection of two refund applications found that the respondent could not be non-suited on the plea of limitation since the excess excise duty had been paid on account of mistake of law and set aside the order of the Collector Central Excise (Appeals) rejecting two refund applications and by a writ of mandamus directed the refund as claimed subject, however, to verification.

7. In Salonah Tea Company Ltd. Etc. v. Superintendent of Taxes Now-gong and Ors. etc. this Court said :

> Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally as a corollary of the said statement of law it follows that taxes collected without the authority of law, as in

> this case, from a citizen should be refunded because no State has the right to receive or to retain taxes or levies realised from citizens without the authority of law.

8. Dealing with the question of bar of limitation for making a claim for refund of tax or duty paid or collected without the authority of law in such cases, the Court opined :

> Normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner. It is true that in some case the period of three years is normally taken as a period beyond which the Court should not grant, relief but that is not an inflexible rule.

9. In Shri Vallabh Glass Works Ltd., and Anr. v. Union of India and Ors. 1984 (16) ELT 171 SC, this Court, while examining the question as to what is the point of time from which the limitation should be deemed to commence observed that relief in respect of payments made beyond the period of three years may not be granted from the date of filing of the petition, taking into consideration the date when the mistake came to be known to the party concerned. Just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law cannot be permitted to retain the amount, merely because the tax payer was not aware at that time that the recovery being made was without any authority of law. In such cases, there is an obligation on the part of the authority to refund the excess tax recovered to the party, subject of course to the statutory provisions dealing with the refund.

10. We are, therefore, of the opinion that the High Court, while disposing of the writ petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collector Central Excise (Appeals) to deny them the refund for the period 1.9.1970 to 28.5.71 and 1.6.1971 to 19.2.1972 was not proper as admittedly the respondent had approached the Assistant Collector Excise soon after coming to know of the judgment in Voltas case (supra) and the assessee was not guilty of any laches to claim refund.

11. This now takes us to the basic question, viz. the right of the respondent to receive refund otherwise than in accordance with the provisions of Section 11B of the Act as amended by Act 40 of 1991, which amendments are aimed at preventing "unjust enrichment". Learned Counsel for the appellants urged that the excise duty, being an indirect tax, is passed on to the consumers and therefore the respondent was not in law justified to claim refund since, it was not even stated by the respondent in its affidavit that they were going to return the amount to various consumers or that any consumer had in fact sought such a refund. Reference in this connection was made by the learned Counsel specially to the provisions of Section 11B(3) of the Act as introduced by Act 40 of 1991 with effect from 20.9.1991 and it was submitted that with effect from 20th of September 1991, no person is entitled to claim and obtain refund of the excess duty paid except in accordance with the provision of Section 11B(2) of the Act, as amended, and that since the respondent had failed to produce any documentary evidence to show that it had not passed on the burden of excess excise duty to the consumers, it was not open to it to claim and obtain the refund. Learned Counsel

therefore urged that in accordance with the directions of this Court in its order dated 8.10.1982, the respondent be directed to pay back the amount which was received by them under orders of this Court with interest @ 12% p.a.

12. Learned Counsel for the respondent, on the other hand submitted, both at the Bar and in the written submissions, that since the appellants had not taken any objection based on the doctrine of "unjust enrichment" either in the writ petition or in the special leave petition or by way of an additional ground before this Court, it could not be permitted to raise the plea of "unjust enrichment" for the first time during the hearing of the appeal. It is urged that since the objection based on "unjust enrichment" is not a pure question of law but a mixed question of fact and law, it should not be permitted to be raised at the belated stage during hearing of the appeal. Learned Counsel then submitted that Section 11B(3) of the Act has no application to the present case since the prohibition contained in the said Sub-section relates to refund to be made after the introduction of the said Sub-section and the same cannot apply to a case where refund has "already been made" 'as in this case'. Learned Counsel submitted that by the order dated 8.10.1982 of this Court, "refund" as directed by the High Court has already been made and, therefore, the present case does not attract the prohibition contained in Section 11B(3) of the Act. Without prejudice to this submission, it was urged by learned Counsel for the respondent that even if the respondent is directed to pay back the amount received by it under orders of this Court, the direction of payment of interest @ 12% p.a. as contained in the order of this Court dated 8.10.1982 be not applied and no interest be directed to be paid by the respondent. Placing reliance on the judgment in Tata Engineering and Locomotive Company Ltd. v. Muncipal Corporation of the City of Thane and Ors. (1991) 6 JT SC 322, it was urged that the plea of unjust enrichment be negatived and the appeal dismissed.

13. Let us first deal with the objection raised on behalf of the respondent that the plea based on Section 11B cannot be permitted to be taken during the hearing of the appeal for the first time. Indeed the respondent is right in contending that the plea of "unjust enrichment" had not been canvassed before the High Court in the writ petition. The writ petition was directed against the order of the appellate authority rejecting two refund claim petitions as time barred. The writ petition was decided in 1982. The amended provisions came into force with effect from 20.9.1991, while the appeal was pending in this Court. The appellant could, therefore, not have taken the ground contained in Section 11B(2) or (3) of the Act in their written statement in the High Court. Though as pointed out by learned Counsel for the respondent, the appellant has not taken a specific plea based on the doctrine of "unjust enrichment" in the Memo of appeal in this Court also but we find that in paragraph 7 of the Memo of appeal it has been said :

> 7. The High Court failed to note that it is not the case of the Respondent that they had received any claim for refund in this regard from even a single customer of theirs in respect of the various periods in question.

14. Again, in paragraph 3 of the stay application (CMP 24970 of 1982), it has been inter alia stated :

> ...It may be further stated that the respondent will not be in any manner prejudiced since they have already realised from their customers the excise duty on the

> manufactured goods. The balance of convenience would also lie in favour of a stay of the judgment of the Delhi High Court pending disposal of the appeal....

15. The respondent did not controvert the above averments. Even otherwise, the appellants cannot be refused permission to raise a plea relating to the interpretation of the amended provisions of Section 11B of the Act, which came into force only during the pendency of the appeal. A plea which relates to the interpretation of a statutory provisions which comes into existence during the pendency of an appeal under Article 136 can always be permitted to be raised during the hearing to do complete justice between the parties. Such a plea relating to interpretation of a statutory provision is essentially a question of law and can be allowed to be raised for the first time during the hearing of the appeal and that is why on the oral prayer of learned Counsel for the appellants we permitted that plea to be raised. In so far as the factual aspect of the enquiry is concerned, both for purposes of Sections 11B(2) and 12B of the Act, this Court has itself granted an opportunity to the respondent to rebut the presumption which can be raised under Section 12B of the Act. The objection raised by the respondent, thus, has no force or merit.

16. Section 11B of the Act regulating refund of Central Excise Duty has undergone a vast change after its amendment by the Central Excises Customs Laws (Amendment) Act 1991 (No. 40 of 1991) with effect from 20th of September 1991. Sub-section (1) of Section 11B, after its amendment, provides that any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date in a prescribed form supported by documentary and other evidence intended to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty has not been passed on by him to any other person. The first proviso to the Sub-section lays down that where an application for refund has been made before the commencement of Act No. 40 of 1991 such application shall be deemed to have been made under the amended provisions and shall be dealt with in accordance with the provisions of Sub-section (2) as amended. In the second proviso, it is stated that the limitation of six months shall not apply where such duty has been paid under protest. Sub-section (2) of Section 11B inter alia provides that the Assistant Collector of Central Excise while entertaining 'the claim for refund of duty may order the refund of the amount of duty paid by the claimant provided he had not passed on the incidence of such duty to any other person. The thrust of the amendment vide Section 11(B)(2) of the Act is that the refund of duty paid by the manufacturer can be allowed, if due, only in cases where the assessee has not passed on the incidence of such duty to any other person.

17. Sub-section (3) of the amended Section 11B provides :

> (3) Notwithstanding anything to the contrary contained in any judgment, degree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

18. It is, thus, seen that under Section 11B(3) (supra) no refund shall be made except as provided for in Sub-section (2), as amended, notwithstanding anything to the contrary contained in any

judgment, order or direction of the Appellate Tribunal or any court or in any other provision of the Act or the Rules made thereunder or under any other law for the time being in force. We are not persuaded to agree with learned Counsel for the respondent that the amended provisions of Section 11B can be applied only prospectively i.e. to refund claims made after the introduction of the amendment and would not apply to pending cases and refund claims filed prior thereto and that the prohibition contained therein cannot apply to the present case. The refund in the present case was ordered by the High Court in the writ petition by setting aside the orders of the statutory authority refusing the claim for refund, as barred by limitation. The judgment of the High Court is under appeal before us. It was during the pendency of the appeal in this Court that Section 11B of the Act was amended by Act 40 of 1991 with effect from 20.9.1991. The matter relating to refund was thus wide open before this Court in the present appeal and had not been finally settled when Act 40 of 1991 came into force. As per amended Section 11B, all pending claims for refund on or before 20.9.1991 are required to be dealt with and disposed of in accordance with the amended provisions of law. By operation of Section 11B(3), as amended, notwithstanding the order given by the High Court in the writ petition, no refund can be made to the respondent except in accordance with the provisions of Section 11B(2) of the Act. The direction to pay the amount to the respon dent to the extent ordered by the Delhi High Court contained in the interim order of this Court dated 8.10.1982 was a conditional one and subject to the respondent (i) furnishing bank guarantee to the Collector of Central Excise, Meerut for the amount in question and (ii) that in case the respondent fails in this appeal, it shall be liable to pay interest @ 12% p.a. while refunding the amount to the appellant. Thus, the amount in question was directed to be paid to the respondent by this Court only as an interim arrangement, during the pendency of the appeal and could not be construed to be an order of 'execution' of the order and directions of the High Court. The conditional order made on 8.10.1982 did not finally conclude the "refund claim" of the respondent and cannot take the case of the appellant out of the purview of Section 11B(3) of the Act read with the first proviso to Section 11B(1), as amended. The argument on behalf of the respondent to the contrary is not only spacious but also fallacious. In this connection, it would also be advantageous to note a judgment of a three Judge Bench of this Court in Union of India and Ors. v. Jain Spinners Limited and Anr. , as the law on the question of retrospectivity of Section 11B(3) has been settled therein. In Jain Spinners' case (Supra), refund was allowed by the Assistant Collector as a result of the approval of the classification list as filed by the assessee provisionally. Subsequently, on receipt of a test report from the Deputy Chief Chemist, the department took the view that the refund had been erroneously granted and sought to recover it by issuance of a notice. The Assistant Collector confirmed the demand for payment of the duty amount which had been erroneously refunded. The assessee questioned the order of the Assistant Collector through a writ petition before the High Court and also by filing an appeal before the Collector of Central Excise (Appeals). The High Court issued an interim stay in favour of the assessee against the demand confirmed by the Assistant Collector's order subject to the assessee depositing the amount of the demand in the court. The respondent (Union of India) was permitted to withdraw the amount by an interim order of the Court on 19.2.1986 subject to the condition that it would pay interest at bank rate and refund the amount alongwith interest within two months of the decision of the writ petition if the petitioner ultimately succeeded. The appeal filed by the assessee before the appellate authority, however, succeeded and consequential relief was ordered, "if otherwise admissible". The assessee, thereupon, filed an application before the Assistant Collector for refund of the duty plus interest as per the conditions contained in the interim order of

the High Court. The assessee also filed an application before the High Court stating that in view of the appellate order, the writ petition no longer survived and sought a direction to the respondents to pay the amount along with interest. The High Court allowed the application of the assesee on 19.9.1991 and directed the Union of India to refund the amount due to the assessee. On 20.9.1991, Act 40 of 1991 came into force, prohibiting the grant of refund except in accordance with the provisions of Sub-section (2) of Section 11B. The Union of India filed an application stating that whether it was the High Court's order of 19.2.1986 or 19.9.1991, it was the duty of the Assistant Collector to satisfy himself that no part of the duty in respect of which refund was claimed was recovered by the assessee from any other person before making an order of refund. The Union of India sought two months time to consider the claim for refund in accordance with the amended provisions of Section 11B. The application was rejected by the High Court in view of the order dated 19.9.1991, which had been passed prior to the coming into force of the Amendment Act with effect from 20.9.1991. In November, 1991, the assessee filed a contempt petition alleging failure on the part of the officers of the Union of India to comply with the High Court's order granting refund to the assessee. When the petition came up for hearing on 18.3.1992, the counsel for the respondent submitted that the question regarding the applicability of the amended provisions was under consideration of the Government and he sought time. On 13.4.1992, the Assistant Collector passed an exhaustive order holding that since the assessee had passed on the incidence of duty to others, it was not entitled to receive the refund. The High Court at the time of hearing of the contempt petition on 20.4.1992 was apprised of the order of the Assistant Collector but it held that the decision of the Assistant Collector was not a decision of the Government and directed the Union of India to deposit the entire amount of refund with bank interest on or before 24.4.1992. It was in this background, that the Union of India filed an appeal before this Court against the order dated 20.4.1992 passed by the High Court to give effect to its earlier order dated 19.2.1986. This Court held that the High Court's order of 19th February 1986, under which alone the refund was claimed could not be an exception to the provisions of Section 11B(3) of the Act, and that the High Court could not have made any order, after September 20, 1991 directing the payment of refund contrary to the amended provisions of Section 11B(2) of the Act. The Court expressed the view that Section 11B(3) of the Act, as amended, would apply to all cases which were pending notwithstanding any order or decree or judgment of a court or tribunal or the provisions of any other law for the time being in force. This Court inter alia held :

> The only question before us is whether the impugned order dated 20.4.1992 of the High Court which is passed to give effect to its earlier order of 19.2.1986 is valid or not. Since, we are of the view that the order of 19.2.1986 attracts the provisions of Sub-section (3) of Section 11B of the Act which has come into force on 20.9.1991, the respondents are not entitled to take advantage of the said order unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to others.

19. Repelling on argument raised on behalf of the assessee that the amount deposited in court or withdrawn under orders of the court, would stand on a different footing then the orders of "refund" contemplated by Section 11B(3) of the Act, and would not fall within the mischief of the prohibition contained therein, Sawant J., speaking for the three Judges Bench observed :

> Further, if the contention advanced by the learned Counsel is accepted, it would defeat the amended provisions of the Act. It would then be open to the assessees to obtain orders from courts as in the present case, and instead of paying the assessed amount of duty to the authorities, deposit it in court and raise a plea that what is deposited in Court is not duty and the assessees are entitled to get the refund either directly from the court or if it is withdrawn by the authorities, from the authorities, notwithstanding that they have passed on the duty to others. It would create two artificial classes of assessees, viz., those who have paid the duty to the obtained orders from the courts for depositing the duties in courts. The former will, and the latter will not, be governed by the amended provisions of the Act. This would result in a discriminatory and invidious situation. The view canvassed by the learned Counsel will also open a new door for unjust enrichment by enabling the assessees to bypass the statutory provisions which have been specifically enacted to prevent the malpractice.

20. The judgment in Jain Spinners' case (supra), therefore, answers fully the submissions raised on behalf of the respondent and we reject the plea raised on behalf of the respondent that the prohibition contained in Section 11B(3) of the Act would not apply to the facts and circumstances of the present case more so because the judgment and order, of the High Court directing refund was pending final adjudication by this Court when the amended provision of Section 11B(3) of the Act came into force with effect from 20.9.1991.

21. That apart, the argument on behalf of the respondent that in the present case "refund has already been made" to the respondent in accordance with the directions of the High Court by virtue of the interim order of the Court dated 8.10.1982 is factually incorrect. It is based on misconstruction both of the order of the High Court as well as the interim order of this Court. After quashing the orders of the Collector Central Excise (Appeals), holding the two refund applications as time barred, the High Court allowed the writ petition and issued a mandamus "directing the respondents to refund to the petitioners the sum of Rs. 23,68,686.85 + Rs. 26,21,356.16 or such other lesser sum as may be found on verification to be due". Thus, refund had to be made, even under the orders of the High Court dated April, 12, 1982, only after "verification of the refund due". The order was, thus, not an order absolute in terms. Admittedly, the respondent did not approach the competent authority for "verification of the refund due" and no amount till date has been verified by the competent authority to be due to the respondent. Again, payment made to the respondent under interim orders of this Court dated 8.10.1982 was only an interim arrangement pending disposal of the appeal, against the judgment of the Delhi High Court and was further subject to the stipulations and conditions contained therein. That interim order cannot be treated to be an order of "refund" in terms of the directions of the High Court. It is, therefore, futile for the respondent to contend that Section 11B(1)(2) and (3) have no application to the present case. We are of the opinion that in the facts and circumstances of the present case, the provisions of Section 11B as amended by Act 40 of 1991 are clearly attracted to the present case because the order of the Division Bench of the High Court had not acquired any finality when the amendment Act of 1991 came into force and the present appeal was pending in this Court. All pending claims for refund on or from 20.9.1991, are required to be dealt with and disposed of only in accordance with the

amended provisions of the law, by reason of the amended Section 11B(3) and the present case is no exception.

22. Under the amended provisions of Section 11B, claim for refund has to be made by an assessee to be Assistant Collector Central Excise in the prescribed manner, supported by documentary and other evidence, to establish that the claimant had not passed on the burden of the excise duty to any other person and had borne it himself, but with a view to obviate delay, which would result by an order of remand aimed at providing an opportunity to the respondent to establish by any material or documentary evidence before the Assistant Collector Excise, that it had not passed on the incidence of duty to any other person we directed the respondent to furnish documentary or other evidence, as it may deem appropriate, to establish that the amount of duty of excise in relation to which the refund is claimed was collected from or paid by him and that the incidence of such duty had not been passed on by him to any other person. The respondent has not furnished any documentary or other evidence at all. With the written submissions, the respondent has however, filed an affidavit in which it has been stated in paragraph 3 as follows :

> Without prejudice to the contention that Sub-section (3), or Sub-section (2)(d) or any other Sub-section of Section 11B of the Central Excises & Salt Act, 1944 (hereinafter referred to as the "Act"), as amended by Central Excises & Customs Laws (Amendment) Act, 1991 (Act 40 of 1991) is not applicable to the present case, since refund has already been made pursuant to a writ issued by the Delhi High Court under Article 226 of the Constitution of India, it is stated that differential duty, in respect of which refund has already been made to the Respondent company, was not passed into the customer, as explained in the illustration below. It may be clarified that the differential duty, in the present case, relates to the differential between the duty calculated on the basis of (i) the price at which the Respondent Company sold the goods to WDs (1st sale) and (ii) the higher price at which the wholesale dealers re-sold the goods to Secondary Wholesale Dealers (2nd sale).
>
> (Emphasis ours)

23. This averment is not at all satisfactory. It does not go to show that the respondent did not pass on the burden of the excess excise duty to any other person. The expression "was not passed on to the customer, as explained in the illustration" is vague and non-specific. It is not stated as to at what rate the duty was collected by the respondent in the present case. The "illustrations" given in the affidavit cannot carry the matter any further nor can the same be any substitute for a clear and categoric statement of fact that the excess duty was paid by the assessee or collected from it and that its incidence was not passed on by the assessee to any other person. There is no averment, much less a clear and specific one, even to show that the respondent did not collect excise duty at the higher rate (even according to the illustrations) when they sold the goods, since the price was an integrated or cum duty price. The respondent has not filed any evidence or material whatsoever to show that the burden of excess excise duty has been borne by them and not passed on to any other person in spite of ample opportunity given by this Court.

24. Section 12(B) of the Act which was also introduced by the Amending Act 40 of 1991 lays down as follows:

> Section 12B. Presumption that the incidence of duty has been passed on to the buyer-Every person who has paid the duty of excise 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.

25. This Section, thus, creates a rebuttable presumption that every person who has paid excise duty has passed on the burden of the same to the buyers of such goods. The presumption has to be rebutted by the manufacturer who has paid the duty. The burden of proof is on the person claiming the refund to establish that he has paid the duty but not passed on the duty to the buyer of such goods. Since, this Court granted sufficient opportunity to the respondent to furnish such documentary or other evidence as it may wish to produce to establish that it had not passed on the incidence of the excess excise duty to the buyers of such goods and despite the grant of that opportunity, it has failed to produce any such evidence or material and the affidavit filed by it falls completely short of the necessary averments, we would consider it futile to either remand the case to the Assistant Collector Excise or to grant an opportunity to the respondent to file a fresh application before the Assistant Collector Excise under Section 11B(1) and (2) of the Act to seek refund in the manner known to law by adducing such evidence as is required by the amended provisions of law. The failure of the respondent to produce the necessary evidence before us goes to show that the respondent has failed to rebut the presumption that it had not passed on the burden of the excise duty to any other person as envisaged by Section 12(B) of the Act (supra).

26. Reliance placed by the respondent on the judgment of this Court in Tata Engineering and Locomotive Company's case (supra) is misplaced. In that case, this Court found, on the basis of the pleading and the material on the record, that TELCO (appellants in the appeal) had not, unlike the present case, recovered the amount paid by them by way of octroi duty from any third person. The Court noticed :

> The learned Counsel for the respondent then contended that the appellants have recovered the amounts paid by them by way of octroi duty from the dealers or the customers to whom they had sold the goods and therefore they are in any case not entitled to get a refund. The argument was that if refund is ordered it would amount to allowing the appellants to unjustly enrich themselves at the cost of the public to whom the burden had already been passed. This argument is based on the ground that in the selling price the Company had merged the octroi duty originally paid as deposit and if a refund is made the company would be getting an additional amount over and above normal price which they would have charged but for the fact that they were initially asked to deposit octroi. There is no evidence, that any of the articles sold by the Company is subject to any price control by the Government or that the Company had charged any octroi separately in the bills. Invoices and the other documents of sale to the outside purchasers produced before us do not also show that any octroi was separately charged and collected by the Company. It may be

mentioned that in the rejoinder filed by the appellant in the writ petition they have specifically denied that they "have recovered the amount paid by them by way of octroi duty from the dealers to whom they had sold the goods or that the dealers in turn have recovered the octroi duty from the customers." In view of this the question of unjust enrichment does not arise.

27. TELCO case (supra) is thus clearly distinguishable and has no application to the present case.

28. Thus, in view of the amended provisions of Section 11B of the Act, since the respondent has failed to establish that it had not passed on the burden of the excess excise duty to any other person, it is not entitled to the refund of the amount claimed by it and we accordingly allow this appeal and set aside the order of the Division Bench of the Delhi High Court directing the refund of Rs. 23,68,686.85 plus Rs. 26,21,356.16 while upholding the order of the High Court as regards the question of limitation. Further, in accordance with the interim order of this Court dated 8.10.1982, we direct the respondent to refund to the appellants the sum of Rs. 23,68,686.85 and Rs. 26,21,356.16 (total Rs. 49,90,043.01) with 12% interest per annum from the date when the amount ws received by the respondent, within a period of eight weeks from today since the respondent has been unable to make goods its submission that it should not be burdened with the payment of interest at the rate of 12% per annum, which was a specific condition contained in the interim order dated 8.10.1982. On the failure of the respondent to pay the amount as per the above direction, the appellants shall be entitled to encash the bank guarantee and/or take such other steps as may be available to it in law for recovery of the amount. The amount after recovery shall be appropriated by the appellants in the manner provided by the amended provisions of the Act.

29. In the peculiar circumstances of the case we however leave the parties to bear their own costs.