Waiver Of Cost) M/S Rites Ltd., vs Assistant Commissioner, Cgst & Anr on 28 January, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 13543/2023 & CM APPL. 63402/2023 (FOR WAIVER OF COST)
M/S RITES LTD.,
Through:

versus

ASSISTANT COMMISSIONER, CGST & ANR. .....Responde
Through: Mr. Shubham Tyagi, SSC, CBIC with Mrs. N. Ojha, Adv

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR
ORDER

% 28.01.2025

1. The writ petitioner has approached this Court aggrieved by the decision handed down by the respondents in the Order-in-Appeal dated 30 January 2023 on its application seeking refund of tax which had been deposited for the period September 2017 to January 2020.

2. From the Order-in-Original which was passed while dealing with 26 refund applications which had been made, we find that the following would appear to be the undisputed facts.

3. The petitioner is stated to be a Government of India enterprise, engaged in providing consultancy services in the field of transport, infrastructure and related technologies. It had, in the period in question, been engaged to provide third party inspection services in This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/02/2025 at 23:20:32 respect of projects being implemented by the Delhi Jal Board. Since the services which were being so provided were to a governmental authority, it was clearly not liable to pay tax under the Central

Goods and Services Tax Act, 20171 and which position also stands fortified from a reading of the Exemption Notification No. 12/2017 dated 28 June, 2017 and which has been noticed by the respondents.

4. Upon the aforesaid mistaken payment coming to light, the petitioner appears to have approached the respondent and moved the applications seeking refund of taxes deposited during the period in question.

5. The original authority has, while negating the claim for refund, proceeded to hold that even if it were assumed that the payments made by the petitioner were not taxable, the deposits as well as the prayer for refund would be governed by the provisions of Section 54 of the Act read along with Rule 89 of the Central Goods and Services Tax Rules, 20172. It proceeded to thus reject the applications for refund as made in-toto.

6. Aggrieved by the said order, the petitioner preferred an appeal which came to be partly allowed by the appellate authority in terms of its order of 30 June 2023. The appellate authority accorded partial relief to the petitioner by granting refund for the period which, according to it, fell within the period of limitation as prescribed and stipulated by Section 54 read along with the relevant rules. The refund claim for the period March 2018 to January 2020 was thus held to be admissible.

7. Before us, learned counsel for the petitioner rests its case on a CGST Act CGST Rules This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/02/2025 at 23:20:32 recent decision rendered by us in Commissioner of Central Excise and Service Tax v. Oriental Insurance Company Limited3 and where we had an occasion to deal with an identical challenge of a refund being refused, tested on the anvil of prescriptions of limitation as may be embodied in various statutes. We had, on a consideration of the legal position as enunciated by the Supreme Court as well as various High Courts, ultimately come to hold in Oriental Insurance as follows:-

> "9. We note that two Division Benches of our Court have also answered the aforesaid issue in favour of the respondent as would be evident from the decisions rendered in National Institute of Public Finance and Policy v. Commissioner of Service Tax6 as well as Alar Infrastructures Private Limited v. Commissioner of Central Excise, Delhi-I.7 Dealing with the question which stands posited, the Court in National Institute had held as under:--
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> "4. Concededly, at the relevant time service tax was not payable for any of the functions or work undertaken or performed by the appellant/assessee. In these circumstances, under a wrong impression that it was liable to service tax, the assessee was levied certain amounts. Subsequently, upon inquiry, it was informed by CBEC on 13.04.2009 that its activities were not taxable. Soon thereafter, it sought refund of the amounts deposited. The Deputy Commissioner refunded part of the amount but

> disallowed refund of Rs. 11,49,090/- on the ground that the application was filed after a lapse of period of one year. The Assessee unsuccessfully filed an appeal to CESTAT which appears to have relied upon the judgment of the Supreme Court in Collector of Central Excise, Chandigarh v. Doaba Co-operative Sugar Mills, (1988) 37 ELT 478 (S.C.).

5. Counsel for the assessee contends that when the amount in question was never payable as there was no levy at all, the question of denying the refund of part payment did not arise and that the general principal of limitation will be applicable from the date of discovery of mistaken payment in the present case. So the refund claim is made within the stipulated period of the limitation.

6. Counsel for the Revenue, on the other hand, relied upon 2023 SCC OnLine Del 6065 This is a digitally signed order.

 the judgment of the Supreme Court in Collector of C.E., Kanpur v. Krishna Carbon Paper Co., (1988) 37 ELT 480 (SC). Relying upon the said judgment, it is submitted that the refund claim before a departmental authority is to be made within the four corners of the statute and the period of limitation prescribed in the Central Excise Act and the Rules framed there-under.

7. This court is of the opinion that the CESTAT clearly fell into error. Krishna Carbon Paper Co. (supra) was a case where principal duty was payable; excess amount had been paid on a mistaken notion with respect to the liability for excess production under a notification which was later discovered to be not correct. In the present case, levy never applied - a fact conceded by no less than the authority of CBEC. In these circumstances, the general principle alluded to in Krishna Carbon Paper Co. (supra) would apply. Consequently, the appeal has to succeed and is therefore allowed. The appellant shall be entitled to refund of entire amount with proportionate interest."

10. Identical conclusions came to be rendered by the Division Bench in Alar Infrastructures. We deem it apposite to extract paragraphs 3 and 4 of the report hereinbelow:--

> "3. Having heard the submissions of counsel for the parties, this Court finds that the question of applicability of Section 11B of the CE Act read with Section 83 of the Finance Act, 1994 to the refund application of the Appellant would arise only if the CESTAT came to the conclusion that the services rendered by the Appellant were in fact liable to service tax. If, on the other hand, the CESTAT finds that the services rendered by the Appellant were not amenable to service tax at all, the question of processing the refund application of the Appellant with reference to Section 11B of the Act would not arise. This legal position has been made explicit in the context of a claim for refund under the Customs Act, 1962 in the decision of this Court in Hind Agro Industries Limited v. Commissioner of Customs, (2008) 221 ELT 336 (Del.). In that decision the Court has discussed the legal position emerging from the decision of the Supreme Court in Mafatlal Industries v. Union of India, (1997) 89 ELT 247 (SC).

> 4. Consequently, the Court is of the view that the CESTAT ought to have first satisfied itself that the services rendered by the Appellant was, on facts, amenable to service tax and different from the other three appeals which were heard together with the Appellant's This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/02/2025 at 23:20:33 appeal and allowed by the same impugned order. If and only if the CESTAT finds that the services rendered by the Appellant were in fact amenable to service tax would it then take up the question whether in terms of Section 11B of the Central Excise Act, 1944 and the claim of the refund was barred by limitation."

11. We note further that dealing with the question of service tax mistakenly paid, the Karnataka High Court in Commissioner of Central Excise Bangalore v. KVR Construction8 made the following observations and explained the legal position in the following terms:--

> "19. From the reading of the above section, it refers to claim for refund of duty of excise only, it does not refer to any other amounts collected without authority of law. In the case on hand, admittedly, the amount sought for as refund was the amount paid under mistaken notion which even according to the Department was not liable to be paid.
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> 20. According to the appellant, the very fact that the said amounts are paid as service tax under the Finance Act, 1994 and also filing of an application in form R of the Central Excise Act would indicate that the applicant was intending to claim refund of the duty with reference to section 11B, therefore, now it is not open to him to go back and say that it was not refund of duty. No doubt in the present case, form R was used by the applicant to claim refund. It is the very case of the petitioner that they were exempted from payment of such service tax by virtue of circular-dated September 17, 2004 and this is not denied by the Department and it is not even denying the nature of construction/services rendered by the petitioner was exempted from to payment of service tax. What one has to see is whether the amount paid by the petitioner under mistaken notion was payable by the petitioner :
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> Though under the Finance Act, 1994 Such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not Have demanded the petitioner to make such payment. In other words, the authority lacked authority to levy and collect such service tax. In case, the Department were to demand such payments, the petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the Department to regularise This is a

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from the respondent-company, the Department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion.

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24. Now, we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 23,96,948 paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Therefore, once it is not payable in law there was no authority for the Department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract section 11B. Therefore, it is outside the purview of section-11B of the Act."

12. Similar is the view which has been taken by the Bombay High Court in Parijat Construction v. Commissioner of Central Excise, Nashik.9 It would thus appear that High Courts across the board have taken a consistent view that where once it is found that the assessee was not liable to be subjected to a service tax, it would not be bound by the limitation as prescribed under Section 11B of the Act.

13. This would also appear to appeal to reason since undisputedly and in terms of Article 265 of the Constitution, the Union can only levy a tax which is authorized by law. Since it is conceded before us that the respondent was not liable to pay any service tax, it This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/02/2025 at 23:20:33 would be wholly unjust to permit the Union to retain monies which were not liable to be collected or

were authorized by law. We find that an identical view has been expressed by a Division Bench of the Madras High Court in 3E Infotech v. CESTAT, Chennai10. We deem it appropriate to reproduce the relevant extracts from that decision hereinbelow:--

> "7. The present appeal lies from the order of the Appellate Tribunal. We have heard the Learned Counsel for the Assessee and the State. The issue, which arises for consideration in this case, whether the provisions of Section 115 of the Central Excise Act would be applicable to claim of refund made by an Assessee when the tax has been paid under mistake of law. In this case, indisputably, there was no liability on the petitioner to pay service tax. The Supreme Court of India, in the case of Union of India v. ITC Ltd., 1993 Supp (4) SCC 326 : (1993) 67 ELT 3 (S.C.) while dealing with the question of refund of excess excise paid held:--
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> 8. In Shri Vallabh Glass Works Ltd. v. Union of India, 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.
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> 9. 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 of Central Excise (Appeals) to deny them the refund for the period September 1,1970 to May 28,1971, and June 1, 1971 to February 19, 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 and This is a digitally signed order.

 the assessee was not guilty of any laches to claim refund.

8. In the above cited case, the Supreme Court stated that the Assessee's claim to refund would not be disallowed solely because it seemed barred by limitation. Since the Assessee in that case made the claim for refund shortly after learning about their entitlement for the same, it would not be just to hold that such claim is hit by laches.

9. The High Court of Gujarat in Oil and Natural Gas Corporation Ltd., v. Union of India, (2017) 354 ELT 577 (Guj.) relied on another judgment of the Gujarat High Court in Joshi Technologies International, INC-India Projects v. Union of India = (2016) 339 ELT 21 (Guj.) and quoted the relevant paragraph, which reads as under:--

> "Merely because the provisions of the Central Excise Act, 1944 and the rules framed thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed tinder the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in Commissioner v. Sahakari Khand Udyog Mandli Ltd. (supra).
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> In the Circular dated 7th January, 2014, reference to sugar cess and tea case levied under the Sugar Cess Act, 1982, and the Tea Act, 1953, respectively, is merely illustrative in nature and what is meant by the circular is that the cesses which are collected by the Department of Revenue, but levied under an Act which is administered by different Department are not chargeable to Education Cess and Secondary and Higher Secondary Cess chargeable under the provisions of the Finance Acts, 2004 and 2007, respectively.
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> Education Cess and Secondary and Higher Secondary Education Cess being cesses levied at a percentage of the aggregate of all duties of excise, the basic requirement for levy thereof is the existence of excise duty. In the present case Oil Cess is not a duty of excise and hence, the basic requirement of levy of such cesses is not satisfied.
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> This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/02/2025 at 23:20:34 Furthermore, for the purpose of levy of Education Cess and Secondary and Higher Secondary Education Cess, two other conditions precedent, are required to be satisfied, viz., (i) that the duty of excise should be levied by the Central Government in the Ministry of Finance (Department of Revenue); and (ii) the duty of excise should be collected by the Central Government in the Ministry of Finance (Department of Revenue). In the present case, since the machinery provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated in the OID Act, the second condition precedent is satisfied, viz. that the cess is collected by the Central Government in the Ministry of Finance (Department of Revenue); however, the first condition with regard to levy of such duty of excise by the Central Government in the Ministry of Finance (Department of Revenue) is not satisfied inasmuch as the Oil Cess under the OID Act is levied by the Ministry of Petroleum and Natural Gas. In the aforesaid premises, the requirements of Section

93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007 are not satisfied in the present case, and consequently, the said provisions have no applicability to the facts of the present case. The petitioner, therefore, cannot be said to have been liable to pay Education Cess and Secondary and Higher Secondary Education Cess under the above provisions.

In the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. The petitioner was, therefore, justified in filing the present petition before this court against the order passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake. Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007. Thus, the This is a digitally signed order.

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Since the provisions of Section 11B of the Act are not applicable to the claim of refund made by the petitioner, the limitation prescribed under the said provision would also not be applicable and the general provisions under the Limitation Act, 1963 would be applicable. Section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, since the very retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law, in the light of the decision of this court in Sioastik Sanitarywares Ltd. v. Union of India (supra), the question of applying the limitation prescribed under Section 11B of the CE Act would not arise.

Even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in This is a digitally signed order.

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If the adjudicating authority was not satisfied with the Chartered Accountant's certificate and the other material produced by the petitioner, he could have called upon the petitioner to produce further documentary evidence in support of its claim that it had not passed on the incidence of duty to the purchaser. However, without affording a reasonable opportunity to the petitioner to produce documentary evidence in support of its claim that there was no unjust enrichment, the adjudicating authority was not justified in holding that there was unjust enrichment. Therefore, the finding that the petitioner's claim is hit by unjust enrichment cannot be legally sustained.

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11. Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.

12. On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs. 4,39,683/- cannot be barred by limitation, and ought to be refunded. There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India. On the facts and circumstances of this case, we deem it appropriate to pass the following directions:--

(a) The Application under Section 11B cannot be rejected on the ground that is barred by limitation, provided for under Section.

(b) The claim for return of money must be considered by the authorities."

14. In view of the aforesaid, we find no ground to interfere with the view as expressed by the CESTAT which has taken note of the broad consensus struck by various High Courts on the question This is a digitally signed order.

 including the decision rendered by this Court in National Institute. The decisions that we have noticed above, came to be rendered post Mafatlal and which judgment of the Supreme Court has also been duly noticed and explained."

8. Learned counsel appearing for the respondent however, submits that Section 54 speaks of a claim for refund in respect of tax and interest paid or any other amount paid by an assessee. The submission thus appears to be that even though the tax may not have been payable as long as the same was voluntarily deposited, it would fall within the expression "any other amount" and thus still be bound by the prescriptions contained in Section 54.

9. Reliance was additionally placed on the following two decisions rendered by the Punjab and Haryana High Court as well as the Madras High Court. Insofar as the decision of the Madras High Court in Assistant Commr. of S.T., Chennai v. Nataraj and Venkat Associates4 is concerned, we find that the High Court had negated the submission of the assessee of the bar under Section 11B of the Central Excise Act, 19445 being inapplicable by holding as follows:-

> "8. From the materials available on record, it is seen that the amounts were credited to the Revenue under the Head of Account "0044-Service Tax" through TR-6 challans, which are purported for payment of Service Tax only and as such, the claim of the respondent that the payment was only deposit and not Service Tax, cannot be sustained. Further, a tax, be it, direct or indirect, is intended for immediate expenditure for the common good of the state and it would be unjust to require its repayment after it has been in whole or in part expended, which would often be the case in most payment of such sort. Therefore, it is impracticable for the authorities to refund applications that are filed beyond time even it is paid under a mistake of law. Therefore, the authorities have rightly rejected the claim of the respondent and this aspect has not been taken note of by the learned single Judge."

10. We find ourselves unable to concur with the view so expressed W.A. No. 129 of 2010 decided on 23 April 2013 Central Excise Act This is a digitally signed order.

 and which has clearly come to be rendered without the decision of a Constitution Bench of the Supreme Court in Mafatlal Industries Ltd. and others v. Union of India and others6 having been noticed.

11. As is evident from a reading of the extracts of the decision in Oriental Insurance Company which have been set out hereinabove, the Supreme Court in Mafatlal Industries had come to categorically hold that monies deposited and which could not possibly fall within the ambit of a tax validly imposed, would not be bound by the contours and prescriptions contained in Section 11B of the Central Excise Act. The Constitution Bench had pertinently observed that refund of taxes which may be raised consequent to a levy being rendered unconstitutional would however be governed by the provisions contained in the Limitation Act, 1963. This aspect has clearly been overlooked by the Madras High Court while rendering its decision in Nataraj and Venkat Associates.

12. The decision of the Punjab and Haryana High Court in M/s Sarita Handa Exports (P) Ltd. v. Union of India and others7 proceeds on the basis that Mafatlal Industries was a decision which had held that a refund application made beyond a period specified under Section 11B would not be entertainable "unless refund was as a consequence of declaration of a provision as unconstitutional". With due respect, the aforesaid proposition is clearly contrary to what the Supreme Court itself had held in Mafatlal Industries and proceeds on an extremely narrow view of the what the Supreme Court intended to hold and convey in its judgment. The principle enunciated in Mafatlal Industries cannot possibly be construed as pertinent only to cases (1997) 5 SCC 536 2010 SCC OnLine P&H 8633 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 14/02/2025 at 23:20:34 where a claim for refund is based on a particular impost having been declared to be unconstitutional.

13. That only leaves us to the examine the contention of learned counsel appearing for the respondents and who had urged us to hold that the expression "any other amount" as appearing in Section 54 of the CGST Act, should be read as including within its ambit amounts paid even under a mistake in law.

14. We find ourselves unable to sustain that submission bearing in mind the undisputed fact that the aforesaid expression itself appears in a provision engrafted in a taxing statue. The words "any other amount" cannot be read de hors the provision in which it appears and which itself regulates the manner in which applications for refund of tax paid under the CGST Act are to be examined and disposed of. The phrase "any other amount" would thus be liable to be read ejusdem generis with tax and interest which is otherwise spoken of in the principal part of Section 54.

15. The refund claims which are thus sought to be principally regulated by Section 54 are those which would pertain to a tax validly imposed and collected and the claim for refund stemming from a subsequent adjudication on merits and which results in a right of refund being created. The prescription of limitation would thus clearly not be applicable where concededly the original deposit was made under a mistaken belief of a liability existing.

16. We, accordingly, allow the instant writ petition and quash the impugned Order-in-Appeal dated 30 January 2023 to the extent indicated below. The decision handed down by the appellate

authority insofar as it proceeds to reject the claim for refund for the period September 2017 to December 2017 and February 2018 shall stand set This is a digitally signed order.

17. The respondents shall in consequence attend to the claim for refund as made and ensure that the same is examined and disposed of with due expedition, preferably within a period of three weeks time from today. The refund shall be made along with statutory interest as applicable.

18. The claim for refund shall be subject to due verification of the bar of unjust enrichment which would otherwise apply.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

JANUARY 28, 2025/v This is a digitally signed order.