Commissioner Of Central ... vs M/S Allied Photographics India Ltd on 18 March, 2004

Equivalent citations: AIR 2004 SUPREME COURT 2953, 2004 (4) SCC 34, 2004 AIR SCW 1771, 2004 (4) SLT 740, 2004 (3) SCALE 447, 2004 (2) LRI 1, 2004 (3) ACE 496, (2004) 4 JT 105 (SC), (2004) 5 SUPREME 230, (2004) 3 SCALE 447, (2004) 17 INDLD 572, (2004) 166 ELT 3, (2004) 113 ECR 573

Bench: V.N. Khare, S.B. Sinha, S.H. Kapadia

CASE NO.:
Appeal (civil) 2687 of 2001

PETITIONER:
Commissioner of Central Excise,Mumbai-II

RESPONDENT:
M/s Allied Photographics India Ltd.

DATE OF JUDGMENT: 18/03/2004

BENCH:
V.N. KHARE, S.B. SINHA & S.H. KAPADIA

JUDGMENT:

J U D G M E N T KAPADIA, J.

Finding inconsistencies between two decisions of three-Judge Benches of this Court in the case of Sinkhai Synthetics and Chemicals Pvt. Ltd. v. Collector of Central Excise [2002 (143) ELT 17] and Collector of Central Excise, Chennai v. T.V.S. Suzuki Ltd. [2003 (156) ELT 161] on one hand and the decision of nine- Judge Constitution Bench in Mafatlal Industries Ltd. v. Union of India [(1997) 5 SCC 536] on the other, a two- Judge Bench of this Court vide order dated 13.11.2003 has referred the following question of law involved in this civil appeal to a larger Bench and accordingly the matter has come before this court.

> "Whether a claim for refund after final assessment is governed by Section 11 B of the Central Excise Act 1944?
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> FACTS:
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> New India Industries Ltd. (NIIL) is incorporated under the Companies Act 1956 and carries on business of manufacturing photographic printing paper which became chargeable to excise duty vide tariff item No. 37- C(2) of the Central Excise Act 1944 (hereinafter referred to as "the Act") with effect from March 1, 1974. NIIL had

entered into distribution agreement with a firm, Agfa Gevaert (India) Ltd. (M/s AGIL) for supply of goods. On 8.5.1974 the Department served show cause notice on NIIL (Manufacturer) to explain why prices declared by the company vide letter dated 7.3.1974 should not be rejected as wholesale cash price and why prices charges by M/s AGIL to its dealers should not be approved in terms of section 4(a) of the said Act. On 13.12.1974 the Department confirmed the show cause notice and directed NIIL to pay excise duty on the prices charges by M/s AGIL to its dealers. In pursuance of the said order, a notice of demand dated 3.1.1975 was served on NIIL demanding excise duty of Rs.99,631/- for the period 1.3.1974 to 20.5.1974 which NIIL paid, Under Protest, and carried on appeal to the Appellate Collector. On 8.1.1976 the said appeal was dismissed. NIIL moved the High Court under Article 226 of the Constitution of India vide Misc. Petition No. 841 of 1976 challenging the order holding that the liability of NIIL to pay excess duty should be ascertained by the price charged by M/s AGIL to its dealers. The petition was subsequently withdrawn. On 15.9.1975, NIIL addressed a latter to the Department submitting a declaration stating that M/s AGIL is not related to NIIL in terms of section 4(a) of the said Act. On 1.10.1975, the said section 4 of the Act was amended and the concept of "related person" was introduced. On 11.11.1975, NIIL was asked by the Department to pay excise duty on the price charged by M/s AGIL to its dealers. NIIL went in appeal which was dismissed on 21.9.1979. On 31.10.1984 the Department approved the ex-factory price of NIIL instead of the price list of M/s AGIL to its dealers. Therefore, from 1.11.1984, NIIL started paying excise duty on the ex-factory price charged by NIIL to M/s AGIL and not on price charged by M/s AGIL to its dealers. ON 11.8.1986, NIIL filed refund claims for Rs.60,19,238.65 for recovery of excise duty between the period 1.11.1981 to 31.10.1984. On 29.9.1986 another refund claim for Rs.42,77,358.59 was lodged for recovery of excise duty during the period 1.11.1978 to 31.10.1981. Similarly on 7.4.1987 another refund claim was lodged for excise duty paid in excess during the period 1.3.1974 to 31.10.1978 by NIIL amounting to Rs.22,38,391.72. These refund claims were made in view of judgment of this Court in the case of Union of India & Ors. v. Bombay Tyre International Ltd. reported in [AIR 1984 SC 420]. On 7.4.1987, NIIL made a consolidated refund claim of Rs. 1,25,34,988.97 for the entire period from 1.3.1974 to 31.10.1984. In respect of these refund claims the Department served a show cause notice and ultimately the Assistant Collector granted refund to NIIL only for two months preceding the lodgment of the claim. On 13.4.1987, NIIL filed Writ Petition No. 1336 of 1987 in the High Court challenging the order of Assistant Collector denying refund except for two months. That writ petition came for hearing before learned Single Judge on 29.8.1988. The learned Judge held that the action of the Department in collecting duty not on the sale price of NIIL to M/s AGIL was illegal and, therefore, NIIL was entitled to refund. However, since the question of unjust enrichment was debatable, the learned Judge referred the question to the Full Bench. After the decision of the Full Bench in the case of New India Industries Ltd. v. Union of India reported in [1990 (46) ELT 23], the said Writ Petition No.1336/87 was reposted before the learned Judge on 17.1.1990 when he directed Union of India to prove that the tax

> burden has in fact been shifted to consumers. Pending further examination, the Department was directed to deposit Rs.1,25,34,988.97 in Court. When the Writ Petition came for hearing on 22.3.1990, NIIL conceded that it had passed on the burden to M/s AGIL, the sole-selling distributors of NIIL. The learned Judge, however, directed M/s AGIL to file affidavit stating whether it had passed on the burden to its dealers or not. Therefore on 22.3.1990 the refund claims of NIIL were rejected but the learned Judge went into further enquiry as to whether the burden had been passed on by M/s AGIL to its dealers and by judgment dated 14.6.1990 held that Union of India had failed to prove that M/s AGIL had passed on the burden to its dealers and accordingly granted refund of Rs.1,25,34,988.97 to M/s AGIL. Being aggrieved, the Department carried the matter in appeal to the Division Bench which took the view that since NIIL had conceded of having passed on the tax burden to M/s AGIL there was no question of the trial court further examining the question as to whether M/s AGIL had passed on the burden to its dealers. Accordingly, the Division Bench allowed the appeal filed by the Department vide judgment dated 2.3.1993. Being aggrieved, NIIL came to this Court vide SLP No. 7484 of 1993. By order dated 30.1.1997, this Court disposed of the SLP observing that since NIIL had passed on the burden of excise duty to M/s AGIL the refund claims filed by NIIL are liable to be rejected.

Accordingly, the said SLP was dismissed. However it was clarified that the said Order will not prevent M/s AGIL from adopting appropriate remedy as open to it in law. In view of the order dated 30.1.1997 passed by this Court, M/s AGIL filed Writ Petition No. 1776 of 1993 in the High Court contending that the petitioners (AGIL) were entitled to refund of Rs.1,25,34,988.97 as sole selling distributors of NIIL. That as distributors they (AGIL) were not related to NIIL. That their transaction was at arms length and therefore, the Department had erred in collecting excess excise duty from NIIL on the basis of the prices charged by M/s AGIL to its dealers. In the Writ Petition, M/s AGIL relied on the judgment of this Court in the case of Bombay Tyre (supra). By order dated 28.9.1993 passed by the High Court, the Department was allowed to withdraw Rs.1,25,34,988.97 with undertaking to bring back the amount with interest as and when the Court so directs. In the meantime on 19.12.1996 this Court delivered its judgment in Mafatlal's case (supra) inter alia giving 60 days' time to those claimants, who had earlier adopted legal proceedings claiming refund to move under section 118 as amended w.e.f. 20.9.1991. Consequently, M/s AGIL moved their refund claim before the Department on 11.2.1997 for Rs.1,25,34,988.97. On 9.5.1997, a show cause notice was issued by the Department to M/s Allied Photographics India Ltd. (formerly known as M/s AGIL) calling upon them to show cause why Rs.1,25,34,988.97 should not be transferred to Consumer Welfare Fund. By judgment and order dated 31.10.1997 passed by the Assistant Commissioner refund was granted to M/s Allied Photographics India (P) Ltd. (M/s APIL). This order of Assistant Commissioner was confirmed in appeal by the Commissioner (Appeals) and the Tribunal vide impugned order dated 13.6.2000 and the Department was directed to refund Rs.1,25,34,988.97 with interest. Being aggrieved, the Department has come to this Court by way of present civil appeal under section 35L(b) of the Act.

ARGUMENTS:

Mr. A.K. Ganguli, learned senior counsel for the Department submitted that there was a difference between provisional assessment under rule 9B and payment of duty under protest in terms of rule 233B. In this connection reliance was placed on the judgment of this Court in Mafatlal's case (supra). He submitted that under the second proviso to section 11B if duty is paid by the manufacturer under protest the limitation of six months was not applicable, however, the purchaser of duty paid goods, after finalization of assessment of excise duty payable by the manufacturer, was not entitled to rely upon the said proviso. That in any event in the present case, M/s APIL (the respondent-herein) had claimed refund by filing an independent application on 11.2.1997 and therefore it was governed by section 11B(3). In support reliance was placed on para 104 of the Mafatlal's case. It was submitted that the abovementioned two decisions of this Court in the cases of Sinkhai Synthetics and Chemicals Pvt. Ltd. v. Collector of Central Excise reported in [2002 (143) ELT 17] and Collector of Central Excise v. T.V.S. Suzuki Ltd. reported in [2003 (156) ELT 161] run counter to the law laid down by this Court in Mafatlal's case and a clarification to that effect was required in the interest of justice. Learned counsel next contended that M/s APIL as the sole distributor of NIIL had bought the products in the course of trading between 1974 and 1984 and had sold them to its dealers earning profits between 12.6535% to 21.1333%. That during the said period, the purchaser had no right to claim refund and that M/s APIL became entitled to claim refund only after 20.9.1991 when section 11B was amended by the Central Excise and Customs Amendment Act of 1991 when such right was recognized for the first time and, therefore, there was no reason for M/s APIL not to pass on the burden to its dealers. That M/s APIL not only passed on the burden to its dealers but even admittedly made profits on its sales. That the consideration paid by M/s APIL to NIIL included excise duty and the very fact that M/s APIL recovered all its expenses and made profits in all its sales to its dealers itself establishes that incidence of duty was passed on to the dealers by M/s APIL in the course of its trading business. It was further urged that M/s APIL had never moved any refund claim prior to 8.6.1990 and that it filed its affidavit on that day in response to suo-moto notice issued by the High Court in the Writ Petition filed by NIIL inter alia for refund whereby for the first time M/s APIL contended that it had not passed on the burden to its dealers. In this connection, M/s APIL asserted that the excess duty component was negligible amount of 1.62% of its sale price; that it had earned profits varying from 12.6535% to 21.1333% and therefore it absorbed the burden of excess duty within its profit and that it gave a trade discount varying from 2% to 4% to its customers which itself was more than the burden of additional duty. However, on behalf of the Department it was contended that excess duty component was a part of cost incurred by M/s APIL during the above period 1974/1984 and there is no reason why M/s APIL did not recover it from its dealers particularly when M/s APIL had no right as a purchaser to claim refund which was recognized only on 20.9.1991 when section 11B was amended and therefore, M/s APIL was seeking to unjustly enrich itself by seeking such refund. Lastly, it was urged that M/s APIL had worked out its sale prices before the Department in such a way that it has not passed the burden to its dealers and yet it has earned profits varying from 12.6535% to

21.1333% which was contrary to normal conduct of a trader. In this connection it was further submitted that M/s APIL did not produce any material before the Department disclosing how its sale price were arrived at.

Per contra, Shri S. Ganesh, learned senior counsel for the respondent M/s APIL submitted that M/s APIL as the purchaser was entitled to claim refund of the excess duty as that amount had been passed on by NIIL to M/s APIL. In this connection reliance was placed on judgments of this Court in the case of Mafatlal (supra) and in the case of National Winders v. Collector of Central Excise reported in [2003 (154) ELT 350]. Learned counsel for the respondent contended that in the present case section 11B was not at all attracted. In support he pointed out that during the period 1974 to 1984, the Department insisted on NIIL paying excise duty on the footing that M/s APIL was related to NIIL. That the Department insisted on NIIL paying the additional excise duty of 1.62% on the footing that M/s APIL was related person to NIIL. However in 1984 assessments of NIIL were finalized in terms of judgment of this Court in the case of Bombay Tyre (supra) wherein it was held that the distributor could not be treated as a "related person" and accordingly the amounts paid by NIIL towards excise duty during 1974-84 were adjusted and appropriated against the amounts found payable on the said assessments and consequently the disputed amount of excess duty of 1.62% paid by NIIL under protest during the above period became refundable on the finalization of NIIL's assessments in 1984. That neither NIIL nor M/s APIL ever disputed the said assessments made in 1984 and M/s APIL had based their refund claim on the said assessment. It was submitted that when a provisional assessment is made under the Act or when excise duty is paid Under Protest by the appellant, all payments of excise duty are On Account payments which are to be adjusted and appropriated only on vacating of the protest or finalization of assessment. In this connection, reliance was placed on rule 9B (5) as it stood prior to its amendment in 1989 and rule 233B (v) and (vi). In either situations, when the assessment is finalized or the protest is vacated and the account is settled between the appellant and the Department and the said On Account payments made by the appellant are adjusted and appropriated against the assessed amount and if it is found that any amount is payable by the appellant then it can be recovered by the Department without issuance of show cause-cum-demand notice under section 11A.

Correspondingly, if any amount is found to be repayable by the Department to the appellant on such taking of accounts, then that amount has to be refunded without going through section 11B. In this connection reliance was placed on the judgment of this Court in the case of CCE v. National Tobacco Co. of India Ltd. reported in [AIR 1972 SC 2563]. According to the learned counsel the same principle was applicable in cases where the Department has to refund moneys to the appellant on finalization of the assessment; which principle has been reiterated vide para 104 of the Mafatlal judgment. Accordingly it was submitted that the doctrine of unjust enrichment in section 11B would not apply to the present case. Lastly it was urged that the argument of the Department was based entirely on section 11B (3) which had no bearing on the basic issue as to whether section 11B(2) was at all applicable particularly when the appellant was seeking refund of an "On account" payment

made Under Protest or under the Provisional assessment". Therefore, the reliance on section 11B(3) was misplaced. That in the circumstances, neither Sinkhai Synthetics nor T.V.S. Suzuki can be said to be in any way incorrect, much less per incuriam. On merits, learned counsel for the respondent submitted that the question as to whether the burden of duty has been passed on to the consumer is to be answered by relying on one singular test viz. whether the manufacturer has increased his sale price in order to pass on the disputed amount and not whether the manufacturer has made profits or losses. In this connection, reliance was placed on judgments of the Appellate Tribunal having been accepted by the Department that composition of costs incurred by M/s APIL was not relevant and the only relevant factor was whether M/s APIL had increased its sale price to its dealers after it was required to pay the differential amount of excise duty in the form of the increased price charged to it by NIIL. In this connection it was submitted that M/s APIL did not increase its sale price after it was required to bear the differential amount of excise duty of 1.62% in the form of the enhanced purchase price paid by it to NIIL and on the contrary, far from enhancing its sale prices, M/s APIL granted discounts between 2% to 4% on the sale price charged by it to its dealers and this discount was more than the disputed differential amount of excise duty which came to 1.62% of the price. It was submitted that the case of M/s APIL has been accepted by all the authorities below and that this Court should not interfere with the concurrent findings of fact recorded by the authorities below. In this connection it was submitted that the said findings were based on the audited accounts of APIL; certificate of Chartered Accountant, Sale Invoices of APIL and two affidavits filed on behalf of APIL. It was further urged that in the case of Mafatlal (supra) it has been held that where the claim for refund relates to the period prior to 20.9.1991, any evidence which reasonably shows that the disputed duty has not been passed on to the dealers/customers in the form of increased price would suffice and the claimant is not required to produce documents specified in section 12A which has prospective operation. Hence, M/s APIL (respondents herein) had not increased the sale price for recovering the additional disputed duty burden of 1.62% which was passed on to it (M/s APIL) by NIIL. Learned counsel for the respondent next contended that profits made by it during the period 1974 to 1984 does not indicate passing on of the duty burden to its dealers. It was contended that profit or loss is not the determinative factor in order to ascertain whether the disputed additional duty is passed on by the respondent to its dealers. In the circumstances, it was submitted that on the said material and evidence and having regard to the specific findings the only possible conclusion was that the respondent, M/s APIL had not passed on the disputed duty burden to its dealers/customers.

POINT FOR DETERMINATION:

> Whether the doctrine of unjust enrichment in section 11B of the Act is applicable to the facts of this case, having regard to the fact that NIIL (manufacturer) had paid the differential disputed excise duty Under Protest from 1.3.1974 to 31.10.1984 when the assessment was finalized in favour of NIIL in view of the judgment of this Court in the case of Union of India & Ors. v. Bombay Tyre International Ltd. reported in [AIR 1984 SC 420]?
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> FINDINGS:

The points at issue in this civil appeal are whether refund of duty paid under provisional assessment is similar to duty paid under protest as both are "On Account" payments adjustable on finalization of assessment or vacating of protest? Secondly, in the course of such adjustment or vacation of protest, if any amount is found payable by the Department to the manufacturer, is it open to the purchaser to contend that he (the purchaser) has stepped into the shoes of the manufacturer seeking refund of "on account payment" and, therefore, he was not bound to comply with section 11B of the said Act. In this civil appeal, we have to deal with the law governing refund during the disputed period from 1974 to 1984. To resolve the dispute herein, we quote hereinbelow section 11B of the said Act as also rule 9B of the Central Excise Rules, 1944 as it stood prior to Central Excise & Customs (Amendment) Act, 40 of 1991: "Section 11B: Claim for refund of duty. (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date:

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

Explanation. For the purposes of this section, (A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means,

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

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

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

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

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

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required which exported outside India, if returned to a

factory after having been removed from such factory for export out of India, the date of entry into the factory;

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

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

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

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

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

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

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

Rule 9B: Provisional assessment of duty. (1) Notwithstanding anything contained in these rules:

(a) where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or

(b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or

(c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, but the proper officer deems it necessary to make further enquiry (including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the

goods after their removal) for assessing the duty, the proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally at such rate or such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and as finally assessed.

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

> Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Collector may, in his discretion, demand a fresh bond and may, if the security furnished for a bond is not adequate, demand additional security.
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> (4) The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are not so assessed.
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> (5) When the duty leviable on the goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be."

Before analysing section 11B, it is important to note that there is a difference between making of refund and claiming of refund. Section 11B was inserted in the said Act w.e.f. 17.11.1980. Under sub-clause (e) to explanation B to section 11B(1), where assessment was made provisionally the relevant date for commencement of limitation of six months was the date of adjustment of duty as final assessment. Entitlement to refund would thus be known only when duty was finally adjusted. Sub- clause (e) referred to limitation in cases covered by rule 9B which dealt with duty paid under provisional assessment. The said rule started with a non-obstante clause. Rule 9B(1)(a) to (c) indicated the circumstances in which the proper officer would allow provisional assessment. Rule 9B(4) dealt with clearance of goods provisionally assessed whereas rule 9B(5) dealt with adjustment of provisionally assessed duty against finally assessed duty. The said rule 9B was a complete code by itself. On compliance with the conditions therein, the proper officer was duty bound to refund the duty without requiring the assessee to make a separate refund application. The said rule, therefore, provided for making of refund. On the other hand, section 11B(1) dealt with claiming of refund by the person who has paid duty on his own accord. In this connection, section 4 of the said Act is relevant. In the case of Bombay Tyre (supra) it has been held that section 3 of the Act refers to levy of duty whereas section 4 dealt with assessment. Assessment means determination of the tax liability. Under the Act, duty was payable by the manufacturer on his own account. Hence, under

section 11B(1), such a person had to claim refund by making an application within six months from the relevant date except in cases where duty was paid under protest in terms of the proviso. However, even in such cases, the person claiming refund had to pay the duty under protest in terms of prescribed rules. A bare reading of section 11B(1), therefore, shows that it refers to claim for refund as against making of refund by the proper officer under rule 9B.

On 20.9.1991, the above section 11B underwent a drastic change vide Central Excises and Customs Laws (Amendment) Act, 40 of 1991 (hereinafter referred to as "the Amendment Act"). By the Amendment Act, the concept of unjust enrichment as undeserved profit was introduced. We reproduce herein below amended section 11B: "Section 11B: Claim for refund of duty. (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish 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 had not been passed on by him to any other person:

> Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub- section (2) substituted by that Act:
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> Provided further that the limitation of six months shall not apply where any duty has been paid under protest.
>
> (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:
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> Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise 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) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
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> (b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette specify:

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 has not been passed on by the persons concerned to any other person.

(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 any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

Explanation. For the purposes of this section (B) "relevant date" means

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

According to statement of objects and reasons for enacting the Amendment Act, the Public Accounts Committee recommended introduction of suitable legislation to amend the said Act to deny refunds in cases of unjust enrichment. Under the amended section 11B(3) of the said Act, notwithstanding anything to the contrary in any judgment, decree, order or direction of the appellate Tribunal or any Court, no refund was to be made except in accordance with section 11B(2) of the said Act. Further, there was substitution of sub-clause (e) to explanation B to section 11B(1) by which the original sub-clause (e) was deleted and substituted by new sub-clause

(e) under which in cases where duty has been passed on by the manufacturer to the buyer, the relevant date for computing the period of limitation would commence from the date of purchase of goods by the buyer. At this stage, it is important to note that although sub-clause (e) as it stood prior to 20.9.1991 dealt with the period of limitation in cases of refund of duty paid under provisional assessment, the substantive provision for provisional assessment of duty was rule 9B. Therefore, even with the deletion of old sub-clause (e), rule 9B continued during the relevant period. The deletion of sub-clause (e) and continuation of rule 9B shows that the section 11B (as amended) applied to claiming of refunds where the burden was on the applicant to apply within time and prove that the incidence of duty has not been passed on whereas rule 9B covered cases of ordering of refund/making of refund, where on satisfaction of the conditions, the concerned officer was duty bound to make the order of refund and in which case question of limitation did not arise and,

therefore, there was no requirement on the part of the assessee to apply under section 11B. Lastly, rule 9B referred to payment of duty on provisional basis by the assessee on his own account and, therefore, in cases where the manufacturer has been allowed to invoke this rule and refund accrues on adjustment under rule 9B(5) that refund is on the account of the manufacturer and not on the account of the buyer. If one reads section 11B on one hand and rule 9B on the other hand, both indicate payment by the assessee on his own account and refund becomes due on that account alone.

In the light of what is stated above, we now quote hereinbelow para 104 of the judgment of this Court in the case of Mafatlal Industries Ltd. (supra): "104. Rule 9-B provides for provisional assessment in situations specified in clauses

(a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9-B will not be governed by Section 11-A or Section 11-B, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11-B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9-B(5) reagitating the issues already decided under Rule 9-B assuming that such a refund claim lies and is allowed, it would obviously be governed by Section 11-B. It follows logically that position would be the same in the converse situation."

At the outset it may be pointed out that in para 104 there is nothing to suggest that payment of duty under protest does not attract bar of unjust enrichment. Para 104 only states that if refund arises upon finalization of provisional assessment, section 11B will not apply.

In the present case, reliance was placed by the respondent M/s APIL on the above para in support of its contention that payment of duty under protest and payment of duty under provisional assessment are both "on account" payments under the Act. We do not find any merit in this argument. As discussed, there is a basic difference between duty paid under protest and duty paid under rule 9B. The duty paid under protest falls under section 11B whereas duty paid under provisional assessment falls under rule 9B. That section 11B deals with claim for refund whereas rule 9B deals with making of refund, in which case the assessee has not to comply with section 11B. Therefore, section 11B and rule 9B operate in different spheres and, consequently, in para 104 of the said judgment, it has been held that in cases where duty is paid under rule 9B and refund arises on adjustment under rule 9B(5), then such refund will not be governed by section 11B. In the said para, it has been clarified that if an independent refund claim is made after adjustment on final assessment under rule 9B(5), agitating the same issues, then such claim would attract section 11B.

This is because when the assessee makes an independent refund claim after final orders under rule 9B(5), such application represents a claim for refund and, it would not come in the category of making of refund and therefore, the bar of unjust enrichment would apply. Hence, there is no merit in the contention of the respondent M/s APIL that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under the said Act. This argument was obviously advanced because unless the two payments are equated as contended, the respondent M/s APIL was required to comply with section 11B. In this matter, duty has been paid under protest. It is the case of the respondent M/s APIL that since such payment was similar to payment under rule 9B, the respondent M/s APIL was not required to comply with section 11B. In the light of the discussion hereinabove, we hold that the respondent was bound to comply with section 11B. Lastly, in any event, the application dated 11.2.1997 fell in the category of refund claim being made after finalization of assessment of NIIL and, therefore, section 11B had to be complied with in terms of para 104 of the above judgment in the case of Mafatlal Industries Ltd. (supra). For above stated reasons, since there was failure to comply with section 11B, the respondent was not entitled to refund.

The point which still remains to be decided is whether the respondent herein was entitled to refund without complying with section 11B of the Act on the ground that it had stepped into the shoes of NIIL (manufacturer) which had paid the duty under protest. It was argued on behalf of the respondent that NIIL had paid the excise duty under protest pending final assessment, which was ultimately decided in favour of NIIL and since NIIL had sold the product to the respondent herein, the respondent was entitled to the benefit of the second proviso to section 11B(1) which inter alia stated that limitation of six months shall not apply where duty had been paid under protest. We do not find any merit in this argument. In the case of Bombay Tyre International Ltd. (supra), it has been held by this Court that section 3 of the said Act is a charging section whereas section 4 is a computation section which covers assessment and collection of excise duty. That the basis of assessment under section 4 was the real value of excisable goods which included manufacturing cost and manufacturing profit but excluded selling cost and selling profit. That the price charged by the manufacturer for sale of the goods represented the real value of the goods for assessment of excise duty. In the case of Atic Industries Ltd. v. H. H. Dave, Asstt. Collector of Central Excise reported in [AIR 1975 SC 960], this Court has held that the resale price charged by a wholesale dealer who buys goods from the manufacturer cannot be included in the real value of excisable goods in terms of section 4 of the said Act. Therefore, it is clear that the basis on which a manufacturer claims refund is different from the basis on which a buyer claims refund. The cost of purchase to the buyer consists of purchase price including taxes and duties payable on the date of purchase (other than the refund which is subsequently recoverable by the buyer from the Department). Consequently, it is not open to the buyer to include the refund amount in the cost of purchase on the date when he buys the goods as the right to refund accrues to him at a date after completion of the purchase depending upon his success in the assessment. Lastly, as stated above, section 11B dealt with claim for refund of duty. It did not deal with making of refund. Therefore, section 11B(3) stated that no refund shall be made except in terms of section 11B(2). Section 11B(2)(e) conferred a right on the buyer to claim refund in cases where he proved that he had not passed on the duty to any other person. The entire scheme of section 11B showed the difference between the rights of a manufacturer to claim refund and the right of the buyer to claim refund as separate and distinct. Moreover, under section 4 of the

said Act, every payment by the manufacturer whether under protest or under provisional assessment was on his own account. The accounts of the manufacturer are different from the accounts of a buyer (distributor). Consequently, there is no merit in the argument advanced on behalf of the respondent that the distributor was entitled to claim refund of "on account" payment made under protest by the manufacturer without complying with section 11B of the Act.

As stated above, para 104 of the judgment in the case Mafatlal Industries Ltd. (supra) states that if refund arises upon finalization of provisional assessment, section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra). In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17.1.1991. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied para 104 of the judgment of the Constitution Bench in the case of Mafatlal Industries Ltd. (supra), which with respect, had no application. As stated above, para 104 of the judgment in the case of Mafatlal Industries Ltd. (supra) dealt with refund consequent upon finalization of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalization of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of Mafatlal Industries Ltd. (supra). We may also point out that the judgment in the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. (supra) is based on the concession made by the counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned counsel for the respondent herein placed reliance on the judgment of this Court in the case of TVS Suzuki Ltd. (supra). In that case, application for refund was filed. This was on completion of final assessment. On 9.7.1996, the Department issued a show-cause notice as to why the refund claim should not be rejected for non-compliance of section 11B. By order dated 17.7.1996, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner (Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of para 104 of the judgment of this Court in Mafatlal Industries Ltd. (supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under rule 9B(5). The judgment of this Court in the case of TVS Suzuki Ltd. (supra), therefore, supports the view which we have taken herein above that refund consequent upon finalization of provisional assessment did not attract the bar of unjust enrichment.

Mr. Ganesh, learned senior counsel appearing on behalf of the respondent vehemently urged that the issue arising in the present matter is squarely covered by the decision of Division Bench of this Court in the case of National Winder v. Commissioner of Central Excise, Allahabad [2003 (154) ELT 350] in which it has been held that if duty is paid by a manufacturer under protest then limitation of six months will not apply to a claim of refund by a purchaser. For the reasons given hereinabove, we hold that the said judgment is per incuriam. At this stage, it is important to note that the Division

Bench judgment [Hon. S.N. Variava & B.P. Singh, JJ.] in the case of National Winder (supra) was delivered on 11.3.2003. However, on 13.11.2003, the Division Bench [Hon. S.N. Variava & H.K. Sema, JJ.], has referred the matter as stated above to the larger bench in the light of conflict which the Division Bench noticed between the earlier judgments of this Court on one hand and paragraph 104 of the judgment of the Constitution Bench of nine-Judges in the case of Mafatlal Industries Ltd. (supra). Hence, by this judgment, we have clarified the position in law.

Having come to the conclusion that the respondent was bound to comply with section 11B of the Act and having come to the conclusion that the refund application dated 11.2.1997 was time barred in terms of section 11B of the Act, we are not required to go into the merits of the claim for refund by the respondent who has alleged that it has not passed on the burden of duty to its dealers. Mr. Ganesh, learned senior counsel however submitted that this Court should not interfere, under Article 136 of the Constitution, in view of the concurrent finding of fact given by the authorities below that the respondent has not passed on the incidence of duty to its dealers. We do not find any merit in this argument. In May, 1974, the Department took the view that price declared by NIIL in its price list cannot be accepted as assessable value of excisable goods and price at which their sole distributor M/s AGIL sold the goods represented the correct price. Accordingly, on 8.5.1974 show-cause notice was issued to NIIL as to why the prices submitted by NIIL should not be rejected and why excise duty should not be collected from NIIL on the prices at which their distributor M/s AGIL sold the goods in the market. By order dated 31.12.1974, the Department held that the transactions between NIIL and M/s AGIL (predecessor of the respondent herein) were not at arms length and accordingly it was ordered that the prices charged by the distributor M/s AGIL should be taken as a wholesale cash price under section 4 of the said Act, as it stood at the relevant time. However, later on, in view of the judgment of this Court in the case of Bombay Tyre International Ltd. (supra) the Department approved the price list of NIIL vide order dated 31.10.1984 and accepted the ex-factory price of NIIL. On the basis of the said order, NIIL claimed refund of Rs.1,25,34,988.97 on which the Department issued show- cause notice on 23.2.1987 calling upon NIIL to show- cause why the said amount should not be credited to the Consumer Welfare Account. NIIL objected. However, their objection was rejected. Thereafter, the litigation took place as stated above. Ultimately, vide order dated 31.10.1997, the Assistant Commissioner Central Excise granted refund, which order was confirmed in appeal by the Commissioner (Appeals) and by CEGAT. Hence, the Department has come by way of the present Civil Appeal.

On the above facts, the short point which arises for determination is whether incidence of duty was passed on by NIIL to its distributor M/s AGIL and whether M/s AGIL in turn passed on the burden to its dealers. On the first point, NIIL conceded in the earlier proceedings before the High Court that it had passed on the duty burden to its distributor M/s AGIL. Therefore, the only question which we are required to decide is whether M/s AGIL in turn had passed on the duty burden to its dealers as alleged. In the present case, it was argued on behalf of the Department before the authorities below that 20% of the total price paid by M/s AGIL represented the duty recovered by NIIL as a part of the sale price. It is important to note that M/s AGIL was the sole distributor of NIIL. Therefore, it is highly improbable for a distributor to incur cost of purchase which included 20% element of duty in addition to the purchase price without passing on the burden to its dealers. From the record, it appears that during the disputed period 1974 to 1984, M/s

AGIL were in trading which further supports the above improbability. In the present case, there is no material placed on record by M/s AGIL as to how it had accounted for the cost of purchase in its books and the accounting treatment it gave to the said item at the time of payment of the purchase price. No record as to costing of that item has been produced. This material was relevant as in the present case NIIL conceded that it had passed on the burden of duty to its distributor M/s AGIL (buyer) and it was the buyer who claimed refund. It has been urged on behalf of the respondent and which argument has been accepted by the Authorities below that 20% of the total price paid by M/s AGIL to NIIL represented total excess excise duty levied and not the excess duty collected by NIIL in the form of sale price from its distributor M/s NIIL. It was argued that excess duty collected by NIIL represented only 1.62% of the total price. It was argued that resale price charged by M/s AGIL to its dealers had no relevance to excess excise duty paid by M/s AGIL to NIIL at the time of purchase as the sale price charged by M/s AGIL to its dealers was based on the prevailing market price. We do not find any merit in this argument. In the present case, the refund claim is made by a buyer and not by the manufacturer. The buyer says that he has not passed on the burden to its dealers. The buyer has bought the goods from the manufacturer paying the purchase price which included cost of purchase plus taxes and duties on the date of purchase. In such cases, cost of purchase to the buyer is a relevant factor. None of the authorities below have looked into this aspect. Even the appellate Tribunal has not gone into this relevant factor. It has merely quoted the passages from the order of the lower authority, whose order was impugned before it. Costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own account were relevant circumstances which the Authorities below failed to examine. It was submitted that cost of purchase was not a relevant factor. It was submitted on behalf of the respondent that the resale price charged by the buyer was not a relevant factor. It was submitted that since the sale price of the goods before and after the assessment remained the same the burden of excess duty was absorbed by the respondent. It was submitted that in any event the sale price of the goods increased much less than the amount of duty (differential) involved in this case and, therefore, incidence of duty was not passed on to the consumers. In this connection, reliance was placed on several judgments of the Tribunal. We have gone through these judgments. They are not applicable to the facts of this case. In the present case, we are concerned with the distributor buying the products from the manufacturer and reselling them to its dealers. Hence, the cost of purchase is a relevant factor. The facts of the cases before the Tribunal deal with sale by manufacturer to the consumer. They deal with assessees' invoice bearing a composite price. They are the cases which dealt with the claim of refund by the manufacturer. They did not deal with claim of refund by the buyer. Hence, they have no bearing on the facts of the present case.

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

Accordingly, this Civil Appeal stands allowed. The judgment and order No.C-II/1748-50/WZB/2000 dated 13.6.2000 in Appeal No.E/3318/99-Mum passed by the

Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai-II is hereby set aside. There shall be no order as to costs.