CASE NO.:
Appeal (civil) 1983-1984 of 2004

PETITIONER:
Commissioner of Central Excise, Jaipur

RESPONDENT:
M/s Birla Corporation Ltd. & Anr

DATE OF JUDGMENT: 25/01/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

Challenge in these appeals is to the judgment rendered by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, (for short 'CEGAT'). By the impugned judgment the CEGAT held that the bar of unjust enrichment does not apply to claim for refund in cases where original payments of duty were made under protest. Accordingly, the orders passed by the Central Excise Authorities were set aside.

Background facts in a nutshell are as follows:-

Respondent no.1 was formerly known as M/s. Birla Jute & Industries Ltd. \026 unit Chittor Cement Works. It was engaged in the manufacture of Cement which is classifiable under Chapter 25 of the Schedule to the Central Excise Tariff Act, 1985 (in short 'Tariff Act'). It claimed the benefit of rebate of central excise duty under Notification No.36/87-CE dated 1.3.1987 which was denied by the Department. Thereafter, respondent no.1 paid duty at the applicable rates under protest during the period between March 1987 to March 1990. Initially, the respondent no.1 was held to be entitled to the benefit of the notification in terms of the order dated 14.5.1991 passed by the Collector (Appeals), Central Excise. Respondent no.1 by letter dated 29.5.1991 requested the jurisdictional Assistant Collector to grant refund in compliance of the order passed by the Collector (Appeals). Being aggrieved by the order of the Collector (Appeals), Revenue preferred an appeal before the CEGAT which was dismissed. Authorities were of the view that respondent no.1 had passed on duty to the customers and, therefore, notice was issued on 29.4.1994 to show-cause as to why the amount of refund should not be credited to the Consumers Welfare Fund. By order dated 20.12.1994, the Assistant Collector, Central Excise Division, Udaipur, sanctioned the refund claimed but directed that only a part of it was to be paid to respondent no.1. The remaining amount was ordered to be credited to the Consumer Welfare Fund. It is to be noted that the total claim of refund was Rs.9,70,25,847.60 which consists of the following items:-

(i)
Excise duty under refund
charged/realized from the

purchasers.
Rs.1,08,60,620.00
(ii)
Excise duty under refund
not charged/realized from
the purchasers.
Rs.8,60,52,179.00
(iii)
Excise duty under refund
borne by the unit
Rs.1,13,048.00

The Assistant Collector, inter alia, held that the respondent no.1 had failed to prove that the duty incidence had not been passed on to the customers. Respondent no.1 filed an appeal before the Commissioner (Appeals), which was dismissed placing reliance on the decision of this Court in Mafatlal Industries Ltd. v. UOI [1997 (89) ELT 247 SC]. It was held that principle of unjust enrichment would apply to the present case, since respondent no.1 had passed on the incidence of duty to its customers. Appeals were filed before the CEGAT by respondent No.1 which relying on the decision of this Court in Sinkhai Synthetics & Chemicals (P) Ltd. v. Collector of Central Excise, Aurangabad (2002 (9) SCC 416) held that the principle of unjust enrichment was not applicable as amount had been paid under protest. Accordingly, the appeals were allowed. In these appeals the primary stand of the appellant is that the decision in Sinkhai's case (supra) has been held to be not properly decided by a three-Judge Bench in Commissioner of Central Excise, Mumbai-II v. Allied Photographics India Ltd. (2004 (4) SCC 34).

Learned counsel for respondent no.1 on the other hand submitted that the amount was paid provisionally under Rule 9-B of the Central Excise Rules, 1944 (in short the 'Rules'). The amendment to Section 11-B of Central Excise Act, 1944 (in short the 'Act') was made on 20.9.1991. In view of position prior to amendment, Section 11-B(3) of the Act, was applicable and refund was to be granted without an application.

Learned counsel for the respondent no.2 has submitted that pursuant to the orders passed by the Appellate Authority For Industrial & Financial Reconstruction, New Delhi (in short 'AAIFR') adjustments have been made and if the order of the Tribunal is interfered with that may disturb the arrangements made. It has been stated by the respondents that the incidence was not passed on the customers and it has been borne by the assessee and, therefore, Section 11-B of the Act has no application.

By order dated 13.11.2003 as reported in Commissioner of Central Excise, Mumbai v. Allied Photographics India Ltd. (2004 (4) SCC 55), doubting the correctness of the view expressed in Sinkhai's case (supra) reference was made to a three-Judge Bench. The three Judge Bench in Commissioner of Central Excise, Mumbai II v. Allied Photographics (speaking through one of us Kapadia, J.) (2004 (4) SCC 34) held as follows:-

"(1) Section 11-B was inserted in the Act w.e.f. 17-11-1980. Under Explanation (B)(e) to Section 11-B(l), 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. Explanation (B)(e) referred to limitation in cases covered by Rule 9-B which dealt with duty paid under provisional assessment. The said rule started with a non obstante clause. Rule 9-B 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 11-B(1) dealt with claiming of refund by the person who had paid duty on his own accord. In this connection, Section 4 of the Act is relevant. It dealt with assessment which means determination of tax liability. Under the Act, duty was payable by the manufacturer on his own account. Hence, under Section 1l-B(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 the prescribed rules. Thus, Section 11-B(1) refers to claim for refund as against making of refund by the proper officer under Rule 9-B.

(2) On 20-9-1991 Section 11-B underwent a drastic change vide Central Excises and Customs Laws (Amendment) Act 40 of 1991 (for short "the Amendment Act"). By the Amendment Act, the concept of unjust enrichment as undeserved profit was introduced.

(3) According to Statement of Objects and Reasons for enacting the Amendment Act, the Public Accounts Committee had recommended introduction of suitable legislation to amend the Act to deny refunds in cases of unjust enrichment. By the Amendment Act, Section 11-B(3) was amended and clause (e) to Explanation (B) was substituted by a new clause (e). However, although clause (e) as it stood prior to 20-9-1991 dealt with the limitation period in cases of refund of duty paid under provisional assessment, the substantive provision for provisional assessment of duty was Rule 9-B. Therefore, even with the deletion of old clause (e), Rule 9-B continued during the relevant period. Therefore, Section 11-B (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 had not been passed on whereas Rule 9-B covered cases of ordering of refund/making of refund, where on satisfaction of the conditions, the officer concerned 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 l1-B. Lastly, Rule 9-B referred to payment of duty on provisional basis by the assessee on his own account and, therefore, in cases where the manufacturer is allowed to invoke this rule and refund accrues on adjustment under Rule 9-B(5) that refund is on the

account of the manufacturer and not on the account of the buyer. If one reads Section 11-B on one hand and Rule 9-B on the other hand, both indicate payment by the assessee on his own account and refund becomes due on that account alone.

(4) The Bench found no merit in the stand that payment of duty under protest and payment of duty under provisional assessment are both "on-account" payments under the Act. There is a basic difference between duty paid under protest and duty paid under Rule 9-B. The duty paid under protest falls under Section 1l-B whereas duty paid under provisional assessment falls under Rule 9-B. That Section 11-B deals with claim for refund whereas Rule 9-B deals with making of refund, in which case the assessee has not to comply with Section 11-B. Therefore, Section Il-B and Rule 9-B operate in different spheres. Therefore, the respondent was bound to comply with Section 11-B. 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 11-B had to be complied with in terms of para 104 of the judgment in Mafatlal Industries Ltd. v. Union of India [(1997) 5 SCC 536]. Since there was failure to comply with Section 11-B, the respondent was not entitled to refund.

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 already stated, Section 11-B dealt with the claim for refund of duty. It did not deal with making of refund. Therefore, Section I1-B(3) stated that no refund shall be made except in terms of Section 11-B(2). Section 11-B(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 11-B 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)."

In view of what has been stated above, the order of CEGAT cannot be maintained.

But the crucial question is whether the duty element had been passed on to the customer. This is to be factually adjudicated. We, therefore, remit the matter to the Assistant

Collector to decide this matter. The parties shall be permitted to place materials in support of their respective stand. We make it clear that we have not expressed any opinion as to the effect of the adjudication to be made by the Assistant Collector in the proceedings before the AAIFR.

The appeals are accordingly disposed of without any order as to costs.