F NO. 195/750/12-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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Mumbai- 400 005

F.NO.195/750/12-RA/807 Date of Issue: 18.01.2018

ORDER NO.33/2017-CX (WZ) /ASRA/MUMBAI DATED 29.12.2017 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Hindustan Petroleum Corporation Ltd.

Respondent : Commissioner of Central Excise (Appeals), Mumbai-III

Subject : Revision Applications filed, under section 35EE of the Central Excise ACT, 1944 against the Orders-in-Appeal No. BC/149/M-II/2012-13 dated 29.06.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III.

ORDER

This revision application has been filed by M/s. Hindustan Petroleum Corporation Ltd. (hereinafter referred to as "the applicant) against the Order-in-Appeal No. BC/149/M-II/2012-13 dated 29.06.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai- III, upholding the Order-in-Original No.MAD/Refund/03/Ch-II/11-12 dated 13.07.2011 passed by the Deputy Commissioner of Central Excise, Chembur-II Division, Mumbai-II.

2. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:-

3. The case briefly is that the applicant, a public sector undertaking engaged in the business of refining of crude petroleum and marketing various finished petroleum products thereof. Due to non-production of re-warehousing certificates in 1997 the applicants were issued 12 SCNs amounting to Rs 4,26,36,538/ which were adjudicated by Deputy Commissioner, Central Excise vide Order-in-Original dated 25.09.1998, confirming a demand of Rs 2,42,09,991/ -. The applicants preferred appeal with Commissioner (Appeals) and claimed to have paid Rs 2,42,09,991/ - vide TR-6 challan No 224/98-99 dtd 17.03.1999 as per the pre-deposit order dtd 05.03.1999 passed by the Commissioner (Appeals). Thereafter, Commissioner (Appeals) vide O-I-A dated 08.09.2000, remanded the case to Joint Commissioner, Central Excise, who vide his denovo order dated 16.04.2003 confirmed demand of Rs 1,39,59,176/- and imposed penalty of Rs. 50,00,000/-. The applicant once again appealed to Commissioner (Appeals), who vide order dated 29.08.2003, upheld Joint Commissioner order but set aside the penalty imposed. The appellant filed revision application with the Joint Secretary to the Government of India, who vide his order dated 29.10.2004, remanded back the case to the lower adjudicating authority. In remand proceedings, the Additional Commissioner, Central Excise, Mumbai-II vide order dated 10.01.2011,

confirmed an amount of Rs1,41,94,512/-. The applicants in pursuance of this order dated 10.01.2011 filed refund claim on 01.02.2011 for an amount of Rs 1,00,15,479/-. Deputy Commissioner, Central Excise, Chembur-II, Mumbai-II issued show cause notice dated 13.04.2011 to the applicant proposing to reject the refund claim for failure to submit original copy of TR6 challan and original copy of PLA and also on the grounds of unjust enrichment.

4. The lower adjudicating authority adjudicated the aforementioned show cause notice vide Order in Original No. MAD/Refund/03/CH-II/11-12 dated 13.07.2011 rejecting the refund claim on the grounds that the applicant had not submitted original copy of TR-6 Challan No 224/98-99 dtd 17.03.1999 and had also failed to submit documentary evidence to show that the incidence of duty has not been passed on to any other person.

5. While deciding the appeal filed by the applicant against the aforesaid Order dated 13.07.2011, the Commissioner (Appeals) observed that the fact of non-submission of original copy of TR-6 challan cannot be a valid ground for rejection of refund claim and relying Hon' High Court of Kerala in the case of Narayan Nambiar Meloths Vs Commr of Customs -2010(251)E.L.T.-57 and CESTAT Order in the case of Sambhav Enterprises Vs Commissioner of Customs, Cochin-2011(265)E.L.T.113 observed that claiming refund on Xerox copy of the TR-6 Challan/ on production of attested copy of challan is sufficient and originals are not required. However on the issue of unjust enrichment, Commissioner (Appeals) relying on the Apex Court Order in the case of Mafatlal Industries Ltd. reported in 1997 (89) E.L.T. 247 (S.C.) and Hon'ble Delhi High Court's Order in the case of Sawhney Brothers vs Collector of Customs 2011 (271) ELT 366 (Del) observed that in the instant case, the applicant were asked to submit necessary proof that the refund claim is not hit by unjust enrichment but they have not submitted any evidence to pass the test of unjust enrichment and hence rejected the appeal vide Order-in-Appeal No. BC/149/M-II/2012-13 dated 29.06.2012.

6. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

- that this refund has arisen under the Rule 156(B)(2) of the Central Excise Rules, 1944 wherein the unjust enrichment does not apply. To support this contention they rely upon the following case law:

  Elgi Electric & Industries Ltd. Vs. CCE, Coimbatore 2009 (05) LCX 0151 Equivalent 2009 (242) ELT 0453 (TRI – Chennai).

  In this case it was held that in case appellants have paid duty as per Rule 156(B), they are automatically entitled to refund.

  Rule 156(B)(2) states that when duty has been paid and proof of re-warehousing is produced by the consigner to the satisfaction of the proper officer, such consigner shall, on making an application to the proper officer, is entitled to a refund of the duty so paid.

  The Commissioner of Central Excise (Appeals) has not given any finding to this ground though it was a part of our written submission made before the Commissioner of Central Excise.

- that the Supreme Court judgement of Sahakari Khand Udyog Mandal Ltd. Vs. CCE is not applicable in the present case as in that case it was established that the Mandal had recovered the amount from the consumers whereas the present case the appellants have not recovered any amount from the customers and the present refund falls under Rule 156(b)(2).

- Notwithstanding the above grounds, it may be noted that the amount of Rs. 2.42 crores was paid under Section 35(F) and hence the doctrine ofunjust enrichment is not applicable and appellants rely on the following case laws –

  Rane Brake Linigs Ltd. Vs. CCE, Chennai-II, 2004-TIOL-214-CESTAT MAD

  Duty paid under protest while filing appeal against the adjudication order is payment of duty and refund is to be honoured under Section 11B.

  Shree Ganesh Steel Rolling Mills Vs. CCE, Chennai – I, 2009-TIOL-225-CESTAT-MAD.

  Central Excise – refund – bar of unjust enrichment an limitation – advance deposit paid under protest pending investigation – claim is not hit by limitation or unjust enrichment.

ICI India Ltd. Vs. CCE (Appeals), Mumbai-II,, 2008-TIOL 897-CESTAT-MUM

Pre-deposit made as per directions of the appellate authority u/s 35F of Central Excise Act, 1944 are not subject to the provisions of unjust enrichment u/s 11B and refund cannot be denied on that account.

YashMetallics Pvt. Ltd. Vs. CCEx, Pune-II 2007-TIOL-2088-CESTAT-MUM

Amount paid by the assessee pending the appeal is to be treated as ore-deposit under the provision of Section 35F of Central Excise Act – Bar of unjust enrichment does not apply to refund of pre-deposit – Refund allowed.

Indoswe Engineers Pvt. Ltd. Vs. CCE, Pune,2008-TIOL-423-CESTAT-MUM

Doctrine of unjust enrichment has no application to deposits mad under protest during pendency of dispute Tribunal allows appeal with consequential relief.

Airlights Electronics Pvt. Ltd. Vs. CCE, Faridabad, 2004-TIOL-784-CESTAT-DEL

Doctrine of unjust enrichment is applicable only to duty and not to deposits.

Gujarat Insecticides Ltd., Vs.Union of India, 2005-TIOL-86-HC-AHM-CX

Amount paid during pendency of appeal is not duty; unjust enrichment is not applicable; no refund application is required.

In view of the aforesaid grounds the applicant prayed for setting aside the impugned Order in Appeal.

7. A Personal hearing was held in this case on 20.12.2017 and Ms. P Vedavalli, Deputy General Manager Finance, HPCL appeared for hearing and reiterated the submission filed through Revision Application and filed on the date of hearing and relied on the following case laws, (i) DCW Ltd., vs Union of India – 2015(324) E.l.T.702(SC)and (ii) CCE , Pune I Vs Sandvik Asia Ltd., 2015 (323) ELT 431 (Bom) (iii) Circular No 802/35/2004 dated 08.12.2004

and iv) Circular No 275/37/2K-CX. 8A dated 2.1.2002 to support their case and requested to allow the Revision Application.Shri P.K. Gupta, Assistant Commissioner, CGST & CX, Navi Mumbai appeared on behalf of the respondent and filed parawise comments to the Grounds of Defence in Revision application.

8. In their comments to the Grounds of Defence, the respondent department argued that :

The assessee has relied on the Tribunal's judgement in the case of Elgi Electric & Industries Ltd. Vs CCE, Coimbatore [2009 (242) ELT 0453 (Tri-Chennai)] wherein it was held that duty paid as per rule 156(b) are automatically entitled to refund.

However, department relied on the judgment of the Hon'ble Supreme Court in the ease of Sahakari Khand Udyog Mandal Ltd. Vs CCE & Customs [2005 (181) ELT 328 (SC)], wherein the Hon'ble Supreme Court has ruled that "Doctrine of 'unjust enrichment' based on equity, thus, irrespective of applicability of Section 11B of Central Excise Act, 1944, doctrine can he invoked to deny benefit to which a person is not otherwise entitled. Section 11B or similar provision merely gives legislative recognition to this doctrine - That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit - Before claiming a relief of refund, appellant to show that he has paid the amount for which relief is sought, he has not passed on burden on consumers and if such relief not granted, he would suffer loss.

The assessee in the instant claim has failed to submit the refund application accompanied by such documentary evidence to establish that the amount of duty of excise in relation to which said refund is claimed was collected from or paid by him and the incidence of such duty paid had not been passed on by him to any other person.

The Commissioner (Appeals) vide his OIA No. BC/149/M-II.2012-13 dated 29.06.2012 has correctly rejected the assessee's appeal relying on the Apex Court judgment in case of Mafatlal Industries Ltd. [1997 (89) ELT 247] wherein it has been held that the claim of refund except where the levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of Central Excise Act and subject to claimant establishing that burden of duty has not been passed on to the third party. Accordingly, the number of cases relied upon by the assessee are not applicable in the instant case.

9. On the other hand the applicant vide its submissions dated 20.12.2017 submitted as under :-

At the outset, we wish to state that the amount of Rs. 2.42 crores (in which Rs.1.00 crores is also included as reconciled above) was paid under Section 35(F) as pre-deposit and was paid basis the order passed by Commissioner of C. Ex. (Appeals) and hence doctrine of unjust enrichment is not applicable and we rely upon the following case laws:

- *DCW Ltd., Vs Union of India – 2015(324) E.l.T.702(SC)*

  Doctrine of unjust enrichment applicable in all cases except in cases where amount deposited as pre-deposit

- *CCE , Pune 1 vsSandvik Asia Ltd., 2015 (323) ELT 431 (Bom)*

  the amount is directed to be deposited not towards duty liability but as a condition to grant of interim relief or interim stay, then this question of unjust enrichment would not arise at all.

- *Commissioner of Cus (Import) , Raigad vs Finacord Chemicals (P) Ltd., 2015 (319) ELT 616 (S C)*

- *U O I vs Suvidhe Ltd., 1997 (94) ELT A159(SC)*

  where in it was held that when deposits made under 35F is not a payment of duty but only a pre deposit for availing the right of appeal and the amount is bound to be refunded when the appeal is allowed.

Further we wish to rely on the Board Circulars No 1053/2/2017-CX dated 10.03.2017 and 802/35/2004 dated 08.12.2004 issued instructions that 11B is not applicable in case of pre-deposit and to return the deposits made in terms of Section 35F without delay.

The Petroleum products like kerosene, LOBS, ATF, SKO etc. were removed from Refinery under re-warehousing provision for the months of January, April, May, July and August 1997 whereas the duty deposit has been made in March 1999 i.e. deposit has been made post facto clearance hence the question passing on the duty does not arise as the principle of unjust enrichment cannot apply for post facto clearance of goods and we rely upon the following case laws –

- *a) Krishna SSK Ltd. – 2007 (220) ELT 192 (T)*
- *b) Upheld by Mumbai High Court vide Order dated 6/08/ 2008 in CEXA No. 30 of 2008*

- *c) Modi Oil & General Mills 2002 (150) ELT 430 (T)*
- *d) -Do- upheld by Punjab & Haryana High Court 2007 (210) ELT 342.*
- *e) Gujarat State Fertilizer &Chem Ltd., vs CCE , Vadodara 2005 (186) ELT 607 (Tri Mumbai)*

View above the refund claim passes the test of unjust enrichment on both the grounds i.e. unjust enrichment is not applicable for pre-deposit made under Section 35(F) and not applicable for post facto clearance of goods.

The case law Sawhney Brothers vs collector of Customs 2011(271) ELT (366) Del does not applicable in the present case. This pertains to the valuation to be considered for the purpose of customs duty and actual payment of the customs duty at the time of the import of the goods. But the present case is with respect to refund of the pre-deposit made under Section 35 F.

We request you to kindly consider the above submissions and grant us the refund.

10. Government has carefully gone through the relevant case records available in case files, oral & written submissions by both applicant and the respondent and perused the impugned Order-in-Original and Order-in-Appeal.

11. Government observes that Original authority while rejecting the claim on the grounds of unjust enrichment has relied on Hon'ble Supreme Court's Judgement in Sahakari Khand Udyog Mandal Ltd. Vs CCE & Customs [2005 (181) ELT 328 (SC)], whereas the appellate authority on the other hand relied upon Hon'ble Supreme Court judgment in the case of Mafatlal Industries [1997 (89) ELT 247 (SC) 2002] and Hon'ble Delhi High Court judgment in the case of Sawhney Brothers Vs Collector of Customs [2011 (271) ELT 366 (Del)].

12. In this regard Government observes that the Apex Court in the case of Mafatlal Industries (cited supra) has made it clear that all types of refund

claim be there of excess duty paid or otherwise are to be filed under Section 11B and have to pass the proof of not passing on the incidence of duty to others. Similarly, Hon'ble Supreme Court in the case of Sahakari Khand Udyog and Others (cited supra) clearly laid down that all refunds have to pass through doctrine of unjust enrichment, even if it is not so expressly provided for in the statute. From these decisions it clearly emerges that all types of refund have to be filed under Section 11B of the Central Excise Act and no *suomoto* refund can be taken unless and until the department is satisfied that the incidence of duty has not been passed on.

13. In the instant case Government observes that the applicant had filed an application for stay and for waiver of condition under 35 F of the Central Excise Act,1944, of pre deposit of duty, penalty along with appeal against Order in Original No. 117/98/DC/BPS dated 25.09.1998 passed the Deputy Commissioner of Central Excise, Mumbai – II Commissionerate. Relevant portion of the Commissioner (Appeals) order dated 07.03.1999 issued under F.No. V-2(A) 10/M-II/99 is reproduced below:

> *I find that the appellants do not have strong prima facie case nor the balance of convenience is in their favour. I do not find material to show that pre-deposit would cause undue hard ship to them.*
>
> *I, therefore, reject the stay/waiver application. The applicant shall deposit within one week of this order, entire amount of duty. Their main appeal will be heard only after they deposit the amount as directed herein above, in compliance with provisions of Section 35 F of CEA, 1944.*

13. Further, from the perusal of copy of TR-6 Challan No. MR 224/98-99 dated 17.03.1999 enclosed to the application it is seen that the amount of Rs,2,42,09,991/- paid by the applicant was shown as PRE-DEPOSIT OF DUTY AGAINST ORDER-IN-ORIGINAL No. 171/98/DC/BPS dt. 25-9-98. It is also mentioned on the said TR-6 challan as "Refer Comm (App) letter No. V-2(A) 10/M-II/99 dt.7.3.99.

14. From the perusal of the Order in Appeal dated 07.03.1999, it is clear that the amount which deposited by the applicants was not towards Excise

Duty but by way of deposit under Section 35F for availing the remedy of an appeal.

15. In Commissioner of C.Ex., Coimbatore Vs Pricol Ltd. [2015 (39) S.T.R. 190 (Mad.)] Hon'ble High Court Madras , while deciding similar issue at para 7 of its Order dated 12.02.2015 observed as under :-

> *7. The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in Mafatlal Industries case [1997 (89) E.L.T. 247 (S.C.)]. Relevant portion of the order passed by the Supreme Court in Mafatlal Industries case (supra) has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed that it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court of Bombay in Suvidhe Ltd. v. Union of India - 1996 (82) E.L.T. 177 (Bom.), and by the Gujarat High Court in Commissioner of Customs v. Mahalaxmi Exports - 2010 (258) E.L.T. 217 (Guj.), which has been followed in various cases in Summerking Electricals (P) Ltd. v. CEGAT - 1998 (102) E.L.T. 522 (All.), Parle International Ltd. v. Union of India - 2001 (127) E.L.T. 329 (Guj.) and Commissioner of Central Excise, Chennai v. Calcutta Chemical Company Ltd. - 2001 (133) E.L.T. 278 (Mad.) and the said view has also been maintained by the Supreme Court in Union of India v. Suvidhe Ltd. - 1997 (94) E.L.T. A159 (S.C.). There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee.*

16. In Godrej Industries Ltd. Vs Commissioner of Customs, Mumbai [2007 (213) E.L.T. 259 (Tri. - Mumbai)] Hon'ble Tribunal West Zonal Bench in its order dated 29.11.2006 observed as under :

We find that the Commissioner (Appeals) reliance on the Supreme Court's decision in the case of Sahakari Khand Udyog Mandal Ltd., is not appropriate inasmuch the issue before the Hon'ble Supreme Court was not as regards the refund of pre-deposit made for the purposes of hearing of the appeal. On the other hand, we find that the Hon'ble Supreme Court's in the case of CCE, Hyderabad v. ITC Ltd. [2005 (179) E.L.T. 15 (S.C.)], by taking note of the Board's Circular, has ordered payment of interest on refund accruing to the assessee, as a result of success of their appeal. The Tribunal has also considered the said issue in a number of matters and has held that such amounts deposited after adjudication have to be treated as deposits and not duties and would not attract the provisions of unjust enrichment. The Board's Circular No. 275/37/2K-CX.8A dated 2-1-2002 has examined the issue relating to the refund of pre-deposit made during the pendency of the appeal and it was decided that since the practice in department had all along been to consider such deposits as other than the duty, such deposits should be returned in the event the appellants succeeds in appeal or the matter is remanded for fresh adjudication. In Para 3 of the said Circular, the Board's observed as under:

> *"In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested Xerox copy of the challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications already made under the relevant provisions of the indirect tax enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned."*

As is seen from the above Circular of the Board, the deposits made during the pendency of the appeal automatically become refundable to the lessee on success of their appeals, without the assessee having made any refund application. As such, deposits are basically in the nature of a condition of hearing of the pending appeal. In any case, in the present case the imports were effected during the period 1994 to 97 and the deposits were made by the appellants in the year 2000, during the pendency of the appeal before the Hon'ble Supreme Court. As such, in our view it cannot be reasonably concluded that the same would be hit by the bar of unjust enrichment. We accordingly set aside the impugned order of the Commissioner (Appeals) and restore the order of the Assistant Commissioner. The appeal is allowed in above terms.

17. Hon'ble Supreme Court in Commissioner of Customs (Import), Raigad Vs Finacord Chemicals (P) Ltd. [2015 (319) E.L.T. 616 (S.C.)] while deciding the issue of refund of deposit observed as under :

15. As far as the deposit of the aforesaid amount by the appellant and seeking refund thereof is concerned, we need not discuss the law on this aspect in detail as the position would become completely transparent on taking note of some of the circulars issued by the Central Board of Excise and Customs, New Delhi, itself. Further, these circulars are issued to give effect to certain judicial pronouncements.

16. First circular to which we would like to refer is Circular dated 2-1-2002 issued by the Board, wherein the Board clarified that in the matter of refund of pre-deposit, refunds would not be covered under the provisions of Section 11B of the Customs Act or Section 35F of the Central Excise Act, meaning thereby, the aforesaid provisions which pertain to aforesaid unjust enrichment would not be applicable. It is also specifically pointed out in the said circular that these deposits are other than duty. The circular was issued keeping in view of the orders of this Court in few cases including in Union of India v. Suvidhe Ltd [1997 (94) E.L.T. A159 (S.C.)]. It is clear from the following portion of this circular :

"The issue relating to refund of pre-deposit made during the pendency of appeal was discussed in the Board Meeting. It was decided that since the practice in the Department had all along been to consider such deposits as other than duty, such deposits should be

returned in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication.

2. It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of NELCO LTD., challenging the grant of interest on delayed refund of pre-deposit as to whether :

(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,

(ii) the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.

The Hon'ble Supreme Court vide its order dated 26-11-2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be construed in the light of its earlier judgment in the case of Suvidhe Ltd. and Mahavir Aluminium that the law relating to refund of pre-deposit has become final."

17. It is the order dated 7-8-1996 which was passed by this Court in Union of India v. Suvidhe Ltd dismissing the special leave petition which was filed by the Union of India against the judgment of the High Court of Bombay in Suvidhe Ltd. v. Union of India [1996 (82) E.L.T. 177]. Since the special leave petition was dismissed in limine, we would like to reproduce para 2 of the judgment of the High Court wherein the High Court had observed that in case of such deposits, provisions of Section 11B of the Customs Act will have no application. This para reads as under: -

"2. Show cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for Excise Duty and Redemption fine paid in a sum of Rs. 14,07,410/- should be denied under Section 11B of the Central Excise Rules and Act, 1944 (sic), is impugned in the present petition. The aforesaid amount is deposited by the Petitioners not towards Excise Duty but by way of deposit under Section 35F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on 30th of November, 1993 with consequential relief. Petitioners' prayer for refund of the amount

deposited under Section 35F has not received a favourable response. On the contrary the impugned show cause notice is issued why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show cause notice is thoroughly dishonest and baseless. In respect of a deposit made under Section 35F, provisions of Section 11B can never be applicable. A deposit under Section 35F is not a payment of Duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief."

18. By another Circular No. 802/35/2004-CX., dated 8-12-2004 issued by the Board, the Board emphasised that such amounts should be refunded immediately as non-returning of the deposits attracts interest that has been granted by the Courts in number of cases.

19. It is stated at the cost of repetition that since the amount in question was deposited in compliance with the interim order passed by the High Court of Bombay, which was not towards duty, the question of unjust enrichment would not arise at all.

18. Government also following the ratio judgement of Hon'ble Supreme Court in DCW Ltd Vs. Union of India [2015(324)ELT 702(SC)] holds that that Doctrine of unjust enrichment is not applicable in cases where amount deposited as pre-deposit in terms of interim order of a Court/quasi judicial authority.

19. In view of the foregoing discussion, Government holds that the claim of refund of the applicant is not hit by the doctrine of unjust enrichment. Accordingly, Government allows the Revision application with consequential benefits and sets aside the impugned Order in Appeal.

20. Revision application thus succeeds in above terms.

21. So ordered.

True Copy Attested

29.12.17

एस. आर. हिरूलकर
S. R. HIRULKAR
(AC)

29.12.17

(ASHOK KUMAR MEHTA)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 33/2017-CX (WZ) /ASRA/Mumbai DATED 29.12.2017

To,
M/s. Hindustan Petroleum Corporation Ltd.
Mumbai Refinary, PO Box No.18820,
B.D. Patil Marg,
Mahul, Mumbai - 400 074.

Copy to:

1. The Commissioner of CGST & CX, Navi Mumbai, Satara Plaza,Palm Beach Road, Sector 19D, Vashi 400 705.
2. The Commissioner of GST & CX, (Appeals) Raigad, 5th Floor,CGO Complex, Belapur, Navi Mumbai, Thane.
3. The Deputy / Assistant Commissioner, Division-I, CGST & CX, Navi Mumbai, Satara Plaza, Palm Beach Road, Sector 19D, Vashi 400 705.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.