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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment delivered on: 30.08.2024***

\+ W.P.(C) 13906/2018 & CM APPL. 11931/2024 (Addl. Document)

TELECARE NETWORK (INDIA) PVT. LTD. .....Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Kishore Kunal, Ms. Diva Deversha and Mr. Anuj Kumar, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Anurag Ahluwalia, CGSC along with Mr. Hridyanshi Sharma, Adv. for R-1/UOI.
Ms. Sonu Bhatnagar, SSC along with Ms. Nishtha Mittal, Ms. Apurva Singh and Ms. K.S. Mary Jonet, Advs. for R-2 & R-3.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The writ petitioner has approached this Court being aggrieved by the stand of the respondents in failing to grant interest on a sum of INR 13,16,64,468/-, which according to it was erroneously recovered during the period of 26 March 2015 to 22 June 2015. The claim for interest on the delayed disbursal of refund flows in the backdrop of the respondents having ultimately refunded the deposited amounts on 29 November 2018 and post the rendering of our judgment in the original

round of litigation which ensued inter partes and was represented by W.P.(C) 7853/2017. We find that the entitlement of the petitioner to a refund had directly arisen for consideration before this Court in the aforenoted writ petition and the judgment rendered thereon since reported as **Telecare Network (India) Pvt. Ltd. vs. Union of India**[1] [and which we shall for the sake of convenience refer to hereinafter as *"Telecare I"*].

2. The Court had in *Telecare I* taken note of the relevant facts pertaining to the 103 Bills of Entries in question and which pertained to the import of mobile phones in India. It also took note of the stand of the writ petitioner that the self-assessed duty which was to be deposited on the ICEGATE portal provided no option to the petitioner to avail of exemptions under the notifications which applied. It was in the aforesaid backdrop that it is stated to have paid the **Countervailing Duty**[2] leviable under Sections 3(1) and 3(5) of the **Customs Tariff Act, 1975**[3] at the rate of 12.5% as against the 1% which was payable.

3. The petitioner appears to have asserted that it was constrained and compelled to pay the excess amount on account of the functional limitations which beset the ICEGATE portal. This also becomes apparent from a reading of the following communications which have been placed on our record. We specifically take note of the inter-departmental communications dated 21 October 2016 and 04 November 2016 and which are extracted hereinbelow:-

"OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS

[1] 2018:DHC:4916-DB
[2] CVD
[3] 1975 Act

(IMPORT) AIR CARGO COMPLEX, NEW CUSTOM HOUSE,
NEW
DELHI-110037.

C.NO.VII/l2/ACC/ Import/ Gr,VA/PDC-43/2015/21593/21/10/2016

dated 21.10.2016

To

The Additional Director General (ICES),
Directorate General of Systems,
Customs & Central Excise,
4th & 5th Floor, Hotel Samrat,
Chanakyapuri, Kautilya Marg,
New Delhi-110021:

(Kind attn: Ms. Arti Srinivas, ADG)
Madam,

Subject: Providing for Si. No. 263A of Notification No. 12/2012 CE dated 17.03.2012 (as amended) -reg.

Please to the subject mentioned above.

2. In this regard, it is to inform that this Commissionerate had received applications from the importer M/s Jaina Marketing & Associates regarding reassessment of Bills of Entry @1% CVD under Si. No. 263A of Notification No. 12/2012-CE dated 17.03.2012 (as amended) in view of Order in appeal No. CCC(A) CUS/D-l/IMP/298 to 440/2016 dated 26:05.2015, passed by Shri Ashutosh Baranwal, Commissioner of Customs (Appeals), Order-in-Appeal No. CCC(A) CUS/p-l/IMP/638 to 737/2016 dated 26.08.2016 and Order in Appeal No. CCC(A) CUS/D-l/IMP/743/ to 805/2016 dated 05.09.2016 passed by Shri J.R. Panigrahi, Commissioner of Customs (Appeals) (Copies enclosed). The above Orders in Appeal have extended the benefit of Notification No. 12/2012-CE dated 1.7.03.2012 Si. No. 263A (as amended) to the importer.

3. However. During re-assessment it has been noticed chat the system does not accept Si. No. 263A of the Notification no. 12/2012-CE dated 17.03.2012. This benefit needs to be extended to Importers owing to the Supreme Court judgment in the SRF case (CA no. 9440 of 2003-judgment dated 25.03.2015)- The review petition filed by the department (R.P. (C) No. 2440/2015) CC, Chennai-l Vs M/s S.R.F. was dismissed by the Hon'ble Supreme Court of 15.07.2016. However, the relevant notification entries were suitably amended w.e.f, 17.07.2016 so that from that date onwards the ratio of the SRF judgment would not automatically apply. Therefore, the system has to be modified to allow re-assessment of Bs/E filed upto 16,07.2015 with the benefit of said Notification.

4 Therefore, it is requested that aforesaid Si. No. of the Notification may be provided for in the system urgently so that re-assessment as per orders of the Commissioner of Customs (Appeals) may be done and resentment amongst affected importers may be addressed.

Yours faithfully,

Encl: As above

sd/
(Vivek Johri)
Principal Commissioner of Customs,
(Imports) New Custom House, New Delhi
20.10.2016

xxxx **xxxx** **xxxx**

Government of India,
Ministry of Finance,
Directorate of Systems and Data Management
4th & 5th Floor, Hotel Samrat,
Chanakyapuri, New Delhi

Dated 04.11.2016

File No. IV (35) 47/2013-Systems

To
Principal Commissioner of Customs (Import) Air Cargo Complex, New Customs House, New Delhi.

Sir,

Subject: **Providing for Si. No. 263A of Notification No. 12/2012-CE dated 17.03.2012 (as amended) -reg.**

Kindly refer to your letter no. VII/12/ACC-import/Gr-VA/PDC-43/2015 dated 21.10.2016 on the above subject. As you are aware, exemption notifications are implemented in the systems through Directories with, start date and end date for each entry of serial number. Hence, the same would need to be modified through a patch to enable exemption for Si. No, 263A of the notifications No. 12/2Q12-CE dated 17.03.2012 with retrospective effect. NIC has been requested to examine the feasibility for modifying the system accordingly.

2. In the meanwhile, it is requested that the specific time period may kindly be intimated to us for effecting necessary change in the system.

Yours faithfully,
(Arti Agarwal Srinivas)
Additional Director General"

4. Insofar as the question of CVD is concerned, it is common ground that the issue stands answered in favour of the petitioner-assessee in light of the judgment rendered by the Supreme Court in **M/s SRF Ltd. vs. Commissioner of Customs, Chennai**[4]. It was in the aforesaid context that the Court had in *Telecare I* noted that the Revenue appeared to have been, and prior to the judgment handed down in *SRF Ltd.,* consistently denying benefits of the notification to assessees on the ground that no CENVAT credit on inputs and capital goods was admissible to assessees for manufacture of mobile phones since they were imported as opposed to being manufactured.

5. Taking note of the aforesaid stand, the Court in *Telecare I* ultimately held as follows:-

> "**6.** It is submitted that following the judgment in the case of Ashok Traders v. Union of India 1987 (32) ELT 262 (Bom) of the Bombay High Court, it was held that the condition which could not be satisfied and had to be treated as not satisfied. In the case of SRF Limited (supra) decided on 26.03.2015, dealing with similar issue as to whether the assessee is entitled to the benefit of Notification No. 12/2012 CE, the Court held that the I assessee was entitled to exemption from payment of CVD in view of the law already declared in the cases of Thermax Private Limited v. Collector of Customs (Bombay), New Customs House 1992 (4) SCC 440; Hyderabad Industries Ltd. v. UOI 1999 (5) SCC 15; AIDEK Tourism Services Private Limited v. Commissioner of Customs, New Delhi 2015 (7) SCC 429 that for quantification of additional duty in the case of import, it has to be imagined/presumed that the article imported had been manufactured or produced in India to examine what amount of excise duty was leviable. The condition of availing CENVAT was held to be irrelevant and furthermore, the presumption that such goods were manufactured in India and excise duty leviable on it had to be drawn and then an ascertainment would be essential to determine the extent of CVD to which the importer would be entitled and the refund application were to be processed on the basis of the said principle. The demand of the CVD raised in the said cases was thus set aside.

[4] (2015) 14 SCC 596

7. It is stated that after the declaration of the law in SRF Limited (supra), in particular, the respondents have been giving the benefit of concessional rate of duty to others till the statutory amendment took place in Notification No.12/2012 as held in order dated 28.01.2016 passed in C/51815 to 51874 and 51878 to 51899/2016 by CESTAT. The Petitioner complains that it has thus been subjected to discrimination. The petitioner states that since it merely imported the mobile phones and not manufactured them, it could not possibly have taken credit in respect of the said imported goods under the provisions of Credit Rules, 2004 as held by the Supreme Court in SRF Limited (supra). Thus, the Petitioner was eligible for the exemption from payment of CVD at enhanced rate; it claimed the refund application on 24.6.2016 claiming refund of extra amount paid towards CVD during the period of 26.03.2015 to 22.06.2015. The refund application of the Petitioner was accompanied by relevant documents. It is submitted that the Respondents had issued various deficiency memoranda to the Petitioner (its office letters dated 29.09.2016, 26.10.2016 and 11.11.2016). It is submitted that in its letter of 06.10.2016 the petitioner submitted detailed additional submissions and had disputed the fact that the claim was time barred under Section 27 of the Act. It was stated inter-alia as under:

> *"With respect to the eligibility of refund, we would like to submit that the Company has claimed refund of the amount deposited in excess of the actual duty payable on import of mobile phones. The amount paid in excess is not under any of the provisions of the Act and cannot be termed as 'duty' paid or payable under this Act. Thus, provisions of Section 27 of Act shall not be applicable in the instant case. In this respect, we would like to draw reference from the decision of Hon'ble Supreme Court in the case of Union of India and Others vs. I. T.C. Limited, 1993Supp (4) SCC 326, wherein it has been held that any money which is realized in excess of what is permissible in law would be a realization made outside the provisions of the Act. Thus, any amount paid in excess of what was payable is outside the ambit of law."* "

6. In *Telecare I*, the respondents appear to have taken the stand that since the petitioner had consciously paid the duty, the deposit of amounts would not be liable to be viewed as being contrary to law. It also appears to have been asserted that the application for refund was filed beyond the period prescribed under Section 27 of the **Customs**

Act, 1962[5].

7. This is evident from a reading of para 9 of the report which is extracted hereinbelow:-

> "**9.** The Revenue points out that the petitioner paid the duty consciously and after deliberation; therefore, the deposit of amounts towards duty were not contrary to law. Therefore, consequent action had to be undertaken by it within limitation prescribed under the Act. Its inaction in filing the refund application within the prescribed period of limitation as per Section 27 cannot be overlooked or even rectified since the said mistake needs to be corrected by filing within the period of one year from the date of payment only. The delay in filing of application for refund beyond the prescribed period of one year cannot be condoned by any adjudicating authority, appellate authority or Tribunal."

8. While dealing with the aforesaid contention, the Court ultimately held as follows:-

> "**12**. There is no dispute about the applicability of SRF Ltd (supra); indeed, the Revenue's refrain during the hearing was that the amounts could not be refunded because the claims were time-barred and that the petitioner has an alternative remedy. This Court is of opinion that the plea of alternative remedy- an unoriginal and frequently used stereotypical defence by public bodies in such cases at least dodges the crux of any dispute, i.e the liability of the concerned public body or agency on merits. Sans any dispute with respect to facts, this Court finds it entirely unpersuasive, since Article 144 of the Constitution, compels all authorities to give effect to the law declared by the Supreme Court (as in this case, the SRF Limited judgment). The other plea which the Customs had relied on, to defeat the petitioner's refund application was Section 27 (3) which confines refunds to the situations contemplated in Section 27 (2), notwithstanding any judgment, order or decree of the court. This Court is at a loss to observe the relevance of that reasoning, given that SRF Limited (supra) had ruled in principle that import implied a deemed manufacture, without any corresponding obligation on the part of the importer to have availed CENVAT credit. As such, the amount claimed was not duty and could not have been recovered by the Customs authorities in the first instance, given the declaration of law in SRF Limited (supra). Therefore, they cannot now seek shelter under Section 27 (3) to resist a legitimate refund claim."

[5] 1962 Act

The writ petition was ultimately allowed with the impugned order being quashed and a direction being framed for the refund application to be decided within a period of ten weeks in accordance with law.

9. As noted hereinabove, the 103 Bills of Entries were submitted between 26 March 2015 to 22 June 2015. By this time, the law with respect to an importer being required to make a declaration for availing CENVAT credit had already come to be duly declared and enunciated by the Supreme Court in *SRF Ltd.*, and which judgment had come to be pronounced on 26 March 2015. It appears that realizing the mistake committed in making deposits towards CVD at the rate of 12.5% led to the petitioner filing a refund application on 24 June 2016. That application had come to be rejected on 07 March 2017 and which formed subject matter of challenge in the first writ petition.

10. However, and post the judgment handed down by this Court on 06 August 2018, the petitioner filed another application on 23 October 2018 requesting the respondents to process its claim for refund. It was acting upon the said application that the principal amount was refunded on 29 November 2018.

11. It is also pertinent to note that the respondents while passing the impugned order do not dispute the entitlement of the petitioner to the refund of the principal amount as would be evident from the following extracts of that order:-

> "**7f.** In view of the above I find that the party was liable to pay CVD @ 1% in terms of S.No. 263 A of the Notification No. 12/2012-CE dated 17.03.2012, as amended, read with condition no. 16 of the said Notification, on import of mobile phones against 103 Bills of Entry filed during 26.03.2015 to 22.06.2015. Whereas, it paid the said CVD @ 12.5% due to nonawareness of the law. However as soon as they got to know it, they filed the refund for the amount paid in

excess of 1%.

8. The Hon'ble High Court in its order dated 06.08.2018 has also observed that SRF Limited (supra) had ruled in principle that import implied a deemed manufacture, without any corresponding obligation on the part of the importer to have availed CENVAT credit. As such, the amount claimed was not duty and could not have been recovered by the Customs authorities in the first instance, given the declaration of law in SRF Limited (supra).

8a. In other words, the Hon'ble High Court has observed that the amount deposited in excess of 1% CVD (amount claimed as refund i.e. Rs. 13,16,64,468/-) does not amount to DUTY and the relevant sections of the Act applicable to deposit and refund of duty cannot be applied to this amount deposited in excess.

8b. Accordingly, as per the well settled laws as discussed above, the party has paid excess amount of Rs. 13,16,64,468/ and is liable for refund for the same."

12. The solitary dispute which now survives for our consideration is whether the respondents are justified in denying the writ petitioner interest in terms as contemplated under Section 27A of the 1962 Act. The said provision stands couched in the following terms:-

"[**27-A. Interest on delayed refunds**

If any duty ordered to be refunded under sub-section (2) of section 27 to an applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below [five] per cent and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by notification in the Official Gazette], on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

PROVIDED that where any duty, ordered to be refunded under sub-section (2) of section 27 in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation : Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal [, National Tax Tribunal] or any court against an order of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs]

> under sub-section (2) of section 27, the order passed by the Commissioner (Appeals), Appellate Tribunal [, National Tax Tribunal] or, as the case may be, by the court shall be deemed to be an order passed under that sub-section for the purposes of this section.]"

13. Before us, Ms. Bhatnagar learned counsel appearing for the respondents contended that there was no delay caused by the respondents in attending to the claim for refund since the application made on 23 October 2018 after the judgment rendered by this Court, was disposed of on 14 November 2018 itself and thus within three months of the making of the said application as statutorily stipulated.

14. It was additionally argued that the interest which is spoken of in Section 27A is liable to be paid on "*duty*" that may have been deposited. According to Ms. Bhatnagar, the Court in *Telecare I* having held that the amount claimed was not duty, Section 27A consequently would not apply.

15. In our considered opinion, the stand as taken is not only misconceived, it is also wholly unjust and patently arbitrary. We may at the outset note that the observation which is alluded to appears in paragraph 12 of the original judgment and where the Court had observed that since the amount which has been claimed by the writ petitioner was not "*duty*", it could have never been recovered by the Customs authorities in the first instance.

16. In our considered opinion, the observation of the amount claimed not being duty is clearly being misinterpreted and construed dehors the context in which it appears. All that the Court intended to convey was that the amount which the petitioner had mistakenly deposited, could never have been recovered or retained by the

Customs authorities. This is in light of the legal position which stood duly enunciated by the Supreme Court in *SRF Ltd.* itself. Therefore, the observation of the amount not being duty is liable to be understood in the aforesaid context.

17. When *Telecare I* spoke of the amount not being "*duty*", it essentially meant that the amount was not one which could have been legally or legitimately claimed as an impost flowing from the Act. Duty would ordinarily mean a compulsory exaction of money lawfully payable under the Act. However, it would be wholly incorrect to hold that a payment made under a mistaken belief of a liability placed under the Act would fall outside the ken of Section 27A. This is quite apart from us having no hesitation in holding that the stand of the respondents is wholly unjust, inequitable and legally unsustainable.

18. In view of the aforesaid conclusions, we find that the contention of inapplicability of Section 27A can neither be countenanced nor sustained.

19. Undisputedly, the original applications for refund had been moved as far back as 24 June 2016. Bearing in mind the findings which came to be returned and recorded in paragraph 9 of the original judgment, it is also not permissible for the respondents to now assert that the same would be hit by any prescription of limitation.

20. We note that insofar as the issue of payments made under a mistaken assumption of liability and the corresponding obligation to refund the same is one which has been consistently taken by various High Courts. In **Commissioner of Central Excise (Appeals),**

Bangalore vs. KVR Construction[6], the Karnataka High Court pertinently observed:-

> "**16.** We are not concerned with the other conditions of section 11B of the Act because it is not the case of the appellant-Department that the burden of service tax was passed on to any other person. As a matter of fact, the controversy in this appeal revolves around the maintainability of the very application filed under section 11B of the Central Excise Act and whether section 11 applies to the facts of the present case at all. In the case of Mafatlal Industries Ltd. v. Union of India [1998] 111 STC 467 (SC) ; (1997) 89 ELT 247 (SC), the question was with regard to the refund of Central excise and customs duties. It was held that all claims except where levy is held to be unconstitutional, are to be preferred and adjudicated upon under section 11B of the Central Excise Act, 1944 or under section 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to a third party. In such circumstances, it was held, no civil suit for refund of duty is maintainable. It also observes that writ jurisdiction of High Courts under article 226 and of the Supreme Court under article 32 remains unaffected by the provisions of section 11B of the Act. It was further held that concerned court while exercising the jurisdiction under the said articles, will have due regard to the legislative intent manifested by the provisions of the Act and the writ petition would naturally be considered and disposed of in the light of the provisions of section 11B of the Act. It has been held therein that power under article 226 has to be exercised to effectuate the regime of law and not for abrogating it, as the power under article 226 is conceived to serve the ends of law and not to transgress them. At paragraph 113 of the said judgment, they classify the various refund claims into three groups or categories (page 613 in 111 STC):
>
> (i) The levy is unconstitutional—outside the provisions of the Act or not contemplated by the Act.
>
> (ii) The levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or notifications ; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.
>
> (iii) Mistake of law—the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court

[6] 2010 SCC OnLine Kar 5419

or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law.

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19. If this court ultimately concludes that section 11B of the Act is applicable to the facts of the present case, then, the argument of the learned counsel for the appellants that writ petition was not maintainable would merit consideration. Therefore, at this stage, we will not consider the matter regarding maintainability of the writ petition, as first we have to look to the provisions of section 11B of the Act and then decide whether section 11B is applicable to the facts of the case as finding thereon would have bearing for considering the issue of maintainability of writ petition. Section 11B of the Central Excise Act reads as under :

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20. From the reading of the above section, it refers to claim for refund of duty of excise only, it does not refer to any other amounts collected without authority of law. In the case on hand, admittedly, the amount sought for as refund was the amount paid under mistaken notion which even according to the Department was not liable to be paid.

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

had no authority to demand service tax from the respondent because of its circular dated September 17, 2004, the payment made by the respondent- company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent-company, the Department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion.

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24. In the case of Commissioner of Central Excise, Bangalore III v. Motorola India Pvt. Ltd. reported in (2006) 206 ELT 90 (Karn), the Division Bench of this court considered similar issue. It was a case where excess amount was paid over duty under the Central Excise Act on the direction of the Department. There was an application for refund of amount and the same came to be rejected by the Assistant Commissioner on the ground of lapse of time. It was confirmed by both the appellate authority and also the Tribunal. Aggrieved by the order of the Tribunal, the Revenue came up before the High Court. Their Lordships of the Division Bench held that the order of the Tribunal to allow the claim on the basis that amount paid by mistake cannot be termed as duty in the said case was justified and therefore applying the law laid down in the decision of the apex court in the case of India Cements Ltd. v. Collector of Central Excise (1989) 41 ELT 358 dismissed the appeal.

25. Now, we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 1,23,96,948 paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Therefore, once it is not payable in law there was no authority for the Department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract section 11B. Therefore, it is outside the purview of section 11B of the Act."

21. The Madras High Court in **3E Infotech vs. Customs, Excise &**

Service Tax Appellate Tribunal & Anr.[7] propounded a similar principle as would be evident from the following extract of that decision:-

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

22. The Bombay High Court in **M/s Parijat Construction vs. Commissioner of Central Excise**[8] while rejecting an argument that was similar to that advanced by the respondents before us, held as follows:-

> "**5.** We are of the view that the issue as to whether limitation prescribed under Section 11 B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer *res integra*. The two decisions of the Division Bench of this Court in *Hindustan Cocoa* (Supra) and *Commissioner of Central Excise, Nagpur* v. *SGR Infratech Ltd.* (Supra) are squarely applicable to the facts of the present case.
>
> **6.** Both decisions have held the limitation prescribed under Section 11 B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of *Collector of C.E., Chandigarh* v. *Doaba Co-Operative Sugar Mills* (Supra) relied upon by the Appellate Tribunal has in

[7] 2018 SCC OnLine Mad 13637
[8] 2017 SCC OnLine Bom 9480

applying Section 11 B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11 B of the Act to the present case were admittedly Appellant had paid a service tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the Respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable."

23. This Court in **M/s Om Gems and Jewellery vs. Principal Commissioner of International Customs & Ors.**[9] had an occasion to review the entire body of precedent dealing with the issue of refund in some detail. We deem it apposite to extract the following passages from that decision:-

> **"19.** We note that interest has been duly recognized as being a necessary corollary to a wrongful retention of capital. We deem it apposite to extract the following passages from the decision of a Division Bench of the Allahabad High Court in *Wig Brother (Builder & Engineers)* v. *Union of India*:-
>
> > "27. It may be mentioned that money doubles in six years (because of interest). In this case, the petitioner has avoided payment of cess for about 12 years, counting from the date of the demand notice dated 20.7.1991. Thus, even though we are dismissing this petition, the petitioner has really won the case, because he did not have to pay interest from 20.7.1991 till today.
> >
> > 28. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all but is the normal accretion on capital. Had the petitioner paid the amount in question in July, 1991, when it was due, the respondents would have invested the same somewhere and earned interest thereon. Instead, the petitioner has kept the money with himself for about 12 years and has earned interest thereon. Hence for every Rs. 100 which the petitioner had to pay in July, 1991, he has in fact, earned an additional Rs. 300. This is because Rs. 100 becomes Rs. 200 after six years, and in another

[9] 2023 SCC OnLine Del 7932

six years this Rs. 200 doubles and becomes Rs. 400. Thus, even though we have dismissed this writ petition today, the petitioner has really not only won the case (because of the interim order of this Court) he has really earned Rs. 300 for every Rs. 100 he had to pay. Thus, even though we are dismissing this petition the petitioner has got three time more amount than what he has to pay now. All this happened because of the interim order of this Court staying the demand."

20. Reiterating the principles which were laid down in *Wig Brother*, Katju J. while speaking as a member of the Bench of the Supreme Court in *Alok Shanker Pandey* v. *Union of India*[17] had held as follows:—

"8. We are of the opinion that there is no hard-and-fast rule about how much interest should be granted and it all depends on the facts and circumstances of each case. We are of the opinion that the grant of interest of 12% per annum is appropriate in the facts of this particular case. However, we are also of the opinion that since interest was not granted to the appellant along with the principal amount, the respondent should then in addition to the interest at the rate of 12% per annum also pay to the appellant interest at the same rate on the aforesaid interest from the date of payment of instalments by the appellant to the respondent till the date of refund of this amount, and the entire amount mentioned above must be paid to the appellant within two months from the date of this judgment.

9. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence, equity demands that A should not only pay back the principal amount but also the interest thereon to B."

21. We further note that the issue of interest being paid on monies unjustifiably retained, albeit in the context of pre-deposits, again fell for consideration of the Supreme Court in *Sandvik Asia Ltd.* v. *CIT*[18]. While dealing with the liability of the department to

bear that burden in case of unjustified retention of monies, the Supreme Court had observed as follows:—

> "29. In our view, there is no question of the delay being "justifiable" as is argued and in any event if the Revenue takes an erroneous view of the law, that cannot mean that the withholding of monies is "justifiable" or "not wrongful". There is no exception to the principle laid down for an allegedly "justifiable" withholding, and even if there was, 17 (or 12) years' delay has not been and cannot in the circumstances be justified.
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> **xxxx xxxx xxxx**
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> 31. At the initial stage of any proceedings under the Act any refund will depend on whether any tax has been paid by an assessee in excess of tax actually payable to him and it is for this reason that Section 237 of the Act is phrased in terms of tax paid in excess of amounts properly chargeable. It is, however, of importance to appreciate that Section 240 of the Act, which provides for refund by the Revenue on appeal, etc., deals with all subsequent stages of proceedings and therefore is phrased in terms of "any amount" becoming due to an assessee.
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> 32. The Delhi High Court in *Goodyear India Ltd. case* [(2001) 249 ITR 527 (Del)] held that an assessee is entitled to further interest under Section 244 of the Act on interest under Section 214 of the Act which had been withheld by the Revenue. The case of the Revenue was that interest payable to an assessee under Section 214 of the Act was not a refund as defined in Section 237 of the Act and hence no interest could be granted to the assessee under Section 244 of the Act. The Court held that for this purpose Section 240 of the Act was relevant which referred to refund of "*any amount becoming due to an assessee*" and that the said phrase would include interest and hence the assessee was entitled to further interest on interest wrongfully withheld. It is also important to appreciate that the Delhi High Court also referred to the Gujarat High Court decision in *D.J. Works case* [(1992) 195 ITR 227 (Guj)] and read it as taking the same view. This supports the view of the appellant on the correct reading of the Gujarat decision.
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> **xxxx xxxx xxxx**

46. The facts and the law referred to in paragraph (supra) would clearly go to show that the appellant was undisputably entitled to interest under Sections 214 and 244 of the Act as held by the various High Courts and also of this Court. In the instant case, the appellant's money had been unjustifiably withheld by the Department for 17 years without any rhyme or reason. The interest was paid only at the instance and the intervention of this Court in Civil Appeal No. 1887 of 1992 dated 30-4-1997. Interest on delayed payment of refund was not paid to the appellant on 27-3-1981 and 30-4-1986 due to the erroneous view that had been taken by the officials of the respondents. Interest on refund was granted to the appellant after a substantial lapse of time and hence it should be entitled to compensation for this period of delay. The High Court has failed to appreciate that while charging interest from the assesses, the Department first adjusts the amount paid towards interest so that the principle amount of tax payable remains outstanding and they are entitled to charge interest till the entire outstanding is paid. But when it comes to granting of interest on refund of taxes, the refunds are first adjusted towards the taxes and then the balance towards interest. Hence as per the stand that the Department takes they are liable to pay interest only up to the date of refund of tax while they take the benefit of assesses' funds by delaying the payment of interest on refunds without incurring any further liability to pay interest. This stand taken by the respondents is discriminatory in nature and thereby causing great prejudice to lakhs and lakhs of assesses. Very large number of assesses are adversely affected inasmuch as the Income Tax Department can now simply refuse to pay to the assesses amounts of interest lawfully and admittedly due to them as has happened in the instant case. It is a case of the appellant as set out above in the instant case for Assessment Year 1978-1979, it has been deprived of an amount of Rs. 40 lakhs for no fault of its own and exclusively because of the admittedly unlawful actions of the Income Tax Department for periods ranging up to 17 years without any compensation whatsoever from the Department. Such actions and consequences, in our opinion, seriously affected the administration of justice and the rule of law.

47. The word "compensation" has been defined in *P. Ramanatha Aiyar's Advanced Law Lexicon*, 3rd Edn., 2005, p. 918 as follows:"An act which a court orders to

be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; the consideration or price of a privilege purchased; something given or obtained as an equivalent; the rendering of an equivalent in value or amount; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; a recompense in value; a recompense given for a thing received; recompense for the whole injury suffered; remuneration or satisfaction for injury or damage of every description; remuneration for loss of time, necessary expenditures, and for permanent disability if such be the result; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or wages given to an employee or officer."

48. There cannot be any doubt that the award of interest on the refunded amount is as per the statutory provisions of law as it then stood and on the peculiar facts and circumstances of each case. When a specific provision has been made under the statute, such provision has to govern the field. Therefore, the court has to take all relevant factors into consideration while awarding the rate of interest on the compensation."

22. While we are conscious of the correctness of the decision in *Sandvik Asia* having been doubted by the Supreme Court and the matter presently stands referred for the consideration of a Larger Bench in light of the order passed in *Commissioner of Income Tax, Gujarat* v. *Gujarat Fluoro Chemicals*[19], we note that while framing that reference the Supreme Court has not doubted the compensatory character of interest that may be imposed in case of unjustified retention of monies of an assessee. Their Lordships doubted the view taken on the facts of *Sandvik Asia* bearing in mind that advance tax or tax deducted at source loses its identity once it gets subsumed in a demand of tax created in terms of an assessment.

23. A more lucid explanation of the liability to pay interest is found in the decision of the Supreme Court in *Union of India* v. *Tata Chemicals Ltd.*[20]. Highlighting the compensatory element of such interest being provided by courts, the Supreme Court had held as follows:—

"37. A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. As per the old section

an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario, the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorisedly by the Department. When the collection is illegal, there is corresponding obligation on the Revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244-A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company.

38. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there-being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course."

24. What flows from the aforesaid precedents is of the State being under a positive obligation to refund monies paid under a mistake or absent a liability lawfully imposed. Taking a position contrary to the above would clearly be in breach of the constitutional ethos underlying Article 265 of the Constitution itself. It would be wholly unjust and arbitrary for the State to retain such moneys especially where there be no dispute with respect to the assessee otherwise being under no statutory obligation to pay the tax or duty.

25. The restitutory element of interest is yet another aspect which assumes significance in the facts of the present case and which was succinctly explained and acknowledged by the Supreme Court in **South Eastern Coalfields Ltd. vs. State of Madhya Pradesh & Ors.**[10] as under:-

> "**21.** Interest is also payable in equity in certain circumstances. The rule in equity is that interest is payable even in the absence of any agreement or custom to that effect though subject, of course, to a contrary agreement (see *Chitty on Contracts*, 1999 Edn., Vol. II, Para 38-248 at p. 712). Interest in equity has been held to be payable on the market rate even though the deed contains no mention of interest. Applicability of the rule to award interest in equity is attracted on the existence of a state of circumstances being established which justify the exercise of such equitable jurisdiction and such circumstances can be many.
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> **xxxx xxxx xxxx**
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> **28.** That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it

[10] (2003) 8 SCC 648

would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.

29. Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978."

26. Accordingly, and for all the aforesaid reasons, we allow the instant writ petition and hold the respondents liable to pay interest from the date of the moving of the original application on 24 June 2016. The said interest would flow up to 29 November 2018 when refunds were ultimately effected.

27. Bearing in mind the facts which emerge from the record, mainly

of the writ petitioner having been compelled to litigate and the stand of the respondents being thoroughly unfair and unjust, we also impose costs of INR 1 lakh on the respondents.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 30, 2024/RW