



2024:DHC:9757-DB



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

% **Order reserved on: 10 December, 2024**  
**Order pronounced on: 18 December, 2024**

+ W.P.(C) 17146/2022 & CM APPL. 41496/2023 (130 Days Delay in Rej.)

TAVRUR OILS AND FATS PVT LTD .....Petitioner  
Through: Mr. Rajat Mittal, Mr. Suprateek  
Neogi & Mr. Priyanshu, Advs.  
versus

COMMISSIONER CENTRAL GOODS AND  
SERVICE TAX & ANR. ....Respondents  
Through: Mr. R. Ramachandran, SSC

+ W.P.(C) 17152/2022 & CM APPL. 41492/2023 (130 Days Delay in Rej.)

SOUTH INDIA KRISHNA OILS AND FATS  
PVT. LTD. ....Petitioner  
Through: Mr. Rajat Mittal, Mr. Suprateek  
Neogi & Mr. Priyanshu, Advs.  
versus

COMMISSIONER, CENTRAL GOODS AND  
SERVICE TAX & ANR. ....Respondents  
Through: Mr. R. Ramachandran, SSC

**CORAM:**  
**HON'BLE MR. JUSTICE YASHWANT VARMA**  
**HON'BLE MR. JUSTICE DHARMESH SHARMA**

**ORDER**

**YASHWANT VARMA, J.**

1. The petitioners in these matters have instituted the instant writ petitions seeking the issuance of a writ of mandamus commanding the respondents to refund the service tax paid by them on ocean freight during the period April 2017 to June 2017. The petitioners contend that



in international trade and where the subject matter be a **Cost, Insurance and Freight**<sup>1</sup> contract, the overseas supplier would engage a vessel owner for transportation of goods to India. In such situations, the appointment of the vessel as well as payment of transportation charges are borne by the overseas supplier. It is these transportation charges incurred in transporting goods by a vessel or ship which is commonly known as ocean freight. In the case of a **Free On Board**<sup>2</sup> contract, the solitary distinction is that the ocean freight liability is to be borne by the local importer.

2. By virtue of the provisions contained in the **Finance Act, 1994**<sup>3</sup> and the amendments made therein which came into effect from 01 July 2012, a list of negative services came to be collated and which was ordained to be not taxable. The effect of that list of negative services was that except for those services, others were made taxable. The service of transportation of goods by an aircraft or vessel came to be placed in the negative list in terms of the provisions contained in Section 66D(p)(ii) of the 1994 Act. The said clause, however, came to be omitted with effect from 01 June 2016. Accordingly, services by way of transportation of goods by an aircraft or vessel from a place outside India up to customs stations of clearance became chargeable to service tax with effect from 01 June 2016.

3. The petitioners assert that ocean freight, however, and insofar as CIF contracts were concerned, continued to be exempt in terms of Notification No. 25/2012-ST dated 20 June 2012. Thereafter and on 12 January 2017, Notification No. 2/2017-ST came to be issued in terms of

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<sup>1</sup> CIF

<sup>2</sup> FOB

<sup>3</sup> 1994 Act



which the Union Government inserted clause (EEC) under Rule 2(1)(d) of the **Service Tax Rules, 1994**<sup>4</sup>. In terms of that Notification, the Union Government provided for the abatement in value of the taxable service to the extent of 70% and stipulated that service tax shall be paid on 30% of the value of the transport of goods in a vehicle if **Central Value Added Tax**<sup>5</sup> credit had not been availed.

4. However, on 13 April 2017, further amendments came to be made in the tax regime as a consequence of which importers like the petitioners before us became liable to pay service tax on ocean freight in the case of CIF transactions even though the service of transportation of goods was rendered by the ship owner/operator to the overseas seller/supplier as the case may be. This change in the statutory position came about by virtue of amendments introduced in Section 2(26) of the **Customs Act, 1962**<sup>6</sup>. Similar and mirror amendments were also introduced in Rule 2(1)(d)(EEC) of the Rules.

5. These amendments came to be assailed before the Gujarat High Court in **M/s Sal Steel Ltd. & Anr. vs. Union of India**<sup>7</sup>. The said writ petitions came to be allowed with the High Court rendering a declaration that the aforementioned amendments were *ultra vires* the provisions of the 1994 Act and consequently, the levy of service tax on ocean freight was unconstitutional. The aforesaid decision of the Gujarat High Court presently forms the subject matter of challenge before the Supreme Court in a Special Leave Petition bearing Diary No. 27023/2020. The petitioners contend that in the absence of any interim

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<sup>4</sup> Rules

<sup>5</sup> CENVAT

<sup>6</sup> Customs Act

<sup>7</sup> 2019 SCC OnLine 3706

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order operating on that petition, the declaration of invalidity continues to hold the field.

6. According to the writ petitioners, the Supreme Court in a later decision rendered in **Union of India and Anr. vs Mohit Minerals Pvt. Ltd.**<sup>8</sup> has held that the collection of **Integrated Goods and Services Tax**<sup>9</sup> on ocean freight would violate the provisions of the **Central Goods and Services Tax Act, 2017**<sup>10</sup> and be unconstitutional. We deem it apposite to extract the following passages from the decision of the Supreme Court in *Mohit Minerals*:

“**14.5.** Imposition of IGST on ocean freight will lead to double taxation:

(a) Section 3(7) of the Customs Tariff Act states that goods imported into India will be subject to IGST under Section 5 of the IGST Act, on the value as determined by Section 3(8) and Section 3(8)(a). Under Section 3(8), the value includes value of freight; and

(b) Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 includes cost of transportation and insurance in the value of goods, which forms the basis of the levy of IGST under the proviso to Section 5 of the IGST Act. The impugned levy of IGST on ocean freight would thus amount to double taxation on the same transaction.

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**96.** In determining the vires of the impugned notifications, a few preliminary contentions raised by the respondents would have to be addressed. The respondents have argued that no charge has been created for the ocean freight transaction to be taxed in the hands of the importer. It has been alleged that only Section 5(1) is a charging provision and Sections 5(3) and 5(4) cannot independently create a charge.

**97.** In assessing this claim, this Court is bound by a decision of the Constitution Bench in *Mathuram Agrawal* [*Mathuram*

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<sup>8</sup> (2022) 10 SCC 700

<sup>9</sup> IGST

<sup>10</sup> CGST Act

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*Agrawal v. State of M.P.*, (1999) 8 SCC 667] which has identified three essential elements of taxation:

- (i) The subject of the tax;
- (ii) The person who is liable to pay the tax; and
- (iii) The rate at which the tax is to be paid.

This test has been further elaborated by a two-Judge Bench of this Court in *Govind Saran Ganga Saran* [*Govind Saran Ganga Saran v. CST*, 1985 Supp SCC 205 : 1985 SCC (Tax) 447 : AIR 1985 SC 1041] by further requiring the designation of the measure or the value to which the rate of the tax will be applied. Thus, the four canons of taxation are as follows:

- (i) The taxable event;
- (ii) The person on whom the levy is imposed;
- (iii) The rate at which the levy is imposed; and
- (iv) The measure or the value to which the rate will be applied.

**98.** Section 5(1) of the IGST Act specifically identifies the four canons of taxation : (i) the inter-State supply of goods and services as the taxable event; (ii) the “taxable person” as the person on whom the levy is imposed; (iii) the taxable rate as such a rate notified by the Union Government on the recommendation of the GST Council, capped at forty per cent; and (iv) the taxable value as the value determined under Section 15 of the CGST Act.

**99.** Section 5(3) and Section 5(4) of the IGST Act are inextricably linked with Section 5(1) of the IGST Act which is the charging provision. They must be construed together in determining the vires of the taxation. In *CIT v. B.C. Srinivasa Setty* [*CIT v. B.C. Srinivasa Setty*, (1981) 2 SCC 460 : 1981 SCC (Tax) 119 : AIR 1981 SC 972] , a three-Judge Bench of this Court has held that the machinery provisions of an Act and the charging sections are inextricably linked. The Court observed : (SCC p. 465, para 10)

“10. ... A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions of the Income Tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. *The character of the computation provisions in each case bears a relationship to the nature of charge. Thus the charging section and the computation provisions together constitute an integrated code.* When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section.”



(emphasis supplied)

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**D.4. Taxable event : Is an ocean freight transaction for import of goods a valid category of supply of services under Section 5(3) of the IGST Act?**

**106.** The other limb for contesting the validity of the impugned notification is with respect to its identification of a “taxable event”. The question that falls for the determination is whether the impugned notifications issued in 2017, under Section 5(3) of the IGST Act, validly prescribe a taxable event that constitutes an inter-State supply of goods and services with the importer being a recipient of shipping services in CIF transactions.

**107.** The analysis of whether import of goods under CIF contracts constitutes a valid import of service has to be answered on two prongs : (i) whether classification of imports as a specific category of supply of shipping service is valid under Section 5(3) read with Section 5(1) of the IGST Act; and (ii) whether the recipient of the imported goods is also a recipient of shipping services in CIF transactions under Section 5(3).

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**169.** The High Court in the impugned judgment [*Mohit Minerals (P) Ltd. v. Union of India*, 2020 SCC OnLine Guj 49] has observed that : (*Mohit Minerals case [Mohit Minerals (P) Ltd. v. Union of India*, 2020 SCC OnLine Guj 49] , SCC OnLine Guj paras 133-35 & 216)

*“What has led to the present day problems in the implementation of the GST*

*133. The GST is implemented by subsuming various indirect taxes. The difficulty which is being experienced today in proper implementation of the GST is because of the erroneous misconception of law, or rather, erroneous assumption on the part of the delegated legislation that service tax is an independent levy as it was prior to the GST and it go vivisect the transaction of supply to levy more taxes on certain components completely overlooking or forgetting the basic concept of composite supply introduced in the GST legislation and the very idea of levying the GST. Prima facie, it appears that while issuing the impugned notification, the delegated legislature had in mind the provision of the Finance Act, 1994, rather than keeping in mind the object of bringing the GST by making the Constitution (101st) Amendment Act, 2016 to merge all taxes levied on the goods and services to one tax known as the GST.*



134. It appears that despite having levied and collected the integrated tax under the IGST Act, 2017, on import of goods on the entire value which includes the ocean freight through the impugned notifications, once again the integrated tax is being levied under an erroneous misconception of law that separate tax can be levied on the services components (freight), which is otherwise impermissible under the scheme of the GST legislation made under the CA Act, 2016.

*135. All the learned Senior Counsel are right in their submission that if such an erroneous impression is not corrected and if such a trend continues, then in future even the other components of supply of goods, such as, insurance, packaging, loading/unloading, labour, etc. may also be artificially vivisected by the delegated legislation to once again levy the GST on the supply on which the tax is already collected.*

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*216. Thus, having paid the IGST on the amount of freight which is included in the value of the imported goods, the impugned notifications levying tax again as a supply of service, without any express sanction by the statute, are illegal and liable to be struck down.”*

(emphasis supplied)

**170.** We are in agreement with the High Court to the extent that a tax on the supply of a service, which has already been included by the legislation as a tax on the composite supply of goods, cannot be allowed.”

7. Our attention has also been drawn to a judgment rendered by the Ahmedabad Bench of the **Customs Excise and Service Tax Appellate Tribunal**<sup>11</sup> in **Commissioner of Service Tax vs. Kiri Dyes and Chemicals Limited**<sup>12</sup> and which came to be dismissed in the following terms:

“The issue involved in the present case is whether the appellant is liable to pay service tax on the service on Ocean Freight or otherwise.

2. Shri Sanjay Kumar, learned Superintendent (AR) appearing on behalf of Revenue/ Appellant submits that though this issue is decided by Hon'ble Gujarat High Court in the case of SAL Steel

<sup>11</sup> Tribunal

<sup>12</sup> Final Order No. A/10507/2023 dated 23 March 2023  
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Limited but the Revenue has preferred SLP before the Hon'ble Supreme Court therefore, this matter may be kept pending till outcome of Hon'ble Supreme Court judgment.

3. Shri R.R. Dave, learned Consultant appearing on behalf of the respondent/ Assessee submits that learned Commissioner (Appeals) following the judicial discipline by relying upon the Hon'ble Gujarat High Court in the case of SAL Steel Limited allowed the appeal of the respondent therefore, there is no infirmity in Order-in-Appeal and the Revenue's appellant is not maintainable. As regards the Revenue's contention that the Revenue's appeal is pending before the Hon'ble Supreme Court in the case of SAL Steel Limited, he submits that there is no stay against the Hon'ble Gujarat High Court order. He placed reliance on the Hon'ble Supreme Court decision in the case of *Union of India vs. Mohit Minerals Pvt. Limited – 2022 (61) GSTL 257 (SC)*.

4. I have carefully considered the submissions made by both the sides and perused the record. I find that the issue whether Ocean Freight/ Sea Transportation service is liable to service tax or otherwise has been decided by jurisdictional High Court of Gujarat in the case of SAL Steel Limited. As regards the Revenue's appeal pending before the Hon'ble Supreme Court against the aforesaid decision, I find that there is no stay against the said High Court judgment. In view of this position, I find no infirmity in the impugned order which was passed relying on the jurisdictional High Court judgment in the case of SAL Steel Limited. Accordingly, following the Hon'ble Gujarat High Court decision in the case of SAL Steel Limited, the impugned order is upheld and the Revenue's appeal is dismissed. Cross objection is also disposed of.

(Pronounced in the open court on 23.03.2023)”

8. We are further informed that the aforesaid decision of the Tribunal was challenged by the Commissioner of Service Tax before the Supreme Court and which civil appeal came to be dismissed on 01 September 2023.

9. Before us, the prayer for refund was sought to be resisted by Mr. Ramachandran, learned counsel appearing for the respondents, firstly on the basis of Section 11B of the **Central Excise Act, 1944**<sup>13</sup> and which stands adopted under the 1994 Act. It was submitted that the

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<sup>13</sup> Central Excise Act  
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prayer for refund for the period April 2017 to June 2017 has been raised for the first time by the writ petitioners by way of the present action and is thus not only barred in light of the limitation as erected in terms of Section 11B of the Central Excise Act but even otherwise in light of the provisions of the **Limitation Act, 1963**<sup>14</sup>, which would apply.

10. Mr. Ramachandran submitted that insofar as the decision in *Sal Steel* is concerned, the same is yet to attain finality and consequently, the claim for refund is not liable to be countenanced. It was further asserted that the claim is barred by limitation not only when tested on the anvil of Section 11B of the Central Excise Act, but also in light of the provisions contained in the Limitation Act and more particularly Section 17(1)(c) thereof. Mr. Ramachandran sought to draw sustenance for the aforesaid submissions by relying upon the following passages as they appear in the judgment of the Constitution Bench in **Mafatlal Industries Ltd. vs. Union of India**<sup>15</sup>. Our attention was specifically drawn to paragraph 108 and which is extracted hereinbelow:

“108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff — whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter — by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in

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<sup>14</sup> Limitation Act

<sup>15</sup> (1997) 5 SCC 536

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accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 — and of this Court under Article 32 — cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute “law” within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal — which is not a departmental organ — but to this Court, which is a civil court.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J.



in *Tilokchand Motichand* [(1969) 1 SCC 110 : (1969) 2 SCR 824 : AIR 1970 SC 898] and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of



another person. He cannot also claim that the decision of the court/tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

(viii) The decision of this Court in *STO v. Kanhaiya Lal Mukundlal Saraf* [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in *Kanhaiya Lal* [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] have also been wrongly decided to the above extent. This declaration — or the law laid down in Propositions (i) to (vii) above — shall not however entitle the State to recover the taxes/duties already refunded *and* in respect



whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and the Customs Act are constitutionally valid and are unexceptionable.

(x) By virtue of sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactments. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution — or of this Court under Article 32 — is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that *Union of India v. Jain Spinners* [(1992) 4 SCC 389] and *Union of India v. ITC* [1993 Supp (4) SCC 326] have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated — in the sense that the appeal period has also expired — before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and/or governed by Section 11-B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.



(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962.”

11. We find the objections as raised to be wholly unmerited for reasons which we assign hereinbelow. As is evident from a reading of the principles which came to be enunciated by the Constitution Bench in *Mafatlal Industries*, a claim for refund founded on the ground of a provision of the statute having been struck down as unconstitutional would clearly fall outside the purview of the enactment itself. The Constitution Bench thus held that in such a case the claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution as also in terms of Section 72 of the **Contract Act, 1872**<sup>16</sup>. It was in that context that the Supreme Court further observed that in all such cases, the period of limitation would have to be calculated taking into account the principles enshrined in Section 17(1)(c) of the Limitation Act.

12. It is, however, pertinent to note that *Mafatlal Industries* in unequivocal terms holds that where the refund is claimed consequent to a declaration of invalidity having been rendered, it would clearly fall outside the purview of the principal enactment and could be claimed either by way of suit or by way of a writ petition. Once it is held that the statutory provisions envisaging a levy of service tax on ocean freight had come to be declared unconstitutional, the levy itself would be liable to be viewed as invalid and thus not maintained under the

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<sup>16</sup> Contract Act  
W.P.(C) 17146/2022 & W.P.(C) 17152/2022



principal enactment. The reliance on Section 11B of the Central Excise Act is thus clearly misconceived.

13. This position stands lucidly explained by the Gujarat High Court in **Comsol Energy (P) Ltd. vs. State of Gujarat**<sup>17</sup>, as would be evident from the following paragraphs of that decision:

“5. This Court in the writ-applicant's own case vide order dated 23.01.2020 declared the Notification No. 8/2017 - Integrated Tax (Rate) dated 28.06.2017 and the Entry No. 10 of the Notification No. 10/2017 - Integrated Tax (Rate) dated 28.06.2017 ultra vires as they lacked the legislative competency. This Court held that the levy of the IGST under the RCM on the Ocean Freight for the service provided by a person located in a non-taxable territory by way of transportation of goods through vessel from a place outside India to customs frontier of India is unconstitutional.

6. Article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. Since the amount of IGST collected by the Central Government is without authority of law, the Revenue is obliged to refund the amount erroneously collected. In the case of *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006, a Constitution Bench of the Supreme Court held that, where sales tax, assessed and paid by the dealer, is declared by the competent court to be invalid in law, the payment of tax already made is one under a mistake of law within the meaning of Section 72 of the Contract Act and, therefore, the Government to whom the payment was made by mistake must be repaid. The Supreme Court further held that in that respect the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, has power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realized by the Government without the authority of law.

7. Section 54 of the CGST Act is applicable only for claiming refund of any tax paid under the provisions of the CGST Act and/or the GGST Act. The amount collected by the Revenue without the authority of law is not considered as tax collected by them and, therefore, Section 54 is not applicable. In such circumstances, Section 17 of the Limitation Act is the appropriate provision for claiming the refund of the amount paid to the Revenue under mistake of law, which is as under:

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<sup>17</sup> 2020 SCC OnLine Guj 3601  
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“Section 17(1) of the Limitation Act, 1963

- (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,-
- (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
- (b) \*\*\*
- (c) the suit or application is for relief from the consequences of a mistake; or
- (d) \*\*\*”

8. This Court, in the case of *Binani Cement Ltd. v. Union of India*, (2013) 288 ELT 193 (Guj), held that where the duty is collected without any authority of law, such collection of duty is considered as collected without authority of law and, therefore, is opposed to Article 265 of the Constitution of India and, thus, unconstitutional. It is held that the assessee is not bound by the limitation prescribed under the special law for claiming the refund of the excess duty or duty collected illegally. The period of limitation prescribed under the Limitation Act would apply. The relevant abstract of the decision at paragraphs nos. 23 and 25 are as under:

“23) *Despite this prima-facie conclusion we have reached, there is a reason why we are inclined to hold that what is collected by the respondents from the petitioners can never be described as a customs duty. We say so because the very levy has been declared to be unauthorized by the Supreme Court in the case of Commissioner of Central Excise & Customs, Bhubaneswari v. Tata Iron & Steel Co. Ltd. (Supra). The Apex Court held that in absence of any notification under section 7 of the Coal Mines Act, the customs department could not levy any duty from the importers relying solely on the notification issued under section 6 of the Coal Mines Act. Such notification could authorize only collection of additional duty of excise. That being so, the collection of the amount from the petitioners could not take the colour of additional duty of customs either mistakenly or illegally collected. It is a case where the duty was collected without any authority of law. Such collection of duty is not illegal or unlawful or irregularly collected customs duty under the Customs Act, but a duty collected without authority of law and therefore opposed to Article 265 of the Constitution of India and is thus unconstitutional. In that view of the matter, the petitioners cannot be bound by the limitation prescribed in the Customs Act, 1962 for claiming refund of excess duty or duty*





collected illegally. The period of limitation prescribed under the Limitation Act would apply.

25) In the result, the petition is allowed in part. The collection of the duty described as additional duty of customs in purported exercise of powers under section 7 of the Coal Mines Act, is held unlawful. The petitioners shall be entitled to refund of such duty paid only within three years immediately preceding the date of filing of the petition, which happens to be 18.8.2006. Such refund shall be granted to the petitioners with simple interest at the rate of 9% per annum from the date of payment till actual refund, however, only after ascertaining that the burden of such duty was not passed on to consumer or any other person.”

9. Similar situation arose in the case of Joshi Technology International v. Union of India, (2016) 339 ELT 21 (Guj), wherein this Court held that the statutory time limit provided under Section 11B of the Central Excise Act is not applicable to the claim of refund of duty paid under mistake as the same was paid under mistake of law and, therefore, such claim is considered as outside purview of enactment. It was held that general provisions provided under the Limitation Act is applicable to claim refund of such duty. The relevant paragraphs of the decision are given as under:

“14.4 Thus, in view of the principles enunciated by the Supreme Court in *Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong* (supra), in case where money is paid by mistake, the period of limitation prescribed is three years from the date when the mistake was known. Besides, section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Therefore, in case where money is paid under a mistake, the limitation would begin to run only when the applicant comes to know of such mistake or with reasonable diligence could have discovered such mistake. Adverting to the case at hand, the mistake is in the nature of a mistake of law. It appears that the legal position was not clear and hence, pursuant to representations made by the trade and field formations, the CBEC was required to issue the circular dated 07.01.2014 clarifying the issue. As noticed earlier, the petitioner had all along, right from July 2004 been paying Education Cess and subsequently, from the year 2007 was paying Secondary and Higher Secondary Education Cess, till April 2014. It was only when the



Circular dated 07.01.2014 came to be issued by the CBEC, clarifying the issue, that the petitioner came to know about its mistake. Considering the nature of the mistake and the fact that the issue was not free from doubt till the above circular came to be issued by the CBEC, it also cannot be said that the petitioner could with reasonable diligence have discovered the mistake. It appears that it is only sometime after the Education Cess and Secondary and Higher Secondary Education Cess came to be paid for the month of April 2014 that the petitioner came to know about its mistake and in July 2014, it filed the application for refund before the second respondent. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, as discussed hereinabove, the retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law and hence, in the light of the decision of this court in *Swastik Sanitarywares Ltd. v. Union of India (supra)*, the question of applying the limitation prescribed under section 11B of the CE Act would not arise.

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TO SUMMARISE:—

- Merely because the provisions of the Central Excise Act, 1944 and the rules framed thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed under the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in *Commissioner v. Sahakari Khand Udyog Mandli Ltd. (supra)*.

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- In the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. The petitioner was, therefore, justified in filing the present petition before this court against the order



*passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake.*

*- Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of section 93 of the Finance Act, 2004 and section 138 of the Finance Act, 2007. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under section 11B of the Central Excise Act, 1944.*

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

*- Even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of*



*the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same.”*

**10.** Similarly, in the case of *3E Infotech Ltd. v. CESTAT*, (2018) 18 GSTL 410 (Mad.), the Madras High Court held that the service tax paid under mistake of law is to be returned to the assessee irrespective of the period covered under the refund application. It was held that refusing to return the amount would go against the mandate of Article 265 of the Constitution of India. The relevant paragraphs of the decision are as under:

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

*13. 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.*

*14. 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 bared by limitation, provided for under Section.*
- b) The claim for return of money must be considered by the authorities.””*

14. That only leaves us to examine the submission of Mr. Ramachandran and which proceeded on the basis of Section 17(1)(c) of the Limitation Act. Suffice it to note that the Gujarat High Court on 06 W.P.(C) 17146/2022 & W.P.(C) 17152/2022



September 2019 in *Sal Steel* had declared that the relevant provisions of the 1994 Act insofar as they sought to levy service tax on ocean freight were unconstitutional and invalid. The present writ petitions came to be filed in December 2022. Quite apart from the fact that the judgment in *Sal Steel* had been rendered in 2019 and the appeal taken against that decision is still pending disposal before the Supreme Court, the principles laid down in that decision had come to be reaffirmed by the Tribunal in *Kiri Dyes and Chemicals*. That decision of the Tribunal rendered on 23 March 2023 ultimately came to be affirmed on 01 September 2023 when the Supreme Court proceeded to dismiss Civil Appeal No. 5536/2023 taken against that decision.

15. Even otherwise, we take note of the orders passed by the Supreme Court in **In Re: Cognizance For Extension Of Limitation**<sup>18</sup> and which clearly saved the period of limitation falling between 15 March 2020 and 28 February 2022. We bear in consideration the following directions contained in paragraph 5 of the order dated 10 January 2022 passed in the aforementioned matter:

“5. Taking into consideration the arguments advanced by the learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of MA No. 21 of 2022 with the following directions:

5.1. The order dated 23-3-2020 [*Cognizance for Extension of Limitation, In re*, (2020) 19 SCC 10 : (2021) 3 SCC (Cri) 801] is restored and in continuation of the subsequent orders dated 8-3-2021 [*Cognizance for Extension of Limitation, In re*, (2021) 5 SCC 452 : (2021) 3 SCC (Civ) 40 : (2021) 2 SCC (Cri) 615 : (2021) 2 SCC (L&S) 50] , 27-4-2021 [*Cognizance for Extension of Limitation, In re*, (2021) 17 SCC 231 : 2021 SCC OnLine SC 373] and 23-9-2021 [*Cognizance for Extension of Limitation, In re*, 2021 SCC OnLine SC 947] , it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be

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<sup>18</sup>2022 SCC OnLine SC 27; Suo Motu W.P.(C) 3/2020  
W.P.(C) 17146/2022 & W.P.(C) 17152/2022



prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

5.2. Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.

5.3. In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.

5.4. It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

16. Viewed in that light, and bearing in mind the mandate of the Supreme Court and which clearly and in unequivocal terms excludes the period between 15 March 2020 and 28 February 2022, it would be wholly incorrect for the respondents to urge that the claim of the petitioners is barred by limitation when computed in light of Section 17(1)(c) of the Limitation Act.

17. We, accordingly, allow the instant writ petitions and direct the respondents to attend to and dispose of the refund claims forthwith. The computation of refund shall be along with applicable statutory interest.

**YASHWANT VARMA, J.**

**DHARMESH SHARMA, J.**

**DECEMBER 18, 2024/RW**