

Study Paper on Unjust Enrichment



The Institute of Chartered Accountants of India
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Foreword

Concept of *Unjust enrichment* refers to situations in which one person is enriched at the expense of another in circumstances which the law treats as unjust. This principle was formally introduced in refund mechanism under Indirect Tax in the year 1991 by amending Section 11B of the Central Excise Act, 1944. By extension it was made applicable to Service tax. Refund under indirect tax shall be paid to the applicant, instead of being credited to the Consumer Welfare Fund only if the incidence of such tax has not been passed on to any other person. This implies that refund under indirect taxes is subject to the test of unjust enrichment.

To ensure the refund mechanism works smoothly the concept has to be read and comprehend with relevant legal cases. With this perspective, the Indirect Taxes Committee of ICAI has come out with "*Study Paper on Unjust Enrichment*". This Study Paper has specifically been designed to support the business & industry, revenue officials and members by providing in-depth knowledge of concept and legal maxim pertaining to Doctrine of unjust enrichment in very practical and simplified manner.

We like to heartily appreciate CA. Madhukar N. Hiregange, Chairman, CA. Sushil Kumar Goyal, Vice-Chairman and other members of the Indirect Taxes Committee for their initiation and completing this Study Paper on Unjust Enrichment for the benefit of all. We are sure that this Study Paper will certainly facilitate our members in practice as well as in industry to acquire specialized knowledge and cope-up with the challenges and complexities relating to Doctrine of unjust enrichment, which is also applicable in upcoming GST Law.

We welcome the members to a fruitful and enriching experience.

CA. M Devaraja Reddy
President
ICAI

CA. Nilesh S. Vikamsey
Vice-President
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Date: 06.02.2017

Place: New Delhi

Preface

Under indirect tax law, the duty/ tax is generally passed on to buyer/ receiver and finally to the end consumer. Refund is provided to applicant who has borne the incidence of tax. Hence, refund under indirect taxes is subject to the test of unjust enrichment. In other words, it is only when the incidence of such tax has not been passed on to any other person the applicant is eligible for refund otherwise the refund is credited to Consumer Welfare Fund. Therefore, to resolve the ambiguities pertaining to applicability of doctrine unjust enrichment in different case/circumstances, it is imperative for industry, revenue officers and professional like Chartered Accountants to have clarity on the concept of unjust enrichment and its applicability.

Taking these facts into account, the Indirect Taxes Committee of ICAI has taken an initiative to apprise its members of about the concept of unjust enrichment, its applicability in indirect taxes including forthcoming GST and legal cases to resolve the ambiguities of applicability involved. Hence, this Study Paper is designed to provide in depth practical and theoretical knowledge about detailed and thorough study of principle on unjust enrichment to ease the refund mechanism under Indirect Taxes.

We would like to express our sincere gratitude and thank to CA M. Devaraja Reddy, President and CA. Nilesch Vikamsey, Vice-President, ICAI, as well as other members of the Committee for their suggestions and support in this initiative. We must also thank indirect tax experts' viz. Study Group at Mumbai for drafting this study paper and CA. Ashok Batra and CA. S Venkataramani for reviewing it.

We encourage reader to make full use of this learning opportunity. Interested members may visit website of the Committee www.idtc.icai.org and join the IDT update facility. We request to share your feedback at dtc@icai.in to enable us to make this study paper more value additive and useful.

Welcome to a professionalized learning experience in Indirect Taxation.

CA. Madhukar Narayan Hiregange
Chairman
Indirect Taxes Committee

CA. Sushil Kumar Goyal
Vice-Chairman
Indirect Taxes Committee

Date: 06.02.2017

Place: New Delhi

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1 Background

1. Unjust enrichment is a legal concept referring to situations in which one person is enriched at the expense of another in circumstances which the law treats as unjust. A general equitable principle is that no person should be allowed to enrich at other's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained.
2. The application of concept of unjust enrichment can be found in the Indirect Tax Laws. It is a well settled principle of Indirect Tax Laws that such duty/tax is allowed to be passed on to the end consumer. If the manufacturer has charged excise duty to his buyer on the invoice itself, it is amply clear that he has passed on the burden of such duty to the buyer i.e. he has already recovered the duty from his customer. In such cases, if due to any reasons, any refund of excess duty is granted to the manufacturer, it will amount to excess and un-deserved profit to the manufacturer since he never bore the burden of such excise duty and that refund if any should have been allowed to the customer and not the manufacturer.
3. The principle of unjust enrichment was formally introduced under the Excise Laws by amending Section 11B of the then Central Excises and Salt Act, 1944 (Central Excise Act, 1944) to prevent the flow of huge amount of refunds of Duties of Excise, from flowing into the pockets of the manufacturers which were not actually borne by them.

2 Section 11B of Central Excise Act

- 2.1 Section 11B of the Central Excise Act, 1944 allows the manufacturer to claim refund of any duty of excise and interest, provided he makes an application for refund within a period of one year from the relevant date. The refund is granted subject to the condition that the incidence of duty is borne by the manufacturer himself and has not passed on to the buyer of excisable goods. Sub-section (1) of section 11-B reads as under:

"Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the

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documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person.

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act

Provided further that, the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest."

- 2.2 Based on the amended Section 11B of the Central Excise Act, 1944, the jurisdictional excise officer is required to verify whether the manufacturer has borne the burden of tax. If the answer is yes, then the manufacturer is entitled to the refund. If the answer is no, then the manufacturer is not entitled to the refund claimed.

Illustration 1 – XYZ Limited manufactures goods which are liable to excise duty at the rate of 6%. XYZ Limited charges excise duty on these products at the rate of 6% and sells the same to Mr A (Customer). At the time of filing the returns, XYZ Limited inadvertently classifies the goods to be liable to tax at the rate of 12% and remits the tax calculated at the incorrect rate. In this case, XYZ Limited has paid tax at the rate of 12% when it was only payable at 6% and the additional tax has not been collected from the customer and hence XYZ limited will be entitled to claim refund of such excess tax.

Illustration 2 – XYZ Limited manufactures goods which are not liable to excise duty. XYZ Limited however charges excise duty on these products and sells the same to Mr A (Customer). In this case, since Mr A has borne the burden of tax and not XYZ Limited and hence XYZ is not entitled to claim refund of the excise duty which was not payable in the first place.

- 2.3 In the context of Illustration 2, it would be relevant to note that Article 265 of the Constitution of India (hereinafter referred to as the "constitution") clearly states that "No tax shall be levied or collected

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except by the authority of law". Thus, where any Statute does not provide for any levy or collection of taxes (including duties), the Government shall not be eligible to collect it.

- 2.4 Hence, the manufacturer is not entitled to refund since the burden of tax was not borne by him, and the Government also cannot retain the tax since collection of taxes on exempt products is against the authority of law. Accordingly, such claim for refund will be rejected in the hands of the manufacturer and the amount will be credited to the Consumer Welfare Fund unless the customer has claimed the refund.

3 View of the courts prior to amendment in Central Excise Laws with respect to Principle of Unjust Enrichment [Position Prior to 1991]

- 3.1 Section 11B did not provide for unjust enrichment prior to the year 1991. During those days, the Assistant Collector of Central Excise used to grant refund if he is satisfied that the duty was refundable.

- 3.2 In case of **D. Cawasji and Co. vs. State of Mysore - AIR 1975 SC 813** it was observed that Section 11B did not contain any provisions to deny the refund of duty even if the burden of excise duty has been passed on to the buyers . The relevant extract of the said decision is as under:

"Nor is there any provision under which the Court could deny refund of tax even the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason it is impracticable to do so."

- 3.3 As regards to the doctrine of "Unjust Enrichment", the Hon'ble Bombay High Court in case of **Finolex Cables Limited vs. Union of India and Another 1988 (35) ELT 343 (Bom.)** observed that *"It is unintelligible as to how the State can contend that though it has collected the duty illegally or without the authority of law, it will not refund the same to the person, from whom it has collected and who has paid under the compulsion of law, on the ground that the amount, if refunded, will be retained by that person."* Thus, courts have ordered the refund of duty rejecting the grounds of unjust enrichment. However, there are catena of judgements which had followed the doctrine of "Unjust Enrichment". In case of **Roplas (India) Ltd. And Another vs. Union Of India And Another 1988 (38) ELT 27 (Bom.)**, the Hon'ble Court had delivered the view that in cases where there is little or no possibility of refunding the excess

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amount collected from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the Court should not ordinarily direct any refund in exercise of its discretion under Article 226 of the Constitution.

3.4 In absence of any specific provisions under Central Excise Laws, as discussed above, the position of law was unsettled prior to the year 1991 and therefore, Principle of Unjust Enrichment was introduced formally under the law from the year 1991.

4 Principles laid down by Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. v/s Union of India as reported in 1997 (89) ELT 247 [Position w.e.f. 1991 onwards]

4.1 Hon'ble Supreme Court (Nine Members Bench) in the Landmark decision in case of Mafatlal Industries has laid down following principles:

(a) Article 265 of the Constitution is declaratory in nature. It says that "no tax shall be levied or collected except by authority of law". This, no doubt, means that taxes collected contrary to law have to be refunded. However, Article 265 refers to only valid laws and wherever the validity of such laws have to be ascertained, the same should be according to other relevant Articles of the Constitution.

(b) Following are the categories of cases where claim of refund could arise:

(i) Where a provision of the Act under which tax is levied is struck down as unconstitutional for transgressing the constitutional limitations (Unconstitutional Levy)

(ii) Where the tax is collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules or Notifications or by an erroneous finding of facts (Illegal levy)

(iii) Where claim for refund of duty arises due to subsequent identification of mistake of law by Supreme Court or High Court.

(c) Article 265 cannot be read in isolation. It must be read in the light of the concepts of economic and social justice. The very concept of economic justice means and demands that unless the claimant (for refund) establishes that he has not passed on the burden of the duty/tax to others, he has no right to

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claim for refund. It would be a parody of economic justice to refund the duty to a claimant who has already collected the said amount from his buyers. The refund should really be made to the persons who have borne its burden - that would be economic justice.

- (d) If the person claiming refund has passed on the burden of duty to another i.e. if the person claiming the refund has not really suffered any prejudice or loss, there is no question of reimbursing him. **He cannot be re-compensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty.**
- (e) A reference was also made to Section 64A of the Sale of Goods Act, 1930 and it was observed that the Central Excise duties and the Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these duties are indirect taxes, meant to be passed on.
- (f) Further, the relevant evidence to prove that the burden of duty has been passed on to buyer is in the possession of the manufacturer. Therefore, since the manufacturer is claiming the refund and also since the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party.
- (g) The very idea of "unjust enrichment" is inappropriate in the case of the State. Further, by any standard of reasonableness, it is difficult to prefer the petitioner (claimant) over the State. Taxes are necessary for running the State and for various public purposes.

4.2 The assessee argued that if the burden of proof of unjust enrichment is on the manufacturer, he may not find any incentive in fighting for refunds even if the levy is found unjust. At this juncture, the Court observed that:

- (a) Only the person who has actually suffered loss or prejudice would fight for the levy and apply for refund.

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- (b) In a competitive market economy, the manufacturer's self interest lies in producing more and selling it at competitive prices - the urge to grow. A favourable decision does not merely mean refund; it has a beneficial effect for the subsequent period as well.
- 4.3 It was held that amendment to Section 11B cannot be given retrospective effect. However, it was also pointed out that obligation to prove that duty has not been passed on to another person was always a pre-condition to claim refund. Therefore, all refunds had to pass the test of Unjust Enrichment even before the amendment in Section 11B. Accordingly, any vested rights or substantive rights are not taken away by amendment in Section 11B.
- 4.4 With respect of practical difficulty of identification and refunding the amount of duty to the disperse purchasers, it was held that, practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally.
- 4.5 Further, it was held that just because duty not separately shown in the invoice, it does not follow that the manufacturer is not passing on the duty. Nor does it follow there from that the manufacturer is absorbing the duty himself. The manner of preparing the invoice is not conclusive. While one cannot visualise all situations, the fact remains that every manufacturer will sell his goods at something above the cost-price plus duty.
- 5 Burden of proof on the assessee that incidence of duty has not been passed on to the customers**
- 5.1 Section 11B specifically casts the burden of proof upon the claimant to establish that the incidence of duty has not been passed on by him to the buyer. In case of **Union of India vs. A.K. Spintex Ltd 2009 (234) ELT 41 (Raj.)** as upheld in case of **Eveready Industries India vs. Commissioner of C. Ex., Lucknow 2015 (323) ELT 612 (Tri.-Del.)**, it was held as under:

"So far as Section 12B is concerned, it only places burden of proof on the assessee, by enacting the presumption, against him, and does not do anything beyond it. The burden placed on the assessee, by Sec. 12B, obviously, is a rebuttable one, and the assessee may lead evidence in rebuttal, by proving issuance of debit note and credit note, likewise there may be cases, where purchaser may refund the amount to seller, in cash, or may issue some bank note,

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like Cheque, or Draft, for refund of the amount, or there may be case, where goods are sold on credit, and while making payment of price of the goods the purchaser may debit the amount, and thus, pay lesser amount to the seller, and if all those facts are shown and proved, the burden placed on the assessee, by Sec. 12B, would shift on the revenue, then, it is required for revenue, to prove, either that the theory projected by the assessee, is fake and false, or that the burden has actually been passed on. Once the assessee leads reliable evidence, about his having not passed burden on the purchaser, and revenue fails to rebut that evidence, the presumption enacted by Sec. 12B, stands sufficiently rebutted, and cannot survive ad infinitum"

- 5.2 **Thus, primary responsibility lies upon the assessee to prove that it has not passed on the burden to the buyer. However, where all the evidences relating to same are submitted to the department, the burden of proof will shift onto the department to prove that the evidences produced by the assessee are false.**
- 5.3 The refund claim should be accompanied by an affidavit that the assessee has not passed on the burden of duty to another person. Such affidavit should be sworn by Managing Director or Principal Officer of the Company or Society.
- 5.4 Certificate from Chartered Accountant (CA) in respect of not passing of burden can be accepted considering all other factors of the refund claim. Certificate of CA is only a piece of evidence and in itself is not sufficient to show that burden has not been passed to other person. In such cases, Department can ask for records to check whether statement of CA is correct. However, refund cannot be rejected simply on ground that certificate of CA is not conclusive evidence.
- 6 Doctrine as explained by the court in case of Sahakari Khand Udyog Mandal Ltd. v/s Commissioner of Central Excise & Customs as reported in 2005 (181) ELT 328 S.C.**
- 6.1 The Hon'ble Supreme Court in the given case has defined 'unjust enrichment' as under:
 - (a) 'Unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. 'Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.
 - (b) That no person can be allowed to enrich inequitably at the

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expense of another. A right of recovery under the doctrine of 'unjust enrichment' arises where retention of a benefit is considered contrary to justice or against equity.

- 6.2 The court had taken a view that the doctrine of unjust enrichment had always existed and Section 11B has only brought legislative recognition to the doctrine. Moreover, the court had relied on various judicial precedents given in the English Law defining unjust enrichment.
- 6.3 The Court has given reference to definitions laid down by the English Courts as follows:
- (a) In the leading case of **Fibrosa v. Fairbairn, (1942) 2 All ER 122**, Lord Wright stated the principle thus:
- "Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."*
- (b) Lord Denning also stated in **Nelson v. Larholt, (1947) 2 All ER 751**;
- "It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."*
- 6.4 Further, it was held that irrespective of the applicability of Section 11B, the doctrine can be invoked to deny the benefit to a person who is not otherwise entitled.
- 6.5 In the given case, claimant had collected the amount of duty from the customer and had passed the amount of duty to them. The Court held that the claimant is not entitled to claim any amount as refund.

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Granting of such exemption would amount to unjust enrichment.

It may be mentioned that Law of torts provides to allow people to recover damages for injuries.

7 Price fixed under any law

- 7.1. In the case of **Karnataka Antibiotics & Pharmaceuticals Ltd. vs. C.C.E., Bangalore 1996 (83) ELT 114 (Tribunal)**, it was held that bar of unjust enrichment on refund will not be applicable where maximum selling price is fixed under any law. In such cases the question of manufacturer passing on the burden of duty will not arise.
- 7.2. The above case was also referred in case of **Hindustan Petroleum Corporation Ltd. vs. Commr. of Cus. (Imports), Mumbai 2015 (328) ELT 490 (Tri.-Mum.)** where price of the petroleum was fixed by the government. However, this contention was not accepted by the tribunal based on the decision in the case of **Allied Photographic India Ltd. 2004 (166) ELT 3 (S.C.)** wherein Apex court has held that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors.
- 7.3. Thus, for section 11B, there may still be the requirement of proof to be given by the manufacturer to establish that burden of duty has not been passed on to the buyer even in cases where the prices are fixed.

8 Refund claims when price remains same

- 8.1. In case of **CCE v. Allied Photographic India Ltd (Supra)** it was held that where price remains unchanged after assessments, it will not automatically mean that the burden of duty has not been passed on to the buyer.
- 8.2. Section 12B of the CEA, 1944 provides for the presumption that the amount of excise duty has been passed on to the buyer. Hence, when price remains same before and even after imposition of duty, the assessee has to still establish that he has not passed on the burden of duty to the buyer taking into consideration the cost of manufacture, direct expenses, excise duty, profit margin etc.

9 Refund claims by trader/buyer of goods, when excess duty collected by manufacturer (Except payment made under protest)

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- 9.1. Section 11B is not just restricted to the manufacturer of goods. It takes into consideration every person who has borne the incidence of duty. Therefore, the buyers/traders, not registered under Central Excise Laws, are also eligible for claiming refund of excise duty even if they themselves have not deposited the same in the Government Treasury. The doctrine of unjust enrichment shall be applicable on such applicants as well.
 - 9.2. In case of **Sirpur Paper Mills Ltd. vs. Commr. of CUS., C. EX. & S.T., Hyderabad-I 2014 (312) ELT 612 (Tri.-Bang.)**, Tribunal has confirmed that the provision of Section 11B relating to refund are also applicable to the buyers of the manufactured goods who have borne the burden of excise duty.
 - 9.3. The Bangalore Tribunal has also confirmed the validity of refund claim by the buyer in case of **McNally Bharat Engineering Co. Ltd. vs. Commr. Of C. Ex., Guntur 2006 (194) E.L.T. 318 (Tri. - Bang.)** wherein it was held that it is not necessary that the manufacturer should only file the refund claim. The person who has borne the duty burden only can claim the refund.
 - 9.4. However, in case of **Commissioner Of C. Ex., Mumbai-Ii vs. Allied Photographics India Ltd.(Supra)**, it was held that the accounts of the manufacturer are different from the accounts of the buyer. Where the amount of duty is paid by the manufacturer under protest then as per Section 4 of the CEA, 1944, such payments shall be on his "own account". Consequently, buyer will not be able to claim the refund of the "on account" payments made by the manufacturers. However, in such cases, manufacturer can opt to file refund claim.
- 10 Refund claims when the excess duty paid is shown separately in Balance Sheet as Current assets.**
- 10.1. The law provides that unjust enrichment will apply only when "incidence of excess duty so paid had been passed by claimant to any other person". Further Section 12B of CEA, 1944 provides that any duty/tax paid unless contrary is proved by the claimant, the incidence thereof will be deemed to have been passed on to the buyer. More so claimant has to demonstrate & adduce evidence to the effect that if the refund is not granted he will suffer the loss of excess payment of duty/tax.
 - 10.2. One of the many ways one can prove that incidence of excess duty/tax paid by the claimant is not passed on to the other party/consumer is by showing the said payment as Recoverable

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from Customs/Excise/Service Tax department under Advances as Current assets. But merely any such reflection in accounts will not be conclusive in nature. It has to be considered alongwith other facts like non-recovery of such taxes from consumers by claimant supported with CA certificate to that effect, no payment of such tax portion by the consumers to the claimant and excluding this excess tax portion while considering the cost of goods sold to the consumers and prices remained constant even after payment of such excess duty.

- 10.3. In the case of **Commr. of Customs, Air Cargo Unit, New Delhi versus MarutiUdyog Ltd 2003 (155) E.L.T. 523 (Tri. - Del.)**, it was held that duty incidence was not passed to consumers as the duty based on the following
- Duty was disclosed as amount recoverable from Customs under 'Other Current Assets' in the Balance Sheet
 - A certificate of CA was produced to the same effect that incidence of duty was not passed on to the customers
 - Invoices for relevant period showed that there was no change in price of goods

Department did not put forth any evidence to rebut these documents brought on record by assessee. It was held that Refund could not be denied merely on the ground/assumption that duty paid would have been taken in account to work cost of end-product.

- 10.4. In the case of **BrindavanTex Processors Pvt. Ltd. Vs C C. Ex. 2006 (196) E.L.T. 61 (Tri. - Bang.)** the grievance of the appellant was that the evidence on record clearly indicated that the assessee had not received the duty from its customer *viz* M/s. Madura Coats Pvt. Ltd. M/s. Madura Coats in their correspondence had clearly indicated that they would not make the payment. The Court while applying analogy of **CCE v. Maruti Udyog Ltd.[2003 (155) E.L.T. 523 (Tri. - Del.)**]accepted that when the balance sheet shows refund as amount recoverable from customers under "Other Current Assets" and the same is supported by certificate of CA and that the invoices for the relevant period also shows that there was no change in price of goods and further the department has not rebutted these documents then refund cannot be denied on the ground that the duty paid would have been taken into account to work the cost of end product.

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- 10.5. In the case of **Cargill Foods India Ltd. Vs CC. Ex., 2010 (262) E.L.T. 691 (Tri. - Mumbai)** the appellants were engaged in manufacturing of Refined Edible Oil. They also manufactured jars which are captively consumed within the factory and used for packing of refined edible oil. However, the appellants paid Central Excise duty on the said jars captively consumed which were exempt from payment of Central Excise duty then. Accordingly, they filed refund claim and the same was rejected on the ground that the claim is hit by bar of unjust enrichment. On appeal before the Commissioner (Appeals), the order was confirmed. The appellant preferred an appeal before the Tribunal and the Tribunal relying upon the decision of **Beekay Hoisery Industries - 2005 (188) E.L.T. 301** held that once the amount of refund has been shown as receivable, it means it has not been charged to the profit and loss account and the matter was remanded back to the adjudicating authority. Impugned order in second round holding appellant might not have collected from customers but loaded to value of goods is not acceptable ground which was beyond scope of remand. Balance sheet, profit and loss account, CA's certificate and affidavit were produced. Appellant could establish that duty incidence not passed on and same not controverted by Department. Impugned order denying refund was set aside.
- 10.6. In the case of **C.C.E.Vs Saralee Household & Bodycare India (P) Ltd. 2007 (216) E.L.T. 685 (Mad.)** in which the assessee had classified its products under Central Excise Tariff Sub-heading 3402.90 and paid the duty @ 30% upto February, 1992. Subsequently, the assessee company felt that their products were classifiable under Ch. 3405.40 (Duty payable @ 20%). Since the classification filed by the assessee company earlier under 3402.90 was not approved, they resorted to pay the duty (as applicable to 3402.90) under protest and filed their letter of protest on 9-3-1992 with the Assistant Commissioner of Central Excise. Upon Appeal in the said case the Commissioner (Appeals), allowed the appeal with a consequential benefit thereby revising the classification of the products from 3402.90 to 3405.40. In consequence of the same, the assessee filed a refund claim for the differential duty paid by them under protest. The Hon'ble High Court while upholding CESTAT's order held that it is seen from the records that what was collected by the assessee from the buyers was only the price of the goods plus duty @ 20%, though duty at higher rate @ 30% was indicated in the statutory invoices. The assessee produced books of account along

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with certificates issued by their CA. These documents clearly indicated that the Excise Duty (10%) paid by the assessee was kept as "Receivable from Government" or "Current Assets" in the books of account. The factual position was clear from the contemporary accounts and the certificates issued by the CA. Hence, the refund claim ought not to have been rejected on the ground of unjust enrichment. Presumption of unjust enrichment under Section 12B of the Central Excise Act was successfully rebutted by the assessee.

- 10.7. Other things remaining same viz the duty was not charged to consumer nor paid by claimant, price remaining the same, CA certificate produced to this effect, etc., the law being evolving in nature, various Tribunals have started taking a view that treatment of duty paid in the books of account is not conclusive proof that incidence has been passed on to some other person. Even if the duty is booked under expenditure and the same has not been charged to any person then the result will be profit reduction that itself shows that the incidence of such duty has been borne by the claimant, hence not passed on to any other person. Hon'ble CESTAT in the case of **Elantas Beck India Ltd V/s CCE & ST 2016 TIOL 1667 CESTAT- Mum & Balaji Pressure Vessels Ltd v/s CCex 2016 (68) taxmann.com 315 (Hyderabad)** - held that merely because the Excise duty is booked as expenditure in Profit & Loss Account, it cannot be said that incidence of duty has been passed on by the claimant.
- 10.8. To conclude; just because the excess duty paid is shown as recoverable from department under advances as current assets will result into cash refunds may not always work if other facts are at its loggerhead. But if other facts remain favorable then even if the excess duty is expensed out in Profit & Loss Account then also cash refund could be realized. The crux being how claimant leads facts in its favour resulting into cash refund.

11 Goods consumed captively

- 11.1. While deciding on the issue of applicability of unjust enrichment in Mafatlal's Case (supra) under Section 27 of the Customs Act, 1962 (hereinafter referred to as the "CA Act, 1961") post 1991 amendment - the situation in case of captive consumption was not dealt by the Hon'ble Supreme Court then. Thus question often arose whether unjust enrichment applies to excess duty paid on inputs/capital goods used in making Final goods and sold subsequently i.e. goods consumed captively.

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- 11.2. The Hon'ble Supreme Court in the case **Bhadrachalam Paperboards Ltd. v. Govt. of Andhra Pradesh, 1999 (106) E.L.T. 290 (S.C.)** was seized with an issue of deciding claim made for refund of sales tax which was already held as not payable thus erroneously paid. The High Court had denied the refund as it was of the view that the assessee must have passed on the burden to the consumer, thereby applied the principle of unjust enrichment. Allowing the appeal of the assessee, the Hon'ble Supreme Court held that the High Court was not right in presuming that the burden of tax had been passed on to the customer. The Apex Court held on facts that the question of appellant therein passing on the tax liability to the consumer did not arise when admittedly the assessee reimbursed the amount paid in excess to the Forest department/buyer.
- 11.3. For the first time Apex Court in its 3 member bench deliberated on the question whether the doctrine of unjust enrichment is applicable in respect of raw material imported and consumed in the manufacture of a final product in the case of **UOI vs Solar Pesticide Pvt. Ltd. 2000 (116) E.L.T. 401 (S.C.)**. It held that the use of the words 'incidence of duty....' was significant which meant "the burden of duty". Section 27(1) of CA, 1962 refers to incidence of duty being passed on and not the duty as such being passed on to another person. The expression 'incidence of such duty' in relation to its being passed on to another person would take within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of duty on the raw material would stand passed on to the purchaser of the finished product. It would follow that when the whole or part of the duty which is incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27(1).
- 11.4. Yet another issue cropped up before the Hon'ble Apex Court to decide applicability of the doctrine of unjust enrichment in the case of refund of duty paid on 'capital goods' used captively for manufacture of final product. It was again department's Appeal in the case of **C CEx Vs Grasim Industries 2015 (318) E.L.T. 594 (S.C.)** wherein Apex Court held that principle of unjust enrichment extends even to captive consumption of capital goods. For

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inapplicability of doctrine of unjust enrichment, assessee has to demonstrate that cost of capital goods was not considered in costing of particular product made therefrom for being eligible for refund.

- 11.5. Apex court relying on its earlier judgement of Solar Pesticide (supra) Apex Court held that two things which emerge from the reading of the aforesaid judgment and need to be emphasized are as under :
- (i) in attracting the principle of unjust enrichment it is not only the actual burden which is passed on to the another person that would be taken into consideration but also that the incidence of such duty had not been passed on by him to any other person;
 - (ii) the principle of unjust enrichment shall be applicable in the case of captive consumption as well. According to the Court the principle of unjust enrichment would be applicable in both the circumstances.
- 11.6. In the context of Capital Goods, Apex Court relied on its earlier judgment in the case of Indian Farmers Fertiliser Coop. Ltd. v. C.C.E., Ahmedabad [1996 (86) E.L.T. 177 (S.C.)] to answer the question whether this principle of unjust enrichment would be extended to capital goods also, as it was in respect of raw material. On deliberation of said judgment it concluded that if a particular material is used for manufacture of a final product, that has to be treated as the cost of the product. In so far as cost of production is concerned, it may include capital goods which are a part of fixed cost as well as raw material which are a part of variable cost. Both are the components which come into costing of a particular product. Therefore it cannot be said that the principle laid down by the Court in Solar Pesticides would not extend to capital goods which are used in the manufacture of a product and have gone into the costing of the goods. In order to overcome the bar of unjust enrichment, it therefore becomes necessary for the assessee to demonstrate that in the costing of the particular product, the cost of capital goods was not taken into consideration. Accordingly, the judgment of the Tribunal was set aside & matter was remanded back for the Assessee to demonstrate to the assessing authority that the cost of the capital goods was not included in the costing of the machinery and only then would they be entitled to the refund claim

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- 12 **Refund claim for pre deposit made for filing appeal – unjust enrichment not applicable**
- 12.1. According to the provisions of Section 35F of CEA, 1944 and 129E of CA, 1962, the Tribunal or the Commissioner (Appeals), shall not entertain any appeal unless the appellant has deposited the prescribed amount as pre-deposit. On deposit of the prescribed amount, appeal is admitted and the balance amount is stayed for recovery.
- 12.2. Where an amount deposited by the appellant is required to be refunded consequent upon the order of the Appellate Authority, the appellant is entitled for interest @ 6% per annum from the date of payment of the amount till, the date of refund of such amount.
- 12.3. The question of whether doctrine of unjust enrichment would be made applicable to refund of pre –deposit made for filing appeal has come before the Hon'ble Bombay High Court in **Suvidhe Limited vs. UOI 1996 (82) ELT 177 (Bom.)**, wherein it was held that, in respect of deposit made under Section 35F of CEA, 1944, provision of Section 11B of CEA, 1944 can never be made applicable. A deposit under Section 35F of CEA, 1944, is not payment of duty but only a pre-deposit for availing the right of appeal and such amount is bound to be refunded when the appeal is allowed with consequential relief. It is further held that, in respect of such deposit the doctrine of unjust enrichment will be inapplicable. The SLP filed by UOI against the said decision was dismissed by the Hon'ble Supreme Court in **UOI v. Suvidhe Ltd. - 1997 (94) ELT A159 (SC)**
- 12.4. The Hon'ble Apex Court in **Mahavir Aluminium Ltd v. CCE, Jaipur 1999 (114) ELT 371(SC)**, turned down the department's plea that, refund of the amount pre-deposited for hearing of an appeal not to be released to the assessee unless it is established that he has not wrongly enriched himself by collecting duty from his customers, as the amount paid is in a condition for waiving of payment for grant of stay by the appellate authority and not duty which is to be refunded.
- 12.5. With regard to amount deposited during the pendency of adjudication proceedings or investigation, the Hon'ble Madras High Court in **CCE, Coimbatore vs. Pricol Ltd. 2015 (320) ELT 703 (Mad.)** held that, in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and,

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therefore, the principles of unjust enrichment would not apply to refund of such amounts.

- 12.6. The Tribunal in **Mohan Crystal Glass Works vs. CCE, Ghaziabad 2003 (160) ELT 283 (Tri. - Del.)** held that, any amount deposited towards duty provisionally during the provisional assessment proceedings is paid as pre-deposit and does not cease to have character of pre-deposit merely by adjudicating authority treating amount as payment of duty and same will not be governed by the doctrine of unjust enrichment provided in Section 11B of CEA, 1944.
- 12.7. Payment for provisional assessment not subject to unjust enrichment: The Hon'ble Gujarat High Court in **CCE&C vs. J. M. Baxi & Co. 2011 (271) ELT 19 (Guj.)** held that, amount payable under adjudication order, paid voluntarily without directions of appellate authority for its payment as precondition for hearing the appeal, has to be treated as pre-deposit for hearing of appeal and assessee is entitled to its refund without going through test of unjust enrichment.
- 12.8. The Hon'ble Supreme Court once again at the cost of repetition in **CC (Import), Raigad vs. Finacord Chemicals (P) Ltd. 2015 (319) ELT 616 (SC)** held that, since the amount in question was deposited in compliance with the interim order passed by the High Court of Bombay, which was not towards duty, the question of unjust enrichment would not arise at all.
- 12.9. Another interesting issue has arisen as to whether the doctrine of unjust enrichment is applicable to amount deposited prior to adjudication of demand case, when the said deposit stood adjusted against the duty confirmed in the demand order and deposit converted into duty. The Tribunal dealing with this issue in **N. K. Overseas v. CC, Ahmedabad 2015 (317) ELT 356 (Tri-Ahmd)** held that, even if at one stage deposit made by the appellant is appropriated as duty but on setting aside the demand itself the appropriation also become *null* and *void*, therefore as the amount of deposit still remains as deposit, the doctrine of unjust enrichment to such a refund claim is not applicable.

Hence, it can be inferred that section 11B is applicable on duty only and not applicable on payment made such as pre-deposits, duty under protest.

- 12.10. The Hon'ble Bombay High Court in **CCE, Pune-I vs. Sandvik Asia Ltd. 2015 (323) ELT 431 (Bom.)** held that, it is immaterial and

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irrelevant as to what the assessee terms the “refund” amount in his Books of Account and even if it is shown on the ‘expense side’ in accounts, that does not mean that the burden has been passed on to the consumer.

- 12.11. The Tribunal in **CCE, Surat-II vs. Vardhman Acrylics Ltd 2013 (292) ELT 558 (Tri.-Ahmedbad) and Asha Nitrochem Industries Ltd vs .CCE, Daman 2013 (289) ELT 360 (Tri.-Ahmedbad)** held that, the bar of unjust enrichment is not applicable to *suomotu* reavallment of credit of Modvat/Cenvat credit based on favourable decision, which was reversed earlier under protest and treated as pre-deposit.
- 12.12. The CBEC after taking cognizance of above cited legal position in **Suidhe Ltd and Mahavir Aluminum Ltd .(supra)** in its Circular No. F. No. 275/37/2K-CX. 8A, dated 02/01/2002 in paragraph 3, *inter alia* clarified that, in order to attain uniformity and to regulate refund of pre-deposit, refund applications under Section 11B(1) of the CEA, 1944 or under Section 27(1) of the CA, 1962 need not be insisted upon, thus the doctrine of unjust enrichment is not applicable to such refunds.
- 12.13. Additionally, CBEC in its **Circular No. 984/8/2014-CX., dated 16/09/2014** in paragraph 5.2 has manifestly clarified that pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not to be subjected to the process of refund of duty under Section 11B CEA, 1944 or Section 27 of the CA, 1962. Therefore, in all cases where the appellate authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the Appellate Authority is proposed to be challenged by the Department or not.
- 12.14. Thus, it is a settled law that the doctrine of unjust enrichment is not applicable to refund of pre-deposit made for filing appeal unless, the department has proved that the incidence of said amount has been recovered from customers as duty/tax.

13 Refund for the amounts deposited during investigation

- 13.1. Investigation is a common feature in the Indirect Tax Law be it Customs Law, Central Excise Law or Service Tax Law. During investigation, many a times the assessee pays the disputed amount to the department and at times the assessee makes voluntary payment. However in some cases it is possible that the Authorities

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or Courts direct the assessee to pay some amount during investigation stage. Such payments are generally made to avoid interest or other penal provisions or to safe guard the interest of Revenue, if there is a reason to believe that there may be some revenue leakage. Subsequently after the matter attains finality in the favour of the assessee, assessee files a refund claim of the amount deposited during investigation except when same has been collected from customer.

- 13.2. In case of the amounts paid during investigation, the burden of such payment is either borne by the assessee or he may pass on the burden to the buyers of goods or receivers of service. Hence the applicability of doctrine of unjust enrichment in case of refunds filed of the amounts deposited during investigation would depend upon the facts of each case.
 - 13.3. In the case of Finacord Chemicals (P) Ltd. (supra), the Hon'ble Apex Court deliberated on the said issue of doctrine of unjust enrichment wherein the purchaser of goods had applied for refund of the amounts deposited by the manufacturer during investigation. The Apex Court has held that the amounts deposited in compliance with the interim orders of Courts, by the purchaser of goods, are not towards duty and hence the question of unjust enrichment would not arise at all.
 - 13.4. Before concluding, it is pertinent to note that Mumbai CESTAT in the case of **Lorenzo Bestonso Vs. Commissioner of Customs (Import), Nhava Sheva [2015 (315) ELT 478 (Tri. – Mumbai)]** has held that in case the amount deposited during investigation is a pre-deposit and where assessee's appeal has been allowed with consequential relief, same must be refunded and there is no need to file refund claim for that purpose. The CESTAT held that simple letter calling for refund would suffice and there is no need to file any refund claim.
- 14 Refund claim when scheme of exemption is by way of refund - Notification no 56/2002 CE dtd 14-11-2002 – Unjust Enrichment not applicable.**
- 14.1. Notification No. 56/2002-C.E., dated 14-11-2002 exempts specified excisable goods when cleared from an Industrial unit located in specified areas in the State of Jammu & Kashmir (J&K) to the extent of duty paid in cash by way of a refund mechanism for a period of 10 years from the date of publication of the notification or from the date

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of commencement of commercial production, whichever is later. The exemption is available to new units which have commenced commercial production on or after 14-6-2002 as well as existing units which have undertaken substantial expansion or have made new investments for employment generation on or after 14-6-2002.

14.2. As per the scheme, for availing the exemption under this notification, a unit is required to determine its duty liability in respect of the clearances made during the month and thereafter first pay the duty to the extent possible through Cenvat credit available and only the balance amount of duty, if any, is required to be paid through PLA, which is refundable. The unit can either apply to the Jurisdictional Central Excise Authorities for the refund of duty paid through PLA in terms of the provisions of this Notification or take self-credit in the PLA, which can be utilised for payment of duty through PLA during the next month.

14.3. The question that crops up is whether any such refund, which is being paid by the Central Excise department to indirectly exempt the duty portion paid in CASH to the specified manufacturers in J & K, would be subject matter of unjust enrichment. In para 3 of Circular 682/73/2002, dated 19-12-2002 [2003 (151) E.L.T. T7], following clarification was issued :

*3. In this context, it may be pointed out that the "Refund" envisaged in the notifications is not on account of any excess payment of excise duty by the manufacturers, but is basically designed to give effect to the exemption. In other words, the mechanism has been adopted to operationalize the exemption envisaged in these two notifications. In view of this aspect of the matter, **the provisions of Section 11B of the Central Excise Act, 1944 would not apply in the case of these notifications.***

14.4. Representations were received by the Ministry, seeking clarification as to whether the clarification given by the TRU in the above mentioned Circular will also be applicable for refund granted to units located in Kutch area availing benefit of Notification No. 39/2001, dated 31-7-2001. Vide CBEC Circular No. 842/19/2006-CX, dated 8-12-2006 it was clarified at para 3 as follows;

3. Therefore, it is clarified that clarification issued vide para-3 of Circular No. 682/73/2002, dated 19-12-2002, will also be applicable for units availing exemption under Notification No. 39/2001-C.E., dated 31-7-2001 (Kutch), 71/2003-C.E. dated 9-9-2003 and

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56/2003-C.E., dated 25-6-2003 (Sikkim), 32/99-C.E. and 33/99-C.E. both dated 8-7-1999 (North East).

- 14.5. It is settled position in law that any beneficial CBEC clarifications are binding on the department & benefit to the industry be granted. Thus even in absence of any specific provision it can be concluded that in case of Area based exemption schemes where Excise duty paid in CASH is refunded, it would not be subject to rigors of Section 11B of CEA, 1944. Thus no question of proving that incidence of such duty paid in cash has not been passed to any other person.
- 15 Claims for rebate of duty on export of goods.**
- 15.1 Section 12C of CEA,1944 provides that every refund under Section 11B(2) of CEA, 1944 would be credited to Consumer Welfare fund. But first proviso to Section 11B(2) provides that refund of duty in specified cases shall be paid to the applicant instead of crediting to Consumer Welfare Fund. One such instance is rebate of duty of excise on excisable goods exported out of India.
- 15.2 It is an international practice that local taxes paid on goods are never paid by the overseas buyers nor the same is charged. Therefore these taxes must be refunded in consonance of noble of policy of the Government "Not to Export Taxes" while exporting the goods. Accordingly any Excise duty paid/payable on Excisable goods which are exported out of India would be eligible for refund to the claimant; the principle of unjust enrichment will not apply in such cases.
- 15.3 One question came up before Revisionary Authority in the case of **Cipla Ltd. 2015 (328) E.L.T. 742 (G.O.I)** while deciding amount of rebate where Excise duty was paid on Export of Goods at tariff Rate and lower effective rate applied to domestic removal.
- (a) The facts of the case was that applicant M/s. Cipla Ltd., a merchant exporter filed rebate claims of duty paid on exported goods under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. The manufacturers had paid duty on exported goods @ 10% but paid 4/5% when it cleared said goods for home consumption. The original authority after following due process of law, held that duty was required to be paid on exported goods at the effective rate of duty @ 4% / 5% in terms of Notification No. 4/2006-C.E., dated 1-3-2006 as amended and sanctioned the rebate claims to the extent of duty payable @ 4%/5%. The

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Commissioner (Appeals) modified the impugned Orders-in-Original and allowed the re-credit in Cenvat credit account of the amount rejected as rebate. Both M/s. Cipla Ltd. as well as department filed revision applications against the same Orders-in-Appeal on the grounds stated above.

- (b) Revisionary Authority (Government) held that the instructions issued by CBEC regarding assessment of export goods are quite relevant to decide the issue involved. The instructions contained in para 4.1 of Part-I of Chapter 8 of CBEC Excise Manual on Supplementary Instructions may be perused. The plain reading of said para, reveals that the export goods shall be assessed to duty in the same manner as the goods cleared for home consumption are assessed. Further the classification and rate of duty should be as stated in schedule of Central Excise Tariff Act, 1985 read with any exemption notification and/or Central Excise Rules, 2002. These CBEC instructions clearly stipulate that applicable effective rate of duty will be as per the exemption notification. The said instruction is issued specifically with respect to sanctioning of rebate claim of duty paid on exported goods and therefore the whole issue will have to be examined in the light of these instructions.
- (c) In this case, Notification No. 2/2008-C.E. as amended provided for General Tariff rate of duty and Notification No. 4/2006-C.E. as amended provided for **effective rate of duty** and they have to be strictly construed as such. Therefore, they have to be read together as stipulated in para 4.1 of Part-I of Chapter 8 of CBEC Excise Manual. Government, therefore, is of the view that duty was payable @ 4% on the export goods also and rebate cannot be granted on the duty paid in excess of effective rate prescribed in the Notification No. 4/2006-C.E., dated 1-3-2006 as amended, as stipulated in the above said CBEC Instructions.
- (d) Court further noted that in view of settled position in law which supports the view that rebate of the duty paid on exported goods at effective rate prescribed in the notification is only be allowed and the excess paid amount as duty from the Cenvat credit is to be refunded in the Cenvat Credit account. Whether re-credit of excess duty could be given to the claimant needs to be verified from records based on unjust enrichment principles.

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15.4 In view of above it can be concluded that effective Excise duty payable on goods exported are only eligible as rebate which is not subjected to doctrine of unjust enrichment. However any excess amount of duty which was not payable on export of goods will be subjected to unjust enrichment & the person who has actually borne the incidence will get re-credit in its Cenvat credit Account.

16 Duty paid under protest

16.1 Many-a-times it so happens that there are issues in respect of classification or valuation of particular goods or services or interpretational issues of an exemption, etc. because of which the assessee is unsure about the taxability and indirect tax officers be it Customs, Excise or Service Tax insist on payment of duty or tax, in such scenarios of disagreement between the assessee and the department on a particular issue the assessee can pay the duty or tax under protest to safeguard itself from interest burden and penalty provisions.

16.2 Currently, there are no provisions governing the payments of duty or tax under protest but the refund of payment under protest is governed by Section 11B of the CEA, 1944 and Section 27 of the CA, 1962, as the case may be, of payment under protest of Excise Duty, Service Tax or Customs Duty.

16.3 In respect of refund claim for payments under protest, various Courts have ruled that the doctrine of unjust enrichment would be applicable to such payments and it is pertinent to discuss on one particular case of **Commissioner of C.Ex., Mumbai – II Vs. Allied Photographics India Ltd. (supra)**, wherein it was held that doctrine of unjust enrichment would be applicable to refunds of duty paid under protest.

16.4 There were inconsistencies between two decisions of three-Judge Benches of Supreme Court in the case of **Sinkhai Synthetics and Chemicals Pvt. Ltd. v. Collector of Central Excise [2002 (143) E.L.T. 17]** and **Collector of Central Excise, Chennai v. T.V.S. Suzuki Ltd. [2003 (156) E.L.T. 161]** on one hand and the decision of nine-Judge Constitution Bench in **Mafatlal Industries Ltd. v. Union of India (supra)** on the other, and hence the matter was referred to the Apex court in case of **Allied Photographics** to determine whether a claim for refund after final assessment is governed by Section 11B of the CEA, 1944.

16.5 The point of determination before the Apex Court, in the case of

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Allied Photographics India Ltd., was as to whether the doctrine of unjust enrichment in Section 11B of the Act is applicable to the facts of this case, wherein the manufacturer had paid the differential disputed excise duty under protest and when the assessment was finalized in favour of manufacturer.

16.6 The facts of the case are as under:

- (a) One of the manufacturer had entered into an agreement with a distributor for supply of goods by distributor and the manufacturer had paid excise duty on the price at which the goods were to be supplied to the distributor and the department issued a show cause notice as to why the excise duty should not be paid on the charges which are charged by the distributor to its dealer, as both the parties are related.
- (b) The manufacturer paid the duty under protest and after a particular point of time based on a High Court ruling in another case, the manufacturer filed for a refund claim which was rejected except for a 2-month refund against the refund claim of around 10 years.
- (c) The manufacturer filed a Writ Petition for the whole refund and the Court (Single Judge) held that the action of the department in collecting duty was illegal and therefore the manufacturer was entitled for a refund. However, since the question of unjust enrichment was debatable the Judge referred the question to the Full Bench.
- (d) When the Writ Petition came for hearing, the manufacturer conceded that it had passed on the burden to its sole-selling distributor and hence it was ruled that since the burden was passed on to the distributor the refund claim was rejected. However, it was clarified that the said Order will not prevent the distributor from adopting appropriate remedy as open to it in Law.
- (e) Thereafter the distributor moved the refund claim and a refund was granted to the distributor by the Assistant Commissioner, and the said Order of Assistant Commissioner was confirmed by the Commissioner (Appeals) and Tribunal.
- (f) Being aggrieved, the Department filed a civil appeal against the Order of the Tribunal. The point of issue in the civil appeal was –

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- (i) Whether refund of duty paid under provisional assessment is similar to duty paid under protest as both are "on account" payments adjustable on finalization of assessment or vacating the protest.
- (ii) In the course of such adjustment or vacation of protest, if any amount is found payable by the department to the manufacturer, is it open for the distributor / purchaser to contend that it has stepped in the shoes of manufacturer seeking refund of "on account" payment and therefore he was not bound to comply with section 11B of the Central Excise Act, 1944.

16.7 The Apex Court held as under:

- (a) It is important to note that there is a difference between making of refund and claiming of refund. Refund of duty paid under protest after final assessments attracts bar of unjust enrichment whereas bar of unjust enrichment not applicable to refund consequent upon finalization of provisional assessment under Rule 9B. There is a distinction between duty paid under protest and duty paid provisionally under Rule 9B. In Mafatlal's case it has been held that in cases where duty is paid provisionally under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B (claim for refund of duty). It has been further clarified in the case of Mafatlal that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issue, then such claim would attract Section 11B. Hence, the Apex Court stated that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under Rule 9B.
- (b) Further, it had to be noted that payment under protest was by the manufacturer, and effect on refund claim was by buyer / distributor, manufacturer paid excise duty under protest pending final assessment which was ultimately decided in favour of manufacturer. It was held that basis on which a manufacturer claims refund is different from basis on which a buyer / distributor claims refund, it is not open to buyer / distributor to include refund amount in cost of purchase on the date when it buys the goods, as right to refund accrues to him at a date after completion of purchase depending upon his

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success in assessment and also accounts of manufacturer are different from that of a buyer / distributor, consequently distributor is not entitled to claim refund of "on account" payment made under protest by manufacturer without complying with Section 11B.

- (c) Furthermore, the Apex Court in respect of doctrine of unjust enrichment for refund claim by distributor stated that incidence of duty passed on by manufacturer to distributor whether in turn it was passed on by distributor to its dealers. The Court stated that uniformity in price before and after assessment does not lead to inevitable conclusion that incidence of duty has not been passed on to buyer as such uniformity may be due to various factors and it further stated that the costing of goods in hands of distributor, cost element and treatment given to purchases by buyer in his own account were relevant circumstances which authorities below failed to examine and hence the distributor has failed to prove that the incidence of duty was not passed on to its buyers and hence has failed to make a case for refund and if refund is granted then they would be unjustly enriched.

17 Refund claims when excess duty recovered is refunded to customers.

- 17.1 At times, manufacturer collects duty on value of goods at the time of removal but the value subsequently gets altered on account of discount or other factors. In such scenario, manufacturer issues credit note to its buyers to correct the invoice value alongwith duty paid & in turn the buyers would issue a corresponding debit notes to square up its accounts. This would result into amount payable to the buyers & result into bearing the incidence of reduced sale price alongwith excess duty so paid earlier. In such scenario, the manufacturer files refund claim for excess duty paid.. The issue would then arise whether principles of unjust enrichment apply on refund of such excess duty paid.
- 17.2 The Hon'ble Supreme Court in the case of **Sunrays Engineers Pvt. Ltd. Vs C C. Ex., Jaipur 2015 (318) E.L.T. 583 (S.C.)** held that on reduction of rate of duty with retrospective effect when the manufacturer credited excess amount to the buyers of goods, the burden of excess duty was not passed on to the customers. There was no unjust enrichment in allowing assessee the refund of excess amount.

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- 17.3 Under one situation where higher excise duty was charged by the manufacturer to its customers, the customers raised Debit notes on such Manufacturer instead of paying excess duty & simultaneously manufacturer accepted its mistake by raising corresponding Credit notes on the customers. Thus only net amount alongwith duty is paid to the manufacturer. But the manufacturer has paid duty at higher rate to the department. He therefore filed refund of excess duty paid from the department.
- (a) Hon'ble Rajasthan High Court in the case of UOI v/s A.K. Spintex Ltd (supra) was seized with the issue. The application of refund was rejected on the ground that duty liability was passed on to the customers and subsequent credit notes issued to the customers does not make bar of unjust enrichment inapplicable. The assessee before the Tribunal, relied upon Larger Bench judgment of the Tribunal, in **S. Kumar's Ltd. v. CCE, Indore - 2003 (153) E.L.T. 217**, wherein it was noticed, that since there is no dispute on the fact, that this amount of duty has not been collected by the appellants, it is not hit by the principle of unjust enrichment. The Tribunal found, that there is substantial force in submission of the learned counsel for the assessee, incidence of duty has not been passed on by them to their customers, who had immediately objected to charging of higher duty and once the customers protested, the assessee immediately issued credit notes, which have not been disputed by the revenue, it cannot be claimed that incidence of duty of which refund is now being sought, by the appellant, has been passed on to the customers.
 - (b) It was held, that question of passing the incidence of duty, to the customers, which has not been paid by them does not arise, thus, the appeal was allowed. The department was before High Court where the assessee claimed that issuance of debit note and credit note is as good as cash passing, with the result, that burden of excise duty was immediately reversed back, and came to be suffered by the assessee only, as a result of which no interference is required to be made in the order of the learned Tribunal.
 - (c) Hon'ble High court held that it is clear that once the goods are supplied, the property in the goods passes to the purchaser, and seller becomes entitled to the price, and once

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the debit note is issued by the purchaser, and corresponding credit note is issued by the seller, the price of the goods stand reduced to the extent of debit note and credit note, meaning thereby, that after issuance of debit note and credit note, the price of goods charged by the seller, from the purchaser, is the price, initially billed, minus the amount of the debit note, and credit note. Therefore, when the debit notes and credit notes are issued and effected, which are not disputed, it cannot be assumed, that incidence of burden of excise duty has been passed on to the purchaser.

- (d) So far as Section 12B is concerned, it only places burden of proof on the assessee, by enacting the presumption, against him, and does not do anything beyond it. The burden placed on the assessee, by Sec. 12B, obviously, is a rebuttable one, and the assessee may lead evidence in rebuttal, by proving issuance of debit note and credit note. Likewise there may be cases, where purchaser may refund the amount to seller, in cash, or may issue some bank note for refund of the amount, or there may be case, where goods are sold on credit, and while making payment of price of the goods the purchaser may debit the amount, and thus, pay lesser amount to the seller., If all those facts are shown and proved, the burden placed on the assessee, by Sec. 12B, would shift on the revenue, then, it is required for revenue, to prove, either that the theory projected by the assessee is fake and false or that the burden has actually been passed on.
- (e) Once the assessee leads reliable evidence, about his having not passed burden on the purchaser, and revenue fails to rebut that evidence, the presumption enacted by Sec. 12B, stands sufficiently rebutted, and cannot survive *ad infinitum*. Thus, Hon'ble High court held it cannot be said, that Tribunal was in error, in allowing the claim of the refund

17.4 In another situation it often happens that the value at which Excise duty is paid at the time of removal of final goods is "provisional" viz not final i.e. subject to change like eligibility of quantity discounts, cash discounts etc. The customers at the time of removal are aware of the quantum of the discounts eligible but the same is passed on to them only after reaching the target. Certain decisions on this issue are as follows;

- (a) Department's appeal before Apex Court was dismissed as

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reported in *CCex V/s Triveni Glass Ltd -2015 (320) ELT A338 (S.C)* on the basis that Apex Court did not find any reason to interfere with the order of Tribunal reported at **2003 (162) ELT 529(Tri-Del)** which held in its impugned order that as the sale price at the time of original removal of goods from the factory was provisional and it was subsequently settled by issue of credit notes on monthly basis, the discounted price, net of the credit note was to be treated as assessable value. It was also held that such credit notes having indicated revised prices as well as Cenvat amounts, there was no question of passing higher amount of Excise duty to the buyers. Hence the assessee was eligible to refund of duty paid on excess amount at the time of original removal of goods.

(b) **Hon'ble Karnataka High Court in the case reported at *Sudhir Papers Ltd V/s CCEX 2012 (276) ELT 304 (Kar)*** held that the law on the point is well settled. As is clear from Section 11-B of the Act when a claim for refund is made within the stipulated period, if the appropriate authority on consideration of such claim comes to the conclusion that the applicant has paid excess duty, after holding so, he should pass an order directing crediting of the said excise duty to the welfare fund.

- (i) *It is only if the assessee claims refund on the ground that he has not passed on the burden of duty to his customer by a specific plea and substantiating the same by producing acceptable evidence, then the appropriate authority shall direct payment of the refund amount to the assessee. The question whether the burden of duty has been passed onto the customer or not is purely a question of fact. The burden of proving the said fact is exclusively on assessee. It is only on discharge of the said burden the assessee would be entitled to the refund of the said amount.*
- (ii) *The finding of the CESTAT that the events subsequent to the clearance of the goods, raising of the invoice are relevant in deciding the question of refund of duty is not warranted from any of the statutory provisions. On the contrary, the basis for claim for refund is excess duty is to be paid at the time of clearance. As indicated in the invoice, it is only a subsequent event which makes that*

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demand illegal, not warranted, not authorized and gives the assessee a right to seek for refund. In that context, if credit notes are raised and benefit is passed on to the customer, thus not passing on the burden of excise duty the assessee is entitled to refund of the same.

(iii) *Though the adjudicating authority or the appellate authority denied relief relying on the Judgment of the CESTAT in Addison's case, when that Judgment has been set aside by the Madras High Court - 2001 (129) ELT 44 (Mad), the Tribunal was in total error in following the CESTAT's Judgment and dismissing the appeal of the assessee. Merely because the matter is now pending before the Apex Court in Addison's case - 2003 (152) ELT A94 (SC), that is not a reason to disregard the Judgment of the High Court. The High Court has set aside the Judgment rendered by the CESTAT in Addison's case as the said Judgment is not operating and therefore the Tribunal was wrong in ignoring the Judgment of the Madras High Court in Addison's case. The assessee was entitled to refund of excess duty paid.*

(c) In one case Assessee was a manufacturer of cutting tools and had sold the goods to its dealers, that the price at which goods were sold was a cum duty price; that it was known to the dealer that the turnover discount would be allowed even at the time of sale, that such discounting was in fact given after the sale based on the turnover achieved by the dealer. Its claim for refund of duty paid was on the ground that it had given credit notes to its dealers who were the purchasers of those goods. The Tribunal declined to grant refund on the sole ground that it had not been established by the assessee that the burden of the duty paid by it initially had not been passed on to the consumer. The assessee was before Hon'ble Madras High Court in the case Addison & Co V/s CCex 2001 (129) ELT 44 (Mad.)

(i) *Hon'ble High Court held that it is significant that neither Section 11B nor Section 12B of the CEA refers to the consumer or the ultimate user or the last purchaser. The condition which the claimant for refund must fulfil among other conditions is that he must not have*

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passed on incidence of the duty to "any other person". The claim made by the manufacturer here is required to be considered under that provision. That provision has, of course, to be read along with the presumption provided in Section 12B. If the manufacturer can be said to have rebutted the presumption under Section 12B and has fulfilled the condition set out in clause (d) of proviso to Section 11B(2) manufacturer would be entitled to refund. Such refund cannot be denied on the ground that there was no evidence to show as to who the ultimate consumer of the product was and as to whether the ultimate consumer had been asked to bear the burden of the duty which had been initially paid by the manufacturer.

- (ii) *Section 11B is intended to prevent a person who has paid duty or borne it initially from receiving the refund of a part or whole of the duty if he has already passed on that burden of the duty paid by him to another as that would result in unjust enrichment. The enrichment of the person, who has paid the duty and seeks refund would be unjust if he even while not suffering the burden of duty after having passed on the same to another; obtains refund and retains such refund with him. There would be nothing unjust where the person who has paid duty and has not passed on that burden to another receives refund thereby reducing the burden which he was not required to bear but had borne.*

17.5 There could be another scenario where excess duty after recovering is paid back to the customers by issuing credits notes later. Certain decisions on this issue are as follows;

- (a) **Hon'ble Karnataka High Court's decision in the case of CCE v. Om Pharmaceutical Ltd., 2011 (268) E.L.T. 79 (Kar),** wherein it was held that even in case duty was collected but was repaid, the same is sufficient to hold that the incidence of duty was not passed on, though initially it was passed on but thereafter returned the same to the customer.
- (b) **Hon'ble High Court of Karnataka in the case of Sudhir papers Ltd. v. CCE, Bangalore-I, 2012 (276) E.L.T. 304 (Kar.),** has held that".....if the credit notes are raised and the benefit is passed on to the customer, thus not passing on the

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burden of Excise duty ; the assessee is entitled to the refund of the same."

- (c) This decision has been relied upon by the **Hon'ble Karnataka High Court in the case of CCE, Belgaum v. Jineshwar Malleable & Alloys** 2012 (281) E.L.T. 43 (Kar.), and it has been held that there was no unjust enrichment and the assessee was entitled to the refund of Excise duty since for the excess duty debit notes were issued by the consignee and the amount was credited to their accounts.
 - (d) A similar issue whether duty paid at the time of clearance of goods and collected from customers can be refunded if post clearance transaction is made through credit notes has been allowed by the Hon'ble Tribunal in the case of **CCE, Chandigarh v. Vardhman Industries Ltd.** 2006 (205) E.L.T. 241 (Tri.-Del.), which has been affirmed by the Hon'ble Supreme Court, as reported in 2011 (267) E.L.T. A25 (S.C.).
- 17.6 To conclude refund of excess duty paid & recovered but later refunded back to the customers will not be subjected to principles of unjust enrichment in view of above legal position.
- 18 Refund claims when duty not charged separately.**
- 18.1 At para 17 above the duty was charged/recovered in the invoice to the customers & later when it was held that duty was not payable or short payable, the amount was credited/ refunded back to customers before seeking refund. In cases where Excise invoices & commercial invoices are issued to the customers without showing the element of duty/tax separately i.e. cum duty basis this becomes difficult. One has to look at surrounding evidences like purchase orders, correspondences with the customers to know whether in the first place any duty/tax was payable at all and passed on to the customers ultimately.
- 18.2 If these evidences do not show anything about taxes & the assessee is not paying any taxes, then any duty/taxes paid later would be considered as paid under protest and will not be subject to doctrine of unjust enrichment. Obviously these amounts would not be recoverable/recovered from customers, thus booked in the accounts of the assessee as recoverable from department or expensed out.
- 18.3 Where these evidences show that lower duty/taxes were payable but the assessee on the directions of department had paid at higher rate

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would be considered as paid under protest. Thus the differential duty would remain in dispute & would be shown in books of the assessee as recoverable from department or expensed out. As & when the decision is in favour of assessee, he would be entitled to refund without being subjected to doctrine of unjust enrichment. These amounts would not be recoverable/recovered from customers. The crux is that the incidence of excess tax is borne by the assessee not the customer.

- 18.4 But when these evidences simply show the terms as " inclusive of all taxes/duties", the assessee is not paying any duty/taxes or paying it under protest disputing it either fully or partially. It was held that duty/tax was not refundable. **Hon'ble Gujarat High Court in the case of C C. EX. & S.T. Vs Modest Infrastructure Ltd. 2013 (31) S.T.R. 650 (Guj.)** wherein the assessee had wrongly paid service tax on Business Auxiliary Services while manufacturing goods under a contract which was inclusive of all taxes. Though the excess service tax paid by the respondent was shown separately in the invoice but was not actually collected from their customers. By raising the subsequent credit notes, it is only the entries in the books of accounts which were sought to be rectified. Further the CA certificate and the certificate of the buyer also showed that the amount of service tax was not received by the assessee from their customers. It was held when customers themselves issued certificate that the amount of service tax was not paid to the assessee then there was no question of unjust enrichment. Commissioner (Appeals) as well as the Tribunal were correct in taking the view that the refund was liable to be paid to the assessee as service tax was not passed on to the buyers/customers and there was no unjust enrichment. The amount was refundable. **Hon'ble CESTAT in the case CCEX v/s J.R. Transformers Pvt Ltd 2014 (36) STR 1167 (Tri-del)** relying above judgment held that where total consideration between parties was inclusive of taxes and **no separate Service Tax collected** from recipient there could be no inference of passing on burden of Service Tax to recipient. Therefore, no question of unjust enrichment would arise, the assessee was entitled to refund.
- 18.5 **In contrast to above** an assessee was provider of educational services which was exempted from payment of service tax, inadvertently paid service tax & then claimed refund thereof. The lower authorities took a view that incidence of tax has been passed

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on, merely for the reason that in the agreement, the 'fee' was stipulated as "inclusive of tax". Section 12A makes it mandatory to prominently indicate in the documents/invoices the amounts of such duty which will form part of the price. When the invoice states that the value is inclusive of service tax, the contention of the appellant that the incidence of tax has not been passed on to other is untenable. **Hon'ble CESTAT in the case of Mind Edutainment Pvt. Ltd. Vs Commissioner of S.T., New Delhi 2016 (41) S.T.R. 961 (Tri. - Del.)** held that it is apparent from the agreement which stipulates the value inclusive of taxes & from the invoice that it is **cum-tax invoice** and therefore the incidence of tax is passed on to the school/customer. Undeniably the presumption under Section 12B is raised that the incidence of tax is passed on to the customer. In such circumstances the appellant has to establish by evidence that the service tax passed on was returned to the customer. In the absence of such evidence the presumption stands un-rebutted. Refund was denied.

- 18.6 The bone of contention is when the duty/tax was not payable at all how one can assume it to be included in the cum-duty invoice raised on the customer. If no tax/duty was included in such cum duty invoice, how it can be said that the same was recovered from customers. More so even if it is held that excess duty/tax was recovered from customers though it was not payable, such unpaid duty/tax no longer remains in the nature of tax/duty but becomes part of value recovered from the customer. If such excess recovery of tax/duty was not in the character of tax which was recovered from customers, doctrine of unjust enrichment would not apply in such a case. Let us try to explore this point in following paras.
- 18.7 Wherever the invoices are raised without charging duty separately then popularly it is known as cum duty invoice - relevant extracts from Excise & Service provisions are extracted as follows viz;
- (a) **Section 4(1) of CEA, Explanation provides-** *For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, **actually paid**, shall be deemed to include the **duty payable on such goods***

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- (b) *Section 67(2) of the Chapter V in the Finance Act (Service Tax) 1994 as amended provides - Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.*
- 18.8 This would mean, wherever the cum-duty prices are charged in invoices, then in arriving at the assessable value, the element of **duty/tax which is payable** has to be excluded. The word "payable" means to be paid or liable to be paid as per ordinary dictionary meaning. Liable to be paid means liability in accordance with the law. Therefore, what is permissible to be abated in respect of tax, is the tax actually paid or actually payable in accordance with the law at the time of removal of the goods. Various courts have consistently held that the term 'duty payable' means the duty actually paid; one such was **Pravara Pulp and Paper Mills [1997 (96) E.L.T. 497 (S.C.)]**
- 18.9 The amount of money collected as tax by the assessee from his buyer, is a cost to the purchaser and the purpose and intention of Section 4 is to levy Central Excise duty on the entire cost to the purchaser. However, if the amount collected as tax is actually paid up as tax, only then is it excludible from the transaction value. Any amount collected as tax but not so paid up does not remain TAX, but forms part of the profit of the assessee and forms part of the assessable value as observed by Hon'ble Supreme Court in para 14, 22 and 23 of **CCE v. Super Syncotex (I) Ltd. 2014 (301) E.L.T. 273 (S.C.)**.
- 18.10 In view of above wherever tax/duty was not payable but was indeed paid by the assessee under protest & it is held that the same was not payable by the department/authorities, this excess tax becomes refundable in the hands of assessee even though the tax/duty was not separately charged in the invoices. What was recovered from customers was not TAX/duty but only value of goods/services. Doctrine of unjust enrichment would not apply in such cases.
- 19 **Refund arising consequent to finalisation of provisional assessment.**
- 19.1 Though para 16.7.1 above mentions the ruling given in the **C C. EX. Vs Allied Photographics India Ltd (supra)** at the cost of repetition for better understanding - we wish to rely on following extracts which is

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most relevant in the present para which deals with difference between making refund & claiming refund under the law. Relevant para 8 is as follows

(a) *8. Before analysing Section 11B, it is important to note that there is a difference between making of refund and claiming of refund. Under sub-clause (e) to Explanation B to Section 11B(1), where assessment was made provisionally Entitlement to refund would thus be known only **when duty was finally adjusted.** Rule 9B(1)(a) to (c) indicated the circumstances in which the proper officer would allow provisional assessment. Rule 9B(4) dealt with clearance of goods provisionally assessed whereas Rule 9B(5) dealt with adjustment of provisionally assessed duty against finally assessed duty. **The said Rule 9B was a complete code by itself.** On compliance with the conditions therein, the proper officer was duty bound **to refund the duty without requiring the assessee to make a separate refund application.** The said rule, therefore, provided for making of refund. On the other hand, Section 11B(1) dealt with **claiming of refund by the person** who has paid duty on his own accord. In this connection, Section 4 of the said Act is relevant. In the case of *Bombay Tyre(supra)* it has been held that Section 3 of the Act refers to levy of duty whereas Section 4 dealt with assessment. Assessment means determination of the tax liability. Under the Act, duty was payable by the manufacturer on his own account. Hence, under Section 11B(1), such a person had to claim refund by **making an application within six months** from the relevant date except in cases where duty was paid under protest in terms of the proviso. However, even in such cases, the person claiming refund had to pay the duty under protest in terms of prescribed rules. A bare reading of Section 11B(1), therefore, shows that it refers to claim for refund as against making of refund by the proper officer under Rule 9B.*

.....

(b) *10. In the light of what is stated above, we now quote here in below Para 104 of the judgment of this Court in the case of *Mafatlal Industries Ltd.* 1997 (89) E.L.T. 247 (S.C.) :-*

"104. Rule 9B provides for provisional assessment in situations specified in clauses (a), (b) and (c) of sub-rule (1).

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.....". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B **will not be governed by Section 11A or Section 11B, as the case may be.** However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) re agitating the issues already decided under Rule 9B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."

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

19.2 Section 11B of CEA, 1944 deals with claiming of Refund of duty/tax to which doctrine of unjust enrichment applies & erstwhile Rule 9B of Central Excise Rules, 1944 dealt with making of refund claim by the officer to which Section 11B did not apply. Even today Section 11B does not apply to refund arising consequent to provisional assessment. Separate Erstwhile Rule 9B of CER, 1944 provided for making refund but did not provide for proving that refund arising thereunder was subject to non passing of the incidence of excess duty/tax paid to any other person.

19.3 It seems the department took cue from above judgment & provided for the same under Rule 7 (6) of Central Excise Rules, 2002 w.e.f 1-3-2002 reads as follows;

(6) *Any amount of refund determined under sub-rule (3) shall be credited to the Fund:*

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

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

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

- 19.4 Similar provision is available under CA, 1962 under Section 18(5) inserted w.e.f.13-7-2006 vide section 21 of The Taxation Laws (Amendment) Act, 2006. Thus refund arising consequent to provisional assessment upon its finalisation will have to satisfy the doctrine of unjust enrichment from respective dates.
- 19.5 But surprisingly no provision is available under Service tax till date for claimant to satisfy that he has not passed on the incidence to any other person. Thus under service tax any refund arising consequent to finalisation of provisional assessment will not have to satisfy the doctrine of unjust enrichment. Analogy of Allied Photographics India Ltd. (supra) will continue to apply to such cases even today.
- 19.6 Keeping the salutary principles of unjust enrichment in mind any person who has recovered the tax/duty from its customer should not be allowed refund of any excess duty/tax so paid irrespective of the fact the assessment was provisional. The person who has borne the incidence of excess duty/tax must get the refund else must be rightly credited to consumer welfare fund as per law.
- 20 Claim of refund under Rule 5 of Cenvat Credit Rules, 2004.**
- 20.1 Rule 5 of CCR, 2004 provides for refund of Cenvat credit to a manufacturer who clears a final product or an intermediate product for export without payment of duty or a service provider who provides an output service which is exported without payment of service tax subject to the procedure, safeguards, conditions and limitation as notified.
- 20.2 Clause (c) of sub-Section (2) of Section 11B of CEA, 1944 specifically provides that, the refund is not to be credited to consumer welfare fund in case of refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made or any notification issued under CEA, 1944. Section 11B is also made applicable to FA, 1994 vide section 83 of FA, 1994.
- 20.3 The above said clause (c) unlike clause (d) and (e) of sub-Section (2) of Section 11B of CEA, 1944 is not qualified by the expression *"he had not passed on the incidence of such duty and interest"*. Thus the combined reading of above cited provisions makes it explicit that, for refund of Cenvat credit under rule 5 of CCR, 2004, the doctrine of unjust enrichment is not applicable.

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- 20.4 The Hon'ble Bombay High Court in **Indo-Nippon Chemical Co. Ltd. Vs. UOI 2005 (185) ELT 19 (Guj.)** in paragraph 36 of its decision, *inter alia* held that, it is undisputed position that credit was taken on inputs used in manufacture of goods for export and therefore there was no question of passing on the burden of excise duty to the transferee i.e. foreign buyer. The SLP filed by UOI against the said decision has been dismissed by the Supreme Court in **Asst. Commissioner vs. Indo Nippon Chemicals Co. Ltd. 2005 (186) ELT A117 (SC)**
- 20.5 Relying on above cited decision in case of **Indo Nippon Chemicals Co. Ltd (supra)**, the Tribunal in **Sai Creation vs. CCE, Mumbai-III 2013 (294) ELT 637 (Tri.-Mumbai)** held that, the provisions of unjust enrichment does not apply if the refund pertains to credit of duty on excisable goods used as inputs in the manufacture of goods which are exported. In the instant case there is no dispute on this point. Therefore, the lower appellate authority is completely wrong when they say the provisions of unjust enrichment are attracted. Reliance placed on *Mafatlal Industries* case by the lower appellate authority is also incorrect inasmuch as the said decision pertains to a situation where the provisions of unjust enrichment would apply. When Section 11B of CEA, 1944 providing for grant of refund of excise duty specifically provides that, in certain specified situations, the provisions of unjust enrichment shall not apply, the law has to be interpreted and enforced accordingly.
- 20.6 On similar lines, the Tribunal once again in **Vodafone Cellular Ltd. vs. CCE, Pune-III 2014 (34) STR 890 (Tri-Mumbai)** reiterated the legal proposition that, the transaction is one of export, the principles of unjust enrichment would not be applicable to export transactions as specifically provided in Section 11B of CEA, 1994 while granting refund of Cenvat credit.
- 20.7 Thus, in view of above legal position it can be safely concluded that, the doctrine of unjust enrichment is not applicable to claim of refund of Cenvat credit under rule 5 of CCR, 2004.
- 21 Claim for refund of service tax paid on post removal activities.**
- 21.1 Section 93(1) of the FA, 1994 empowers Central Government to issue notification in the Official Gazette for exempting generally or subject to such conditions as may be specified in the notification, taxable service of any specified description from the whole or any part of the service tax leviable thereon.

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- 21.2 In exercise of the powers conferred by sub-section (1) of section 93 of the Act, Notification No.41/2012-ST dtd29-06-2012 w.e.f01-07-2012 provides for rebate of specified services received by an exporter of goods (hereinafter referred to as the exporter) and used for export of goods (hereinafter referred to as said goods), subject to the specified conditions -
- (a) the rebate shall be granted by way of refund of service tax paid on the specified services used for export of the said goods;
 - (b) the rebate shall be claimed either on the basis of rates specified in the Schedule of rates annexed to this notification(hereinafter referred to as the Schedule),
- 21.3 Similar exemption by way of refund of service tax paid on services used by exporters in export of goods were given in past starting from Notification no 40/2007-ST Dated 17/9/2007 then 41/2007-ST dtd 6-10-2007 , 17/2009 ST dtd 7-7-2009 and 51/2011-ST dtd. 30-12-2011 which were superseded by present Notification No. 41/2012 ST dtd29-06-2012 in vogue.
- 21.4 Section 83 of the FA, 1994, makes section 11B of CEA, 1944 applicable even to service tax matters. Section 11B(2)(c) provides refund be sanctioned to claimant instead of crediting it to consumer welfare fund - if refund of credit of duty paid on inputs under any notifications issued to this effects. The relevant extract thereof is given here below:
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;*
- 21.5 Since above said notifications are issued to refund the Service tax paid by the exporters on specified services used for export of goods by way of exemption, the bar of unjust enrichment will not apply.
- 21.6 More so as explained at para 14 above where scheme of exemption was provided by way of refund route under Central Excise was clarified by CBEC as would not come within the purview of Section 11B. As in the present situation service tax exemption is provided by way refund to exporters on post removal activities, applying the same law here, it can be said that refunds under above said service tax notifications would not come under the purview of Section 11B- doctrine of unjust enrichment will not apply.

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22 Refund claims by service receiver

- 22.1 In a few select cases, specified by the Government, liability to discharge the service tax is shifted on to the recipient of service instead of the general status quo, due to many reasons such as facilitating easy collection of tax, avoidance of revenue drain, etc. Section 68(2) of Finance Act, 1994, paves path for such a mechanism to be enforced, in consonance with Notifications as issued by the Central Government in this respect. The service receiver shall be liable to deposit tax to the credit of the Revenue in case the receiver is covered by the Notification No. 30/2012-ST, dated 20th June, 2012, as amended from time to time.
- 22.2 There may be instances wherein the service tax has been paid erroneously even though there was no levy or if the services are exempted but the service tax has been paid thereon or the levy has been challenged in the Court of Law and subsequently the ruling is in assessee's favour, in such cases the refund claim can be filed for such service tax. The refunds of such service tax is governed by Section 83 of the Finance Act, 1994 read with Section 11B of the Central Excise Act, 1944,
- 22.3 The liability to pay service tax is either on the service provider or service receiver or in some cases, effective from 1st March, 2015; it is on any person liable to pay service tax other than the service provider. Hence, the claim for refund can be made by service receiver in inter-alia the following cases –
- (a) When service tax is paid by the service receiver itself under reverse charge, or
 - (b) When service provider has charged service tax to the service receiver and paid it to the credit of Central Government.
- 22.4 The refund would be granted to the service receiver if it can prove that the burden of tax has been borne by him and not passed on i.e. the onus to prove that the incidence is not actually passed on to any other person lies on the claimant.
- 22.5 Few cases are taken up which deals with unjust enrichment in various aspects of refund claims by service receivers:
- (a) Refund of service tax paid by service receiver under reverse charge:
In the case of **Shankar D. Modani Vs. Commissioner of Central Excise, Pune-III** [2016 (41) STR 98 (Tri. –

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Mumbai], the facts were that the service provider had collected the tax wrongly and deposited the same with the Government and service receiver filed a refund application for the same. However, the refund was rejected on the ground that refund cannot be claimed by the service receiver and the same can be filed only by the service provider, who are the assessee and deposited the tax with the Revenue and that only the service provider would have a right to contest the taxability of a service provided by them and not the claimant, who is the service receiver. However, based on the fact that the service receiver has paid the Service Tax which was not liable to be collected from him, and the same is admittedly deposited with the Revenue, hence held that the service receiver is entitled to refund of the Service Tax wrongly collected from him.

- (b) Refund of amounts paid erroneously representing as service tax, which was not in force:

In the case of **Hexacom (I) Ltd. Vs. Commissioner of Central Excise, Jaipur [2006 (3) STR 131 (Tri. – Del.)]**, the facts were that Department of Telecommunications (DOT) collected lease charges alongwith service tax from Hexacom and subsequently when there was revision in lease charges, the DOT returned the excess amount of lease charges charged to Hexacom but did not return the service tax as the same was deposited with the Service Tax Authorities. The service receiver i.e. Hexacom filed a refund application and it was held that whatever payment was made did not relate to service tax at all, it was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of service tax, including those relating to unjust enrichment, cannot have any application on such refund claim of the service receiver.

- (c) Refund of service tax paid, under reverse charge by service receiver, for services received and used in export of services:

In the case of **Commissioner of S.T., Ahmedabad Vs. S. Mohanlal Services [2010 (18) STR 173 (Tri. – Ahmd.)]**, the facts were that S.Mohanlal Services were into export of services and had received services on which they paid service tax, at later date, as service receiver under reverse charge. The said service tax paid was claimed as expenditure and

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they filed refund claim of the said service tax but the same was rejected, but the Commissioner (Appeals) allowed the Appeal and hence the department went in appeal before the Tribunal. The Tribunal agreed with the findings of the Commissioner (Appeals) and allowed the refund on the following grounds:

- (i) The copies of the invoices raised by the respondent, respective bank's remittance certificates, copies of communication from their overseas clients, their working of service tax liability and a certificate from CA lead to an inference that the respondent have not charged any service tax from their clients and the same had been borne by them.
- (ii) The respondent had calculated their Service tax liability on the gross amount received, which is also evident that they did not charged any Service tax and total receipt was not considered as cum tax receipts.
- (iii) The copies of the balance sheet and profit and loss account of the respondent for the year 2005-06 and 2006-07 furnished by them and showing service tax paid by them as an expense also indicated that the amount of service tax paid by them was borne by themselves and no incidence thereof was passed on to any other person by them.
- (iv) The adjudicating authority's reliance on the judgment in the case of Mafatlal Industries (supra) was misplaced in as much as it relates to sale of goods wherein cost of inputs are necessarily incurred whereas in the present case it is provision of services, especially as commission agents, wherein mental inputs are incurred which cannot be compared in monetary terms.
- (v) Further, the Hon'ble Tribunal relied on the provisions of Section 11B of the CEA, 1944 which provides that where the amount is related to rebate of duty of excise on excisable goods exported out of India, the amount shall be paid to the claimant. This means that provisions relating to unjust enrichment are not applicable in respect of export of service.

Thus, based on the aforesaid facts and various documentary

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proofs which were clearly evidencing that the incidence of tax was not passed on and was borne by the appellants and hence the refund was granted.

- (d) Refund of service tax paid, under reverse charge by service receiver, under protest:

In the case of **Commissioner of C.Ex., Pune-II Vs. B.G. Chitale [2007 (7) STR 583 (Tri. – Mumbai)]**, the facts were that the assessee had received Goods Transport Agency services and paid service tax under reverse charge “under protest” as their contention was that they are not liable to pay the amount of service tax as a recipient of goods transport operators on the ground that they are small scale industries as per Notification No. 43/97-ST dt. 5-11-1997. The said contention was also accepted by the Authorities but the refund claim filed by the assessee was rejected on the grounds of unjust enrichment since the service tax so paid was expensed out. However, the refund was allowed on the ground that merely because the amount is expensed out the refund cannot be rejected and also based on the additional fact that a CA has certified that the assessee has borne the tax incidence.

- 22.6 To conclude, it is pertinent to note that there are innumerable judgments in respect of refund claims and doctrine of unjust enrichment and the test of doctrine is done purely on the basis of the facts of each case as to whether the incidence of tax has been passed on or borne by the claimant.

23 Concept of Anti Profiteering under GST

- 23.1 The Transition Provisions under the Draft Model GST Law (issued by the CBEC in November 2016) allows the assessee to claim credit of taxes paid on inputs held in stock in certain circumstances provided the benefit of such credit is passed on to the customer by way of reduced prices to the customer. This concept, also referred to as “Anti Profiteering” has been added to ensure that the duty benefit availed by the assessee is passed on to the customers and there is real reduction in the prices at which goods are finally sold to the end customers;
- 23.2 The Law also empowers the Government to constitute an authority to examine whether the input tax credit availed by the assessee or the reduction in price on account of reduction in tax rate has led to

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commensurate reduction in the price at which the goods are being sold to the end customers and in case of any default allows the authority to levy penalty;

- 23.3 This concept is an indirect manner of ensuring that the assessee does not get unjustly enriched by the credit of taxes which were not available in the earlier law by selling the goods at prices fixed under pre GST regime by considering such taxes as cost which are not available as credit under the GST regime;
- 23.4 Similar concept was introduced even in Malaysian GST law. However, the rate of GST in Malaysia is only 5% and in India it could be as high as 28% and hence the implications could be high. The Economist view would be that market forces should dictate the price of a commodity and that introduction of such a concept would lead to the assessee being at the mercy of the departmental authorities. We will have to wait and watch to decide if the anti-profiteering provisions meets the desired objective.