

1 Case laws on provisional Assessment

Department cannot order provisional assessment. If Central Excise Officer finds that self-assessment is not in order, he can ask assessee to produce additional documents, records and other information and then issue a demand notice. Where assessee fails to provide records or information and department is unable to issue demand, 'best judgment' method may be used to raise demand on collateral evidence. Burden to provide information for re-determination of duty is on assessee. – (Chapter 3 Part IV Para 3.1 of CBE&C's CE Manual, 2001).

Assessment is not treatable as provisional in absence of express order of provisional assessment, as required under [rule 7(3)] - **J K Cotton Spg & Wvg Mills Co. Ltd. v. CCE 99 ELT 8 (SC).**

Provisional assessment cannot be presumed. It can be done only as per provisions of rule 7]. Hence, order of Assistant/Deputy Commissioner directing provisional assessment is essential **Khardah Company v. UOI - 1983 (14) ELT 2159 (Cal HC).**

Show cause notice before finalising provisional assessment - Issue of SCN is necessary before finalising provisional assessment - **CCE v. ITC Ltd. - 1994(71) ELT 324 (SC)** In contrary judgment, in **Serai Kella Glass Works P Ltd. v. CCE 91 ELT 497 (SC)**, it was held that show cause notice is not necessary before finalising a provisional assessment

No demand unless provisional assessment finalised -, duty cannot be demanded when initial duty itself is provisional. Duty demand can be raised only when assessment is finalized. **CCE v. Transformers & Electricals Kerala Ltd. 1998(103) ELT 575 (CEGAT)**

Pending finalization of provisional assessment, proceedings in terms of Sec 11-A for raising demand cannot be initiated against the assessee **ITC Ltd. 2006- SC**

When assessment is provisional on any ground, the whole assessment is provisional and time limit for demand/refund will start only when the assessment is finalized. **Art Plywood Industries Ltd. v. CCE - 1991 (56) ELT 496 (CEGAT)/Ravi Mardia v. CCE 2000(118) ELT 627 (CEGAT)**

No Suppression of facts/ penalty if provisional assessment was permitted -, it was held that when provisional assessment is permitted, there can be no question of suppression of facts and demand of penalty is not sustainable. **Godrej Foods Ltd. v. CCE 2000(115) ELT 403 (CEGAT)- same view in S Patnaik v. CC 2000(118) ELT 502 (CEGAT)**

However, in **Duncan Industries v. CCE 2001(130) ELT 279 (CEGAT)**, it was held that if charge of evasion of duty by fraudulent means is found to be correct, penalty is imposable even in case of provisional assessment.

Order for classifying goods is not provisional It was observed that to establish clearances on provisional basis, order under rule 9B and clearances on provisional basis is essential. Order classifying goods cannot be treated as provisional merely because appeal against said order is

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pending. Clearances during pendency of appeal/revision cannot be treated as provisional **Metal Forgings v. UOI 2002 146 ELT 241 (SC)**,

If Provisional assessment cannot be finalised within 6 months, the cases must be submitted to Commissioner with request letter of assessee, through AC/DC indicating reasons for non- finalisation and amount of differential duty for future clearances before the expiry of period of 6 months. Commissioner can either extend the period or direct the method to be adopted for finalisation of assessment. If period is likely to be further extended, application should be sent to Chief Commissioner. - **Chapter 3 Part IV Para 2.5 of CBE&C's CE Manual, 2001.**

2. Best judgment assessment

Where assessee fails to provide records or information and department is unable to issue demand, 'best judgment' method may be used to raise demand on collateral evidence. Burden to provide information for re-determination of duty is on assessee. - **Chapter 3 Part IV Para 3.1 of CBE&C's CE Manual, 2001.**

It has been held that though best judgment assessment is an estimate and involves guess work, the estimate must relate to some evidence or material and it must be something more than mere suspicion - **Raghubar Mandal v. State of Bihar - (SC) Dhakeswari Cotton Mills v. CIT 26 ITR 775 (SC)**,

3. Show cause notice

Time limit applicable even if Act amended retrospectively - The time limit of section 11A [parallel section 28 of Customs Act] is mandatory and applies even in cases where Act is amended with retrospective effect - **J K Cotton Spinning Mills v. UOI (1988) 68 STC 421 (SC)** also held in **CCE v. Vapi Paper Mills Ltd. 1998(104) ELT 780 (CEGAT) *** **Bajaj Auto Ltd. v. UOI 2003(151) ELT 23 (Bom HC DB)..**

No demand from purchaser in open market - Goods purchased from open market are presumed to be duty paid. Purchaser does not have to prove duty paid character of such goods. It is not possible for the purchaser to prove the same - **Calcutta Paper Mills Mfg Co. v. CEGAT - 1986 (25) 9 (Cal HC) Vapson Products v. UOI - 1987 (Bom HC).**

Any demand without issue of show cause notice is violation of a statutory provision - Principles of natural justice fully apply to SCN e.g. all evidence on which department wants to reply should be disclosed. Following are the requirements of SCN and if these are not followed, the SCN is vitiated and may not stand scrutiny of law. **Gokak Patel v. Volkart Ltd. (SC).**

Wrong mention of rule and notification will not vitiate Notice or order - Non- mentioning or wrong mentioning of rule or section will not vitiate the SCN if all essential ingredients of statute are mentioned and substance of notice is clear, **State of Karnataka v. Muniyalla SC 470 * N B Sanjana v. Elphinstone Spinning and Wvg Mills Co. Ltd. -(SC).**

Effect of notice for period beyond one-year/five years - if a show causes notice is issued pertaining to period beyond five years; the whole notice does not become invalid. The only effect is that the department will not be entitled to collect duty beyond a period of five years from date of show cause notice. - **UOI v. Maheshwari Woollen Mills - SC Same**

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principle applies if show cause notice is issued for a period beyond one year (i.e. when fraud etc. is not alleged). In such case, notice will be considered valid and enforceable for a period of one year.

Assessee can waive his right -, Sec 11 provided for issue of show cause notice before confirming any demand of duty. It was held that though issue of show cause notice is a mandatory requirement, assessee could waive it as the provision deals with individual's right. It is a notice to the person concerned and not a public notice and right to receive show cause notice can be waived. **CC v. Virgo Steels 2002 (SC)**

Time limit even when stay order issued by Court -, it has been held that limitation for issue of show cause notice is applicable even if some interim order was issued by High Court. Mere issue of some interim order does not refrain authorities from issuing show cause notice for demand of duty, unless there is specific injunction/stay order restraining them for issuing show cause notice- **Metal Forgings v. UOI (2003) 146 ELT 241 (SC)**

Simple letter asking to pay duty is not a notice - letters either in the form of suggestion or advice cannot be taken as show cause notice. This is because law requires that show cause notice to be issued under a specific provision of law **Metal Forgings v. UOI (2003) 146 ELT 241 (SC)**,

Demand/penalty unless SCN is issued - Demand of duty or penalty on a person (like director, partner etc.) cannot be confirmed unless a show cause notice is issued to him - **Metal Fittings P Ltd. v. CCE 1997 71 ECR 607 (CEGAT)**. Penalty cannot be imposed if show cause notice does not contain proposal of penalty. - **Prabhat Forging v. CCE 2002(139) ELT 720 (CEGAT)**.

Department can issue revised show cause notice?

If a subsequent notice is issued clarifying earlier notice or correcting a mistake, it will be a corrigendum. However, if new notice is on entirely different ground, it will be treated as a new show cause notice and period of limitation will be counted from date of fresh notice and not the earlier notice.

Penalty is not imposable on an employee who was neither issued a show cause notice nor had waived the notice. - **Pfizer Ltd. v. CC 2001(131) ELT 251 (CEGAT)**.

Allegations must be mentioned - A show cause notice has to state clearly the allegations made against a noticee (i.e. person to whom notice is issued). Where the allegations are absent or not substantiated, that defect cannot be cured at subsequent stages and certainly not at the stage of second appeal - **CCE v. Bhikhlal Dwarkadas 1998(99) ELT 438 (CEGAT)**.

It was held that section 11A only requires issue of SCN. Demand can come later after notice is adjudicated. Serving of notice is required, serving of demand is not required within one year/5 years - followed in **Atul Glass Industries v. CCE 1999(114) ELT 597 (CEGAT)/ Swadeshi Polytex v. ACCE 1986(26) ELT 701 (All)**,

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Proviso to Sec. 11A does not require that notice should be issued within 6 months of knowledge of Department. Notice can be issued anytime within 5 years of relevant date. - Nizam Sugar Factory v. CCE 1999 (114) E.L.T. 429 (T-LB).

Wrong mention of rule and notification will not vitiate Notice or order - Non- mentioning or wrong mentioning of rule or section will not vitiate the SCN if all essential ingredients of statute are mentioned and substance of notice is clear, and no prejudice is caused, and when the power is available - State of Karnataka v. Muniyalla AIR 1985 SC 470 * N B Sanjana v. Elphinstone Spinning and Wvg Mills Co. Ltd. 1978 (2) ELT J399 (SC). * CCE v. Pradyumna Steel Ltd. - (1996) 82 ELT 441 (SC) * R K Verma v. CCE (2001) 138 ELT 1026 (CEGAT).

Demand even if department had approved, accepted or assessed rate or value - A demand can be raised for previous period of one year/5 years even if department had approved, accepted or assessed value or rate of duty - section 11A(1) of CEA [however, no amendment is made in corresponding section 28(1) of Customs Act]

Demand against approved classification list only prospective - CCE v. Cotspun Ltd. 1999 (113) E.L.T. 353 (SC -LB).

Approval of Show cause notice Show cause notice should be approved and signed by officer empowered to adjudicate the case. The authority to adjudicate the case are - * AC/DC-up to 5 lakhs, JC between 5 to 20 lakhs* Additional Commissioner between Rs 20 lakhs and Rs 50 lakhs
* Commissioner - without any limit. [Thus, now, Superintendent cannot issue show cause notice].

[CBE&C circular No. 752/68/2003-CX dated 1-10-2003]

Notice has to be 'served' - The SCN has to be **served** on the person concerned and mere issue is not enough. If the notice was issued and posted by registered post before last date but received after the last date, the demand notice is not sustainable as it was not 'served' in time - Sewing Systems (P.) Ltd. v. CC - 1992 (62) ELT 725 (CEGAT) (Affirmed by SC as revenue appeal dismissed - 89 ELT A36) - noted and followed in Corvine Chem v. CCE (2004) 170 ELT 181 (CESTAT) * Rashtriya Audyogic Sansthan v. CCE (2001) 135 ELT 353 (CEGAT).

Demand based on statements to other authorities

Demand based on affidavits given to Director of Industries indicating value of clearances, without any corroborative evidence is not sustainable - Punjab Oil and Syndicate Mills v. CCE - 1993 (65) ELT 268 = 47 ECR 246 (CEGAT) * Rishab Refractories P Ltd. v. CCE - 1996(87) ELT 93 (CEGAT) * Elmech Engineers v. CCE 2001(129) ELT 634 (CEGAT)

Demand based on inflated stock statement given to Bank is not sustainable when there is no other evidence of clandestine removal - Kishan Chand and Co. v. CCE - 1996 (82) ELT 210 (CEGAT)

Income Tax cannot be demanded on basis of inflated statement to Bank to obtain enhanced credit facility, in absence of other evidence. - CIT v. Relaxo Footwear (2002) 123 Taxman 322 (Raj HC DB).

No penalty if demand itself is time barred – If demand itself is time barred, penalty cannot be imposed. – Eveready Industries v. CCE (2001) 138 ELT 1287 (CEGAT).

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Demand can be issued on basis of audit objection - In *Swastik Tin Works v. CCE 1986(25) ELT 798 (CEGAT)*, it was held that demand notice cannot be issued on the basis of audit objection. However, as rightly held by *Usha Rectifier Corporation v. CCE 2001(130) ELT 485 (CEGAT)*, these observations were based on peculiar facts of the case and demand can indeed be issued on the basis of audit objection.

Demand if assessee did not fulfill post clearance conditions of exemption time limit not apply it was held that notice u/s 28 is only for duty not levied or short levied, erroneously refunded etc. If goods are cleared under an exemption notification subject to conditions and the conditions are not satisfied, the demand of duty is not u/s 28 of Customs Act [as there was no short levy when goods were cleared]. Hence, time limit of 1/5 years for raising of demand is not applicable. *CC v. C T Scan Research 2003(155) ELT 3 (SC)*

Time Limit of 5 years/ Suppression of facts/fraud/collusion

- Notice can be served for a period of five years in case of fraud, collusion, suppression of facts, wilful misstatement etc.
- extend period from one year to 5 years are exceptional powers and hence have to be construed strictly. It was held that fraud; collusion etc. and intention to evade duty must concur. *J K Cotton Spg & Wvg Mills Co. Ltd. v. CCE 1998 (SC)* *ONGC v. CCE - 1995 (CEGAT)*

Decisions with regard to interpretation/ meaning of Fraud/Collusion/Suppression of facts/intention to evade duty

Extended period of 5 years will **apply only when two ingredients** - wilful suppression, mis-declaration, and the intention to evade duty. *Rainbow Industries v. CCE - 1994 (74) ELT 3 (SC)*-. Same view was also held in *Tamil Nadu Housing Board v. CCE - 1994 (SC)*

Intention to evade duty - Intention to evade payment of duty is not mere failure to pay duty. It must be something more, i.e. that **assessee must be aware that duty was leviable and he must deliberately avoid payment of duty**. 'Evade' means defeating the provision of law of paying duty. It is made more stringent by the use of word 'intent'. In other words, the assessee must deliberately avoid payment of duty payable under the law. Where there was scope of doubt whether duty was payable or not, it is not 'intention to evade duty'. - *Tamil Nadu Housing Board v. CCE - 1994 (SC)*

Fraud - Fraud' means deceit, trickery or misrepresentation. Intention to evade duty is built into the words 'fraud' and 'collusion' -*Cosmic Dye Chemical v. CCE (SC)* It was observed that 'defraud' includes an element of deceit. However, mere silence is not fraud, unless it is the duty of the person to speak or silence itself is equivalent to speech.

Misstatement - A false statement becomes 'willful' if it is deliberate or intentional. It is not willful if the statement is accidental or inadvertent. A statement will not be misstatement only because full facts were not disclosed. 'Willful' means 'with intent to evade duty' - *Cosmic Dye Chemical v. CCE - (1994) (SC)*

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Deliberate withholding information is suppression of facts

No suppression of facts if department aware of facts-**Pushpam Pharmaceutical (SC)**

No suppression of the facts when the assessee has bona fide belief that no legal duty was payable
Surat Textile Mills (2004) 167ELT379(SC)

Mere omission is not suppression. Suppression must be deliberate- **MM Kotecha (2005) 179ELT261(SC)**

Wrongful understanding of law does not constitute suppression - Vinod Paper Mills Ltd. v. CCE 1997 (91) E.L.T. 245 (SC).

Mere failure to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with intent to evade payment of duty ... when the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. **CONTINENTAL FOUNDATION 2007(SC) 216 ELT177**

Mere visits of offices does not mean there was no suppression of facts – ‘No suppression’ cannot be pleaded on the ground that excise officers visited their factory number of times, unless there is something on record to show that they pointed out some fact to Revenue and even after the discovery of that fact, Revenue has not taken any action.

– **Agrico Engineering Works v. CCE 2000**

Mere inaction is not Suppression of Facts - Suppression means intentional, Conscious or deliberate attempt to withholding or not providing information. It was held that mere inaction or failure on part of manufacturer will not amount to suppression of facts. **Collector v. Chemphar Drugs 1989 (SC) Lubri-Chem Industries Ltd. v. Collector - 1994 (SC)]. Padmini Products v. CCE 1989 (43) E.L.T. 195(SC).**

Non Applicability of extended period of 5 years
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Extended period cannot be invoked where classification list is approved. - Nat Steel Equipment v. CCE 1988(34) E.L.T. 8; Prabhu Steel Industries v. CCE 1997 (95) E.L.T. 164 (SC).

Extended period not invokable when bonafide belief arises out of court judgements - Cosmic Dye Chemicals v. CCE 1995 (75) E.L.T. 72(SC).

Extended period not invokable when there are conflicting decisions prevailing and non-requirement under law to do something.- Pushpam Pharmaceuticals Co.v. CCE 1995 (78) E.L.T. 401 (SC).

Mere change in opinion regarding classification not sufficient to invoke extended period - Prabhu Steel Industries Ltd. v. CCE 1997 (95) E.L.T. 164 (SC).

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Information not required to be supplied under law when not supplied does not amount to suppression - Apex Electricals Pvt.Ltd. v. UOI 1992 (61) E.L.T. 413 (Guj).

Department cannot sleep over the matter for years and accuse the assessee of suppression - Mutual Industries Ltd v. CCE 2000 (117) E.L.T. 578 (T-LB).

When the earlier SCN raising on similar issue on identical amount was dropped, subsequent SCN cannot allege suppression of fact or material. Hence extended period of limitation of 5 years will not be available. **Hyderabad Polymers Ltd (2004)166ELT151(SC)**

When there was disagreement Between experts (CAS, CWAs) and Department on the Cost of Production, extended period of 5 years is not applicable –**MRF Ltd (2004)169ELT125 (CESTAT)**

Generator sets assembled from bought out parts at factory amounting to goods only, When the position is not clear and not reporting to department, amounting to suppression of facts and hence the time of 5 years will be applicable -**Mallur Siddheswara Spinning mills Ltd (2004)166ELT154 (SC)**

Aluminum paint was manufactured, neither accounts of product maintained nor duty paid and hence suppression of facts **time** of 5 years will be applicable- **TNSTC Ltd Madurai (2004)166 ELT433 (SC)**

4.Interest

Interest payable during period of stay - It may be noted that interest is payable if finally assessee loses in appeal, even if demand was stayed by Court/Tribunal pending hearing of appeal. The interest will be payable right from the original demand, and not from the date when appeal is decided. Supreme Court in **Haji Lal Mohd v. State of UP (SC)**, had, in a sales tax case, held that running of interest is not prevented because of operation of any stay order. However, penalty cannot be levied during period of stay, as assessee is not in default during that period.

It was held that no interest u/s 11AB will be payable if duty is paid before receipt of show cause notice. Mandatory penalty u/s 11AC is also not payable - **In EID Parry v. CCE 2003 (156) ELT 753 (CESTAT),same view in Ashok Leyland v. CCE 2003 (156) ELT 995 (CEGAT) * EID Parry v. CCE 2003 (157) ELT 193 (CESTAT).**

NO interest for earlier period if fresh demand issued - assessee filed appeal against assessment. On appeal, order was made for re-computation, and fresh notice of demand was issued of reduced tax. It was held that earlier assessment order ceases to exist and liability of interest starts only from date of fresh demand notice Philips **India Ltd.v. ACCT(2004) 136 STC 636 (SC)**

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No interest or penalty if I voluntarily pay duty before Show Cause Notice

In EID Parry v. CCE 2003 (156) ELT 753 (CESTAT), it was held that no interest u/s 11AB will be payable if duty is paid before receipt of show cause notice. Mandatory penalty u/s 11AC is also not payable - same view in Ashok Leyland v. CCE 2003 (156) ELT 995 (CEGAT) * EID Parry v. CCE 2003 (157) ELT 193 (CESTAT).

Interest be payable by the Revenue to the assessee when interest payment on delayed payment of refund is also delayed

Compensation by way of interest on interest wrongfully withheld, irrespective of absence of any statutory provisions granting the same. In this case the interest due to the assessee was withheld by the department for 17 long years. In this case the interest due to the assessee was withheld by the department for 17 long years. Sandvik Asia Ltd. v. CIT 2006 (196) ELT 257 (SC) Note: Though this judgment has been rendered in respect of income-tax laws, the principle enunciated in this judgment may also squarely apply in central excise and customs cases.

Department cannot withhold a refund on the ground that it has filed an appeal against the order giving the refund, in a case where it has not obtained a stay order?

The amount of pre-deposit was not refunded to the assessee when its appeal was allowed by the Commissioner (Appeals). Subsequently, when the Revenue filed an appeal before the Tribunal against such order of Commissioner (Appeals), no stay was granted.

The High Court observed that the officers of the Revenue had been informed by the Board that no refund/rebate claim should be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained. Thus, the High Court directed that the amount of pre-deposit should be refunded to the petitioner with interest within a fortnight. Atul Limited v. CCE., Surat-II 2005 (188) ELT 21 (Guj).

5.Recovery of Duty

Central excise department will get preference to recover money over secured creditors

While recovering the dues, the central excise department would have precedence over the secured creditors. **Apex Court in Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. (2000) 5 SCC 694, CCE.,/ Pondicherry v. Indian Bank 2006 (198) ELT 334 (Mad. HC)**

Liability of partner - Since liability of partners is unlimited; recovery can be made from partner. If public notice of dissolution is given, then partner is liable only for dues upto date of dissolution. However, dues recoverable from an individual partner (in his individual capacity) cannot be recovered from the partnership firm and goods belonging to a firm cannot be attached for recovery of dues from an individual partner. It was held that tax arrears of partnership firm when assessee was partner could be recovered from erstwhile partner, even after he retires. **ITO v. Arungri Chettiar - AIR 1996 SC 2160,**

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When Partnership firm—Dissolved Partner continue to remain liable for excise duty liability incurred before dissolution of firm **GOPAL INDUSTRIES LTD. – 2007-TRIBUNAL (LB) 214 ELT 19**

Liability of legal heir/representatives - High Courts have held that recovery can be made from legal representatives or heir from the movable or immovable property inherited by the legal heirs.

Goods pledged cannot be attached - If the goods have been pledged (usually with Bank), they do not 'belong' to the defaulter and hence are not liable for attachment or detention.

Recovery from Successor: if predecessor fails to pay duty it can be recovered from successor property and goods after obtaining written permission from CCE.

Stay of Recovery - Orders of demand are appealable and appeal can be filed against the order for demand of duty/penalty. Under Central Excise as well as Customs law, appeal can be filed only after the amount demanded is paid. However, appellate authorities can grant stay for recovery pending final decision on appeal. The stay may be unconditional or conditional subject to conditions like part payment, bank guarantee, surety etc. If such stay is obtained, recovery proceedings will be stayed. However, mere filing of appeal does not amount to stay order. A separate application has to be made for stay order from appellate authorities.

It was held that if pre-deposit is refundable to assessee, the amount can be adjusted against any demand pending against the assessee, unless a stay has been obtained. Thus, instead of refunding pre-deposit, excise department can adjust it against any other demand, which may be pending against the party. **Bajaj Auto Ltd. v. CCE 2003 (158) ELT 217 (CESTAT),**

6.Duty paid under protest

Letter of protest is not a claim of refund – Even if letter of protest was filed, it does not constitute a claim of refund. - Chapter 13 Part III Para 4.3 of CBE&C's CE Manual, 2001. Thus, separate refund application is required after the issue is settled.

Letter of Protest is essential – Protest must be registered before or at the time of making payment. Thus, letter-giving reasons of protest is essential. TR-6 challan or on debit entry to PLA should be marked as "duty is being paid under protest".

Doctrine of unjust enrichment applicable to refund even duty paid under protest - Even if duty is paid under protest, doctrine of unjust enrichment will still apply to refund. The manufacturer should charge only the excise duty to which he is agreeable as per his interpretation and balance should be borne by him. **CCE v. Allied Photographics 2004 (166) ELT 3 (SC)**

7.Refunds

Refund due must be sanctioned within three months from date of application. If not so paid, Government will pay interest to the assessee under section 11BB. The rate prescribed is 6% w.e.f. 12-9-2003 [Notification Nos. 67/2003-CE(NT) dated 12-9-2003 and 75/2003- Cus(NT) dated 12-9-2003]

Unjust Enrichment - Validity of Section 11B - Legal validity of provisions of section 11B of CEA (parallel section 27 of Customs Act) has been upheld by a nine member bench of Supreme Court in **Mafatlal Industries Ltd. v. UOI - 1996 (SC)** .

Doctrine of Unjust enrichment. No person can seek to collect the duty from both ends. He cannot collect duty from his purchaser in one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. This would not be economic justice. Manufacturers cannot get unearned and unjustifiable windfall. **Mafatlal Industries Ltd. v. UOI - (1997) 89 ELT 247 (SC)**

Unjust enrichment applies to Capital goods captively consumed – In **SRF Ltd. v. CC 2006 (193) ELT 186 (CESTAT 3 member bench)** it has been held that doctrine of unjust enrichment applies to capital goods captively consumed

Unjust Enrichment applicable to captive consumption of Inputs, - it has been held that provisions in respect of unjust enrichment are applicable in respect of raw material captively consumed also. In case of captive consumption, even if it is difficult to prove that incidence of duty has not been passed to purchase of final product, refund will not be granted if manufacturer is not able to show and prove that incidence has not been passed on to some body else **UOI v. Solar Pesticides P Ltd. 116 ELT 401(SC),- followed in CCE v. Usha Beltron Ltd. 2000(119) ELT 3 = 2000 AIR SCW 4658 (SC 3 member bench) ***

Refund when bank guarantees encashed; in case of a disputed claim, a bank guarantee is normally furnished as security for disputed liability; and if the revenue encashes bank guarantee, it does not amount to payment of duty. In such cases, provision of refund as well as doctrine of 'unjust enrichment' will not apply and the amount will have to be refunded, if the case is finally decided in favour of the assessee. - **Oswal Agro Mills Ltd. v. ACCE 1994 (70) ELT 48 (SC).** - followed in **Grasim Industries v. CCE 2001(127) ELT 57 (CEGAT)**

Doctrine of unjust enrichment" shall be applicable to refund of duty paid which is held to be illegal when the burden passes on to buyer. **PANIHATI RUBBER LTD.-2006-SC**

Doctrine of unjust enrichment" shall be applicable to refund of duty paid in case where duty paid under protest if the burden passes on to buyer. **Commissioner of Central Excise, Jaipur vs. Birla Corporation Limited [2007 (208) ELT 481 (S.C.)]**

Cum duty Price Doctrine of unjust enrichment will not apply

PRICE INCLUSIVE OF ALL TAXES AND PRICE REDUCED SUBSEQUENTLY - BSNL had issued order on provisional basis. The price was inclusive of all duties. Subsequently, the price was reduced while finalising order. It was held that assessee is entitled to refund. It was held that since price is all-inclusive, duty amount that appellant could claim from buyer also gets reduced

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(Hence, doctrine of unjust enrichment does not apply *BWL Ltd. v. CCE* (2004) 168 ELT 458 (CESTAT)),

When goods sold at price less than landed cost

If imported goods are sold at a price lesser than landed cost (excluding customs duty), incidence of duty has not been passed on to actual customers and unjust enrichment is not applicable. - *Shakun Overseas v. CC 2002(140) ELT 444 (CEGAT)*.

If free samples are given

If goods were given as free samples as physician's samples, question of unjust enrichment does not arise - *Sarabhai Chemicals v. CCE* 2004 (168) ELT 70 (CESTAT).

When original application for refund was rejected and later appeal won by assessee against the rejection, Assessee need not file fresh application for refund **SPIC LTD 2007 TRI 209 ELT**

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Penalties

Advocates or legal advisers cannot be penalized for clandestine removal of goods by their client company Advocates or legal advisers or auditors of company could not be alleged or presumed to handle muchless deal with excisable goods as contemplated under section 9(1)(bbb) of the Central Excise Act (or erstwhile Rule 209A of the Central Excise Rules, 2001) while discharging their professional duties. Thus, the High Court held that they would not be liable to penalty for clandestine removal of goods by their client company. **Jayantilal Thakkar & Company v. Union of India 2006 (195) ELT 9 (Bom.)**

Once it is found that penalty u/s 11-AC is impossible (i.e., case is of fraud, collusion etc), the penalty equal to duty shall be imposed and there is no discretion of adjudicating authority to levy lower than equal to duty. **(Penalty equal to duty neither less nor more)** Relaxation from penalty equal to duty is available only if duty is paid along with interest and penalty at 25% of duty is paid within 30 days of order". **IPEA PARAMOUNT PVT LTD -2007 – TRI LB 212 ELT 500**¹

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