(2011) 12 AP CK 0041

Andhra Pradesh High Court

Case No: Central Excise Appeal No''s. 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170 and 186 of 2011

M/s. Asia Pacific Commodities Ltd.		APPELLANT
	Vs	
The Assistant Commissioner of Customs, Division-I		RESPONDENT

Date of Decision: Dec. 30, 2011

Acts Referred:

- Agricultural and Processed Food Products Export Development Authority Act, 1985 - Section 12, 129A, 17(5), 2(2), 2(20)
- Central Excise Rules, 1944 - Rule 11, 11(3), 173B
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22, Order 41 Rule 22(1)
- Contract Act, 1872 - Section 72
- Customs Act, 1962 - Section 130, 21
- Customs, Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982 - Rule 10
- Income Tax (Appellate Tribunal) Rules, 1963 - Rule 11
- Limitation Act, 1963 - Section 17(1)

Citation: (2012) 280 ELT 481

Hon'ble Judges: V.V.S. Raoandthe, J; Sanjay Kumar, J

Bench: Division Bench

Advocate: Lakshmi Kumar and C.R. Sridharan, for the Appellant; A. Rajasekhar Reddy, for the Respondent

Final Decision: Allowed

Judgement

1. This batch of central excise appeals u/s 130 of the Customs Act, 1962 (the Act) - except three appeals; is filed by the ITC Limited (Agro Business Division), Secunderabad. The Commissioner for Central Excise, Customs & Service Tax (Appeals) (hereafter, the CCE(A)) as well as the Customs, Excise & Service Tax

Appellate Tribunal, Bengaluru Bench (CESTAT) disposed of the matters by common order and, therefore, it is appropriate to dispose of all these appeals by common judgment.

Brief background

2. It would be suffice to notice the factual background in CEA No.158 of 2011 filed by ITC Limited. The appellants are in the business of selling and exporting agricultural produce. As per Section 3 of the Agricultural and Processed Food Products (Export Cess) Act, 1985 (the Cess Act), there shall be levy and collection of cess and duty of customs not exceeding 3% ad valorem value of exported scheduled products. The appellants entered into export sale FOB contracts with buyers in Austria, Geneva and Switzerland. After obtaining necessary export documents/licences/permits and paying all export duties and levies, they paid cess under the Cess Act at 0.5% ad valorem. In the invoices relevant to all the shipping bills the value of the export at one composite figure was indicated. These exports were effected in June and July, 2006. The Cess Act was repealed with effect from 01.6.2006 vide the Cess Loss (Repealing & Amendment) Act, 2006. Despite this, the Customs Officials from Kakinada Port insisted for payment of cess and all the appellants paid the cess against the shipping bills after the repeal of the Cess Act. The levy and collection, indisputably was not authorized by law. The appellants filed claims u/s 27 of the Act for refund of cess of export of rice consequent on its abolition. By a speaking order dated 30.10.2006, the Assistant Commissioner of Customs, Division-I, Kakinada having come to the conclusion that "the bar of unjust enrichment clause is not applicable in the instant case since the incidence of duty has been borne by the agents on behalf of the exporters and had not been passed on to any other person" refunded the entire cess amount paid against the shipping bills.

3. In purported exercise of powers u/s 129D of the Act, the CCE, Visakhapatnam called for the records relating to the speaking order of the Assistant Commissioner. On examining, he authorized the Assistant Commissioner to file appeals against the speaking orders in all the matters where refund claims were allowed. The CCE observed that the adjudicating authority erred in holding that the incidence of duty had not been passed on to any other person in as much as in the shipping bills FOB value is inclusive of the cess; FOB value had been realized by exporters as per the Bank certificates, which disentitled them for refund u/s 27 of the Act.

4. In obedience to the orders of the CCE, appeals were filed before the CCE (A), Visakhapatnam-IV. It was mainly contended that FOB value of the shipping bills is inclusive of the cess and the FOB value was realized by the exporters as certified by the Banks and that when the incidence of duty had been passed on to the buyers the principle of unjust enrichment is attracted. The appellants relied on the shipping bills and Incoterms, 2000 which are International Commercial terms pre-defined by the International Chamber of Commerce and urged that the FOB value is not inclusive of a cess paid under the Cess Act. They also submitted that the exporters

themselves incurred the expenditure towards cess and the burden had not been passed on to the buyers. The CCE (A) after referring to the Incoterms, inferred that FOB value in the shipping bills is inclusive of cess as the same is mentioned in the shipping bills. The appeals filed by the department were accordingly allowed.

5. In their appeals before the CESTAT, the appellants relied on Incoterms and the agreement they entered into with foreign buyers in support of their plea that the cess paid was not passed on to the buyers and that there was no unjust enrichment. On considering this plea, the CESTAT concluded as under.

We find that from the above definition it is not possible to arrive at a definite conclusion that the FOB value includes the cess paid on export of rice especially in cases where the contract with the foreign buyer specifically provided that the export duty/taxes etc., were to the account of the seller. In all the cases except in the case of M/s. Al Gyas Exports Pvt. Ltd., the appellants have furnished copies of the relevant contracts containing the above clause. Unless the Department is satisfied on examination of the documents showing remittance received by the appellants, the finding in the impugned order that the FOB value recovered included the impugned cess cannot be sustained. As it is, there is no reliable finding in the impugned order to conclude that the disputed cess amounts had been recovered as part of the FOB value.

(emphasis supplied)

6. It appears that in their written arguments departmental representative raised a plea that when the assessee has not challenged the assessment order, claim for refund would not lie. Countenancing this plea the CESTAT rejected the appeals observing as under.

As regards the claim that a refund claim for excess duty paid can be validly made without challenging assessment under the Act relying on the judgment of the Apex Court in the case of Karnataka Power Corporation Ltd. Vs. Commr. of Cus. (Appeals), Madras, , we note that a Larger Bench of the Tribunal had considered the ratio of the above decision and the decisions of the Apex Court in Flock India case and Priya Blue Industries case and held that a refund claim was not maintainable unless the assessment order in pursuance of which duty paid was challenged and modified/set aside. In the case of Maharashtra Cylinders Pvt. Ltd. v CESTAT, Mumbai & Ors., reported as 2011 (183) ECR 0059 (Bom.), the Hon''ble High Court of Bombay has observed as follows:

8. ... ... The Apex Court in the case o Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), has held that validity of an assessment cannot be considered while dealing with the refund claim. The said ratio would apply to the self assessment as well.

In view of these binding authorities, we reject the arguments of the appellants relying on the judgment of the Apex Court in the case of Karnataka Power Corporation Ltd (supra).

Submissions

7. M/s. C.R. Sridharan and Raghavan Ramabhadran appearing in support of the appellants made the following submissions. The CESTAT having recorded a finding that there is no unjust enrichment and that the incidence of duty had not been recovered as part of FOB from the foreign buyer was in error in rejecting the appeals only on the ground that the claim for refund without challenging the assessment order would not be permissible. Whether the refund claims may be made without challenging the assessment order is not a question which would arise in the appeals. Placing reliance on Section 129D(2) of the Act the Counsel would urge that when the reviewing Commissioner directs an authority to file appeal to the CCE (A) for determination of such points that arise out of the decision or order as may be specified by the reviewing Commissioner, an appeal could not have been filed on the ground which was urged before the CESTAT. According to them the reviewing Commissioner directed the Assistant Commissioner to file appeal against the speaking order only on the question of unjust enrichment and not on any other ground. Even before the CCE (A) the plea which was raised before the CCE (A) was not authorized and the appellate authority decided the matter only with reference to the question whether the appellants are disentitled for refund u/s 27 of the Act on the ground that FOB value is inclusive of the cess. The Counsel would further rely on Section 129B(1) of the Act and Rule 10 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 and would submit that having regard to these provisions the CESTAT could not have decided the question whether appellants were disentitled to claim refund without filing appeals against the assessment order as the same is not a question which was set out in the memorandum of grounds of appeals of the department. Relying on the decision of the Full Bench of this Court in Commissioner of Income Tax Vs. Late Begum Noor Banu Alladin and Another, they would contend that unless the subject matter is one which necessarily arises out of determination made by the first appellate authority, the CESTAT could not have gone into such questions. In support of their submissions, the Counsel also relied on Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., . The Counsel for the appellants submits that the speaking order passed by the original authority allowed refund of claims; refund was made and therefore question of filing appeal against the speaking order passed by the Assistant Commissioner u/s 28(2) of the Act does not arise. Even where an assessment order u/s 17(5) of the Act is passed and the same is in favour of the assessee the question of filing appeal does not arise and if need arises the application for refund of customs duty can be made u/s 27 of the Act. They would rely on the decision in Hind Agro Industries Limited Vs. Commissioner of Customs and Others, . It is nextly contended that the refund claims by the appellants are not

barred by unjust enrichment, though for the purpose of complying with the Cess Act it was mentioned in the shipping bills that the cess was paid. The FOB value did not include the cess as per the agreement between the appellants and the buyer. They would urge that the CCE (A) erred in not construing the agreement as sale contract and Incoterms in proper perspective. They would rely on the decisions in Union of India and others Vs. Solar Pesticide Pvt. Ltd. and Another, , Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, Contship Container Lines Ltd. Vs. D.K. Lall and Others, and Hind Agro Industries Limited.

8. The Senior Standing Counsel for Customs and Central Excise would submit that the FOB value of the contract as shown in the shipping bills is inclusive of the cess paid under the Cess Act and the incidence of duty/cess paid by the appellants had been passed on to the buyer and, therefore, refund claims are barred by unjust enrichment. u/s 28D of the Act the burden of proving that the incidence of duty had not been passed on to the buyer is on the assessee and the appellants have not discharged the burden by producing necessary material. He relies on Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, Placing reliance on Section 130(9) of the Act, he would submit that the provisions of the Code of Civil Procedure, 1908 (CPC) relating to appeals to High Court would apply to the Act and, therefore, finding recorded by the CESTAT in favour of the appellants that the refund claims were not barred by unjust enrichment can be challenged by the respondent as per Order XLI Rule 22 of CPC. It is nextly contended that refund claims are not maintainable when no appeal is filed against the speaking/assessment order of the adjudicating authority. The attention of this Court is invited to Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, , Karnataka Power Corporation Ltd. Vs. Commr. of Cus. (Appeals), Madras, and Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), . National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, and Davangere Cotton Mills Ltd v CCE 2006 (198) ELT 482 (SC) : (2006) 9 SCC 443 the Senior Standing Counsel would submit that u/s 129B(1) read with Rule 10 of the CESTAT Rules, the Tribunal has all powers of the original authority and when the ground was specifically taken by the Revenue in the written arguments that the FOB value includes cess, the Tribunal cannot be said to be in error in deciding the issue of bar of refund claim for not availing appellate remedy. Lastly he would submit that an appeal to High Court u/s 131 of the Act would lie when the case involves substantial question of law and these appeals would not involve any substantial question of law and, therefore, they are not maintainable.

Points for consideration

9. The two broad issues that would fall for consideration are bar of refund claims by unjust enrichment and consequences of bar of not filing appeals against the speaking orders.

Bar of refund claims

10. An application for refund of any duty paid by a person in pursuance of an assessment or borne by him shall be made to the jurisdictional Assistant/Deputy Commissioner of Customs. Every such application shall ordinarily be made before the expiry of one year/six months from the date of payment of duty and interest if any paid on such duty, as the case may be. Further every such application for refund shall be accompanied by documentary or other evidence including the documents referred to in Section 28C of the Act to establish that the amount of duty in relation to which refund claim is made was paid by the person and the incidence of duty had not been passed by him to any other person.

11. Section 28D of the Act contains fiction to the effect that every person who has paid the duty on any goods under the Act shall be deemed to have passed on the full incidence of the duty to the buyer of the goods. This presumption is rebuttable by the person who claims refund of the duties. Therefore every person claiming refund u/s 27 of the Act has to demonstrate by relevant evidence that he is not benefited by unjust enrichment as visualized by Section 72 of the Contract Act, 1872. If the incidence of duty paid is borne by another person the law bars refund claim.

12. In Mafatlal Industries Limited the Supreme Court considered the effect of various in pari materia provisions in Central Excise Act, 1944 and the Customs Act, 1962 as they stood amended by the Central Excise and Customs Law (Amendment) Act, 1991 (Central Act No.40 of 1991). The leading majority opinion delivered by Jeevan Reddy, J. (as his lordship then was) contains as many as twelve propositions. The Senior Standing Counsel relies on proposition Nos.(iii) and (iv) which we extract hereunder.

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

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

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

13. Before us the applicability of the above propositions is not disputed. The CESTAT in paragraph 8.1 of its order held that the finding of the appellate Commissioner that FOB value recovered included the impugned cess is unsustainable. The appellants, therefore, would contend that in view of the finding of fact and in the absence of a cross-appeal or appeal by the Revenue the question cannot be reagitated in the appeal u/s 130 of the Act. As noticed supra the Senior Standing Counsel for the department relies on Section 130(9) of the Act and Order XLI Rule 22 of CPC and would submit that the finding of the CESTAT against the department can be challenged by the department.

14. Order XLI Rule 22 of CPC as it stands after 1976 CPC Amendment enables the respondent to challenge any adverse finding even if the decree is in his favour, with or without filing cross-objections to the judgment in appeal. In Banarsi and Others Vs. Ram Phal, the Supreme Court considered the scope of Order XLI Rule 22 of CPC as it existed before and after CPC Amendment, 1976 and held that, "to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal on his own or taken cross-objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage". Excerpting the relevant placetum from Banarsi may be beneficial.

The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue.

15. In view of the finding of the CESTAT on the question of unjust enrichment is concerned, we are afraid, the department cannot reagitate in these appeals without filing separate appeals u/s 130(1) of the Act or without filing cross-objections. Nevertheless as the parties before us debated on the issue for a considerable time we may briefly deal with this aspect as it involves the question of interpreting the sale contract between the appellant and the foreign buyer.

16. The appellants exported long grain rice under various shipping bills. The cess paid for each consignment is not separately shown though it is prominently mentioned in each of the shipping bills for export with cess. A perusal of these

would show that the invoice value and FOB value are the same. The Revenue would rely on Section 28C of the Act which mandates that every person liable to pay the duty on any goods shall prominently indicate in all the documents the amount of duty which will form part of the price at which the goods are sold. The cess paid is not separately mentioned. In such an event Section 28D of the Act comes into operation and it shall be deemed that the incidence of duty is passed on to the buyer. The non-mention of the cess in the shipping bills for each consignment and the invoice value and FOB value are the two factors which are strongly relied on by the appellants to support their plea that the cess was borne by them and that it was not passed on to the foreign buyer. They also place reliance on the sale contract and Incoterms. There is no dispute that they are the official rules of International Chamber of Commerce of trade terms intended to facilitate conduct of international trade and are binding on all those who are engaged in International trade. After perusing these as well as the shipping bills we are convinced that FOB value (invoice) does not and could not have included the cess paid by the appellants and that the appellants did not pass on incidence of duty to the buyer. In the absence of any such material, the equitable principle of unjust enrichment does not bar refund claims u/s 27 of the Act. We would elaborate the reasons as follows.

17. The description in Stock v Englis (1884) 12 QBD 564 that in FOB contract the seller is bound at his expense to place the goods free on board a ship for transmission to the buyer, has undergone lot of changes in the business world. An FOB contract is described as flexible instrument. Benjamin''s Treatise on ''Sale of Goods'' describes the relative duties of buyer and seller in ''the classic FOB contract'' and additional duties as follows.

20-002 The "classic" f.o.b. contract: relative duties of buyer and seller. The "classic" f.o.b. contract was described in Wimble, Sons Co v Rosenberg. (1913) 1 KB 279 at p.164 Its essential features are that the seller must at his own expense put the goods on board a ship which has to be nominated or designated by the buyer. The seller is not bound to reserve shipping space in advance nor to bear any expense of shipment which arises after the goods have been put on board. When these features are said to be the mark of a "classic" f.o.b. contract, stress is placed on the relative duties of buyer and seller in relation to ship.

20-007 F.o.b. contract with additional duties. An f.o.b. contract may impose on a seller duties in addition to those undertaken by him under a "classic" f.o.b. contract. Thus it may impose on him liability for expenses beyond those of putting the goods on board (such as dock and harbour dues and port rates) as well as the duty of finding shipping space or of doing his best to that end, or of effecting insurance. In such cases the seller''s duties in relation to shipment and insurance are analogous to those of a c.i.f. seller; but the contract is distinguishable from a c.i.f. contract in that the costs of freight and insurance are for the buyer''s account. This will be so even if the seller is under the contract of carriage or of insurance liable to pay these

sums to the carrier or to the underwriter or to both. As between the parties to the contract of sale the buyer bears the ultimate responsibility for these payments, and he takes the risk of any variation in, for example, freight rates which may occur between the time of sale and the making of the contract of affreightment. (Internal quotations omitted)

18. International Chamber of Commerce created Incoterms in 1936. The purpose of these official ICC Rules for interpretation of trade terms to facilitate conduct of International trade and to provide a set of rules for the interpretation of the most commonly used trade terms for foreign trade and minimize inconsistent interpretation in different countries (see Foreword and Introduction to Incoterms, 2000). Para 14 of the Introductory chapter is relevant and reads as under.

14. Customs clearance

The term "customs clearance" has given rise to misunderstandings. Thus, whenever reference is made to an obligation of the seller or the buyer to undertake obligations in connection with passing the goods through customs of the country of export or import it is now made clear that this obligation does not only include the payment of duty and other charges but also the performance and payment of whatever administrative matters are connected with the passing of the goods through customs and the information to the authorities in this connection. Further, it has - although quite wrongfully - been considered in some quarters inappropriate to use terms dealing with the obligation to clear the goods through customs when, as in intra-European Union trade or other free trade areas, there is no longer any obligation to pay duty and no restrictions relating to import or export. In order to clarify the situation, the words "where applicable" have been added in the A2 and B2, A6 and B6 clauses of the relevant Incoterms in order for them to be used without any ambiguity where no customs procedures are required.

It is normally desirable that customs clearance is arranged by the party domiciled in the country where such clearance should take place or at least by somebody acting there on his behalf. Thus, the exporter should normally clear the goods for export, while the importer should clear the goods for import.

(emphasis supplied)

19. In the chapter FOB of Incoterms 2000 seller''s obligations are defined as under.

A1 Provision of goods in conformity

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export licence or other official authorization and carry out, where applicable, all customs formalities necessary for the export of the goods.

A3 Contracts of carriage and insurance

a) Contract of carriage No obligation

b) Contract of insurance No obligation

A4 Delivery

The seller must deliver the goods on the date or within the agreed period at the named part of shipment and in the manner customary at the port on board the vessel nominated by the buyer.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have passed the ship''s rail at the named port of shipment.

A6 Division of costs

The seller must, subject to the provisions of B6, pay All costs relating to the goods until such time as they have passed the ship''s rail at the named port of shipment; and Where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export.

(emphasis supplied)

(A7 to A9 are omitted here as not necessary)

20. Thus it shall be the duty of seller to place the goods for transmission by bearing all the expenses of shipment including customs duties before the goods are put on board and if any transit duties are levied by the Customs authorities they shall be for the seller''s account only.

21. Like in other contracts, clause 15 of the sale contract dated 27.4.2006 between the appellant (in CEA No.158 of 2011) and the buyer reads as under.

15. Taxes/Duties: All export duties, taxes, levies are on cargo present or future, in country of origin, shall be for seller''s account. All import duties, taxes, levies etc present or future in country of destination, shall be for buyer''s account. All taxes/duties on freight and vessel is to buyer''s vessel owner''s account.

22. As per the above clause all export duties, taxes, levies etc., on cargo present or future in India shall be for seller''s account and all import duties, taxes, levies etc., present or future in the country of destination shall be for buyer''s account. Further all taxes/duties on freight and vessel is to vessel owner''s account. Buyer''s

obligations are found in Part B of FOB contract. As per point B2 read with B6 the buyer must obtain any import license where applicable and pay all customs formalities for the import of goods and where necessary for their transit through any country. From a perusal of the FOB contract terms in Incoterms, there cannot be any doubt that it is always the duty and obligation of the seller to bear the costs of customs formalities as well as the duties, taxes and charges payable upon export.

23. In these appeals, the invoice value is also FOB value. Therefore it cannot be said to include the duty paid under the Cess Act and, therefore, the presumption u/s 28D of the Act stands rebutted by the appellants. The CCE (A) went utterly wrong in construing the point A6 ignoring paragraph 14 of Incoterms as well as the sale contract between the appellant and buyer. Therefore the CESTAT was justified in holding that the finding of CCE (A) that FOB value included the cess is unsustainable. We accordingly hold that the principle of unjust enrichment does not bar the refund claims u/s 27 read with 28D of the Act and the point is accordingly answered in favour of the appellants.

Bar of refund claims for not appealing against speaking orders

24. This point needs to be adverted to in two parts separately. The first one is when the appeal is restricted only to the question of unjust enrichment whether it was competent to CESTAT to determine a question which does not arise out of the order as contemplated u/s 129B(1) of the Act. If the answer to the first one is negative, the next question would be, in the facts and the circumstances of the case, non-filing of appeal against the speaking/assessment order would bar refund claim.

(i) Scope of appeal before the CESTAT

25. We may quote Section 129(1) of the Act and Rule 10 of the CESTAT Rules, 1982.

129. Appellate Tribunal.-(1) The Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Service Tax Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.

Rule 10. Grounds which may be taken in appeal.-The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any grounds not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or those taken by leave of the Tribunal under these rules:

26. A plain reading of the above two provisions would show that the CESTAT may pass such orders thereon as it thinks fit confining, modifying, annulling the decision or order appealed against or may refer the case back to the lower authority. Rule 10 clarifies that ordinarily CESTAT shall not allow new grounds which are not taken in the memorandum of appeal unless specifically permitted to do so. Section 254(1) of the Income Tax Act, 1961 read with Rule 11 of the Income Tax Appellate Tribunal

Rules, 1963, is in similar language. These provisions are similar provisions in the repealed enactment that have come up for consideration before the Courts. We may briefly refer to a couple of them. In Scindia Steam Navigation Co. Ltd a Constitution Bench of the Supreme Court considered the scope of Section 66 of the Income Tax Act, 1922, which is similar to Section 256(1) of the Income Tax Act, 1961. After noticing the divergence of opinion among various High Courts with regard to the meaning of the words "any question of law arising out of" the Bench unanimously summed up the legal position as follows.

(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

27. The Supreme Court also categorically held that it is only a question of law that has to be raised before the Tribunal that could be held out of such order. In Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, a three Judge Bench of the Supreme Court held that, "the word ''thereon'' restricts the jurisdiction of the Tribunal to the subject matter of the appeal". A Full Bench of this Court in Begum Noor Banu Alladin considered the question whether the income tax Appellate Tribunal has jurisdiction to grant relief on consideration of an additional ground raised before it by the assessee for the first time although such ground related to an item of assessment which was not disputed at any earlier stage. After referring to the case law the Full Bench held that, "the jurisdiction of the Tribunal is necessarily restricted to the subject matter of the dispute before the first appellate authority and the Tribunal cannot allow the assessee or the Department to dispute new items or entertain new claims for deduction for the first time".

28. The Senior Standing Counsel for Central Excise relies on NTPC and Davangere Cotton Mills. We may briefly advert to these two decisions. In NTPC a three Judge Bench of the Supreme Court considered the scope of Section 254 of the income tax Act. The income tax Appellate Tribunal referred the question to the Supreme Court as to whether the Tribunal has jurisdiction to examine additional ground which has a bearing on the tax liability of the assessee. Observing that there is no reason to restrict the power of the Tribunal u/s 254 of the income tax Act only to decide the grounds which arise from the order of the CIT, the Supreme Court held that the Tribunal should not be prevented from considering the question of law arising out

of the appeal although not raised earlier and that the Tribunal will have the discretion to allow or not to allow a new ground when it is necessary to consider the question in order to correctly assess the tax liability of an assessee.

29. In Davangere Cotton Mills, the question arose whether the third member of the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT, for brevity) to whom the case was referred on difference of opinion between the Bench of two members could permit an additional ground to be raised under Rule 10 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982. The Supreme Court held that the Tribunal has got wide power to hear and consider a new ground and decide the appeal. The relevant observations are as follows.

Rule 10 of the 1982 Rules allows the parties to urge grounds not taken in the appeal provided the Tribunal grants leave to the parties to do so. The Tribunal has also been given a wide power to decide the appeal on grounds not taken in the memorandum of appeal. The only limitation on this power of the Tribunal is that the party affected must be given an opportunity of being heard in respect of the new grounds sought to be urged. According to M/s Davangere Cotton Mills Ltd., the issue had been raised originally before the Tribunal and again before the third member when it was referred to the third member on a difference of opinion. Revenue had ample opportunity of dealing with the submission. Besides, it was submitted, that the issue was in any event being agitated in the matter of M/s Coats Viyella (India) Ltd. and there was no question of taking the Revenue by surprise.

We are of the view that the Tribunal did err in refusing to hear the appellant only on the ground that the ground had not been raised earlier. Rule 10 was sufficiently widely framed to allow the Tribunal to do so. Having regard to the fact that the Tribunal was itself considering the issue on a contested (sic connected) hearing there was no reason why the appellant should have been shut out from pleading its case on the same basis.

30. In view of the above precedent law, we are of the considered opinion that the CESTAT was not precluded from hearing and considering a new ground which related to the subject matter of the dispute before them. The question whether a refund claim u/s 27 of the Act would lie when the assessee did not file appeal against the speaking/assessment order is certainly a question relating to subject matter of the suit and therefore the CESTAT cannot be denied jurisdiction to consider the question raised by the Revenue during the course of the arguments.

(ii) Consequence of non-challenge of assessment order

31. Section 27 of the Act confers a right on any person to claim refund. Section 12 of the Act is the charging section under which duties of customs shall be levied at the rates specified in the Customs Tariff Act, 1975 on goods imported into, or exported from India. "Exporter" as defined in Section 2(20) of the Act, "importer" as defined in Section 2(26) of the Act, and export/import agent as regulated by the Customs

House Agents Licensing Regulations, 2004 are liable to pay the customs duties or tariffs as charged u/s 12 of the Act. Any such person has right to claim refund if such amount is (i) paid by such person in pursuance of an order of assessment; or (ii) borne by him which means the amount might have been paid by the customs agent or a consultant or a banker but the actual amount gets debited to the importer/exporter as the case may be. An application has to be made to jurisdictional Assistant/Deputy Commissioner of Customs before expiry of one year in the case of import by an individual for his personal use or by Government or by educational/research/charitable institution/hospital and in other cases before expiry of six months from the date of payment of duty and interest. Further, every such application shall have to be accompanied by documentary proof or other evidence including documents u/s 28C of the Act, to establish that the amount of duty has actually been paid by such person and the incidence of duty has not been passed on to any other person. When the language in a taxing provision is plain, reading something which is not explicit is impermissible. However the scheme of Section 27 of the Act would itself suggest that a refund claim would always arise in pursuance of an order of assessment and if the order of assessment is adverse to a person, as long as such adverse order stands, refund claim may not lie because adverse order does not confer any right and, therefore, to come within the scope of Section 27(1) of the Act such a person has to necessarily avail the remedy of appeal before the hierarchy of authorities i.e., before the Commissioner (Appeals) u/s 128 of the Act, before the CESTAT u/s 129A of the Act, before the High Court u/s 130 of the Act, before the Supreme Court u/s 130E of the Act if it is a case of classification of goods for the purpose of specified rate of customs tariff.

32. In case an exporter/importer or a customs agent parts with customs duty under an Act which is no more in force or the duty is paid excessively than at required rate or duty is paid wrongly, is there any necessity for the person to file an appeal. In case he makes an application for refund u/s 27 of the Act and customs officials themselves find merit in the claim and allow, is it necessary to file appeal against such order which has been accepted as one where excess amount of duty is paid? In our considered opinion there is no such necessity to file an appeal and without there being an appeal, refund claim is maintainable and if the persons make out a case such refund claim ought to be allowed. The customs officials or the CESTAT cannot deny the refund when there is nothing adverse to the person who paid the customs tariff. We are supported in this view by the decisions of the Supreme Court in Flock India and Priya Blue on which the Senior Standing Counsel also placed reliance.

33. Flock India was the manufacturer of jute Hessian flocked with nylon flocks. They claim that the said product comes under tariff item 22A of the Central Excise Act, 1944. The Assistant Collector passed an order classifying the product under item 22B which attracted the duty of 25% ad valorem. The order became final. Nonetheless the manufacturer filed an application under Rules 11 and 173B of the

Central Excise Rules, 1944 for refund of duty pleading wrong classification under tariff item 22B. The refund claim was rejected by the Assistant Collector. On appeal, the Collector allowed and remanded the matter to the original authority directing to reconsider classification aspect. This order was unsuccessfully assailed by the Revenue before the CEGAT. Before the Supreme Court it was urged that the order of the Assistant Collector having not been challenged and allowed to become final, the application for refund of duty would not be maintainable. Considering Rule 11 of the Central Excise Rules which conferred a right on the person to refund, the Supreme Court held that the right of appeal is a substantive right and if the same is not availed against an order of assessment and is allowed to become final, the application for refund would not lie now and the appealable order cannot be challenged in the proceedings for refund. The relevant observations are as under.

... there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing its order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, if an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which, if we may term it so, is in the nature of execution of a decree/order.

34. Priya Blue is a case which arose out of proceedings for refund u/s 21 of the Customs Act. The said company imported a ship for breaking purposes. The amount of duty payable was assessed based on the entry and the duty was paid under protest. They then filed claim for refund which was rejected. The appeal to the Commissioner (Appeals) as well as further appeal to CEGAT were dismissed following Flock India. Both these authorities held that as no appeal had been filed against the order of assessment, the claim for refund would not be maintainable. Before the Supreme Court, it was contended that if the assessment is not correct the party could file a claim for refund and the correctness of the assessment order can be examined considering the claim for refund, even though no appeal had been

filed against the assessment order. This submission was not accepted by the Supreme Court and it was held as follows.

Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed u/s 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order. ... ... The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained.

35. Thus as held by the Supreme Court in Flock India and Priya Blue, the assessment order, which became final without there being a challenge in the appeal, that must be given effect to. Conversely if the assessment order itself enables refund, the law does not expect nor it would be logical to hold -the person to file appeal - that it would be inferred an empty formality. In the case of self-assessment if the declaration made by the person liable to duty is accepted and such return also mentions about the refund of duty to be made, there would not be any necessity to file appeal before the departmental appellate authority or the statutory tribunal.

36. In these cases all the appellants are exporters. By the time they exported the rice to foreign buyer under various shipping bills separately, as required u/s 28C of the Act, the amount of duty/cess was paid. Then the Cess Act was no more on the statute book. There is no dispute that the cess was paid under protest. But shipping bills were accepted and there was no assessment order. When the appellants moved the Assistant Commissioner u/s 27 of the Act, speaking orders/assessment orders were passed on 30.10.2006 accepting their plea that the appellants are eligible for refund in view of the abolition of the cess under various shipments. The speaking order itself is in favour of the appellants and, therefore, the question of filing appeals does not arise. A feeble submission is sought to be made by the Revenue that the shipping bill itself is an assessment order. The same cannot be accepted. Section 2(2) of the Act defines "assessment" as to include provisional assessment, reassessment or any order of assessment in which duty assessed is ''nil''. In these cases the department has not placed before us any assessment order. Therefore we cannot countenance the submission. We hold that the appellants cannot be denied refund on the ground that they have not availed the remedy of appeal and further appeal to CESTAT especially when there has had been no occasion for the appellants to go against the speaking order dated 30.10.2006 passed by the Assessment Commissioner accepting their plea on the question of cess having regard to the

Cess Laws (Repeal & Amendment) Act, 2006.

37. In the result, for the above reasons, the appeals must succeed. Accordingly these appeals are allowed setting aside the orders of the CESTAT as well as the orders-in-appeal. There shall be no order as to costs.