CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. III

Customs Appeal No. 50904 of 2019

(Arising out of order-in-appeal No. 1-2(SM) CUS/JPR/2019 dated 11.01.2019 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur).

M/s Samyak Metals Pvt. Ltd., **Appellant**
Plot No. 719, Pace City-II, Sector-37
Gurgaon-122 001.

VERSUS

Commissioner, Central Excise & CGST, NCR Building, Statue Circle **Respondent**
C-Scheme, Jaipur (Rajasthan).

WITH

Customs Appeal No. 50905 of 2019

(Arising out of order-in-appeal No. 3-4 (SM) CUS/JPR/2019 dated 15.01.2019 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur).

M/s Surya Alumex **Appellant**
F-1089, RIICO Industrial Area
Phase-III, Bhiwadi (Rajasthan).

VERSUS

Commissioner, Central Excise & CGST, NCR Building, Statue Circle **Respondent**
C-Scheme, Jaipur (Rajasthan).

WITH

Customs Appeal No. 50927 of 2019

(Arising out of order-in-appeal No. 1-2 (SM) CUS/JPR/2019 dated 11.01.2019 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur).

M/s Samyak Metals Pvt. Ltd., **Appellant**
Plot No. 719, Pace City-II, Sector-37
Gurgaon-122 001.

VERSUS

Commissioner, Central Excise & CGST, NCR Building, Statue Circle **Respondent**
C-Scheme, Jaipur (Rajasthan).

AND

Customs Appeal No. 50952 of 2019

(Arising out of order-in-appeal No. 3-4 (SM) CUS/JPR/2019 dated 15.01.2019 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur).

M/s Surya Alumex **Appellant**
F-1089, RIICO Industrial Area
Phase-III, Bhiwadi (Rajasthan).

VERSUS

Commissioner, Central Excise & CGST, NCR Building, Statue Circle **Respondent**
C-Scheme, Jaipur (Rajasthan).

APPEARANCE:

Sh. Ankit Totuka, Advocate for the appellant
Sh. Rakesh Kumar, Authorised Representative for the respondent

CORAM:

HON'BLE SH. P. V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

FINAL ORDER Nos. 50480 – 50483/2023

DATE OF HEARING: 23.03.2023
DATE OF DECISION: 13.04.2023

BINU TAMTA:

The appellant / importer, M/s Samyak Metals Pvt. Ltd., is challenging the Order-in-Appeal dated 11.01.2019 passed by the Commissioner (Appeal), whereby the orders of the Deputy Commissioner reappraising its earlier order were set aside and consequently the refund claim was also rejected.

2. That common questions of law arise in these appeals as to the jurisdiction of the Deputy Commissioner to reopen the assessment order and review its own order. Secondly, the admissibility of the

refund claims on the basis of the said order and hence the same are being taken up together.

3. Before adverting to the legal issues, we need to look into the factual matrix of the case. The appellant had imported Aluminum Scrap Mix (Tense and TT grade) weighing 24.980 MT from Benin which were classifiable under chapter heading 76020010. The Bill of Entry No. 9860159 dated 10.07.2015 was filed at ICD, Kalakaua, Concor, Jaipur at the declared value of goods at 960 USD/ MD and the assessible value was declared as Rs. 21,84,900/- on which total duty including cess was self assessed at Rs.3,95,189/-. The appraising officer found the declared value to be on the lower side as compared to the price available for similar product being imported by other importers. Further, as per Compulsory Compliance Requirement goods were found to be prone to undervaluation and therefore the same were assessed on the basis of London Metal Exchange (LME) prices of prime metal after granting permissible discount as per the Alert Notice No. 14/2005 dated 16.12.2005 issued by the Directorate General of Valuation. Accordingly, the goods were appraised at 1316.30 USD/MT and the assessible value was enhanced to Rs. 27,62,468/- on which the duty payable was reassessed at Rs. 4,99,656/-. The importer paid the said duty amount and cleared the goods on 15.07.2015 from the ICD.

4. After the clearance of the goods, the appellant vide letter dated 06.08.2015 requested the adjudicating authority to reassess the bill of entry. The Deputy Commissioner by reviewing its own order,

reassessed the goods holding that the actual high sea sales contract price paid was the transaction value and therefore accepted the value of the goods as declared by the appellant at 960 USD MT. The said Order-in-original No. 35 dated 27.02.2016 of the adjudicating authority was examined by the department and noticing that the final assessment of the goods cannot be re-opened as under the Customs Act there is no such provision for reassessment of the goods. Accordingly, the department filed an appeal before the Commissioner (Appeals).

5. In the meanwhile, the importer filed the refund claim for Rs. 1,04,466/- under section 27 of the Customs Act, 1962 on account of excess custom duty paid in view of the order of reassessment dated 27.02.2016. Accordingly, the adjudicating authority vide Order-in-original No. 166 dated 31.08.2016 allowed the refund claim on the ground that the importer had procured the goods as raw material for self consumption and therefore the principle of unjust enrichment is not applicable in the case.

6. The department challenged the order of refund by filing separate appeal and the appellant also filed cross objections thereto. The Commissioner (Appeals) disposed of both the appeals filed by the department as well as the cross objections by setting aside the reassessment order. Relying on the decision of the Apex Court in the case **Priya Blue Industries Ltd.,** Vs. **Commissioner of Customs 2004 (172) ELT 145**, the learned Commissioner held that the adjudicating authority had no jurisdiction to review its own order. In

terms thereof, the order of refund was also rejected. The principle of unjust enrichment was held to be applicable in the present case where the goods imported as raw material were captively consumed in view of the decision of the Apex Court in **Union of India** Vs**. Solar Pesticides Pvt. Ltd., 2000 (116) ELT 401**. Accordingly, both the appeals filed by the department were allowed and the impugned orders of the adjudicating authority were set aside. The appellant have filed the present appeals before this Tribunal.

7. The facts in Customs appeal Nos. 50905 & 50952/2019 filed by M/s Surya Alumex are identical and involves the import of same product & issue of valuation thereof & the jurisdiction of the Deputy Commissioner to reassess the Bill of Entry after the clearance of the goods. However, the chronology of events in this case for reference are as follows:-

08.07.2015	Bills of Entry No. 9841353 dated 08.07.2015 was filed declaring the goods as Aluminium Scrap Mix (Tense & TT Grade) with assessable value of Rs. 22,41,416/- with declared price of 977 USD/Unit. The apprising Officer based on contemporary import data and prices as per LME of the said goods and alert Notice No. 14/2005 enhanced the value @ 1318.88 USD per Unit. The importer cleared the goods as per initial assessment and payment of duty by the Customs Authority.
22.08.2015	The importer vide its letter dated 22.08.2015 received in the office on 26.08.2015 requested to reassess the Bills of Entry without mentioning any ground.
27.02.2016	The Adjudicating Authority (Deputy Commissioner) reassessed the Bills of Entry vide its OIO No. 34/2016 dated 26.02.2016 based on the impugned letter dated 22.08.2015 at the original declared value setting aside the enhanced value and reviewing his own order.
07.04.2016	The appellant had filed a refund claim in pursuance of the OIO

	No. 34/2016 dated 26.02.2016.
24.08.2016	The Competent Authority passed its order for refund vide its Order No. 164/2016 dated 24.08.2016. The Competent Authority has also confirmed that the importer has not passed any incidence of excess duty, hence unjust enrichment shall not be applicable under Section 28D of the Act.
29.11.2016	The commissioner of Customs (Preventive) passed order in Review No. 02/2016 dated 25.11.2016 against order of reassessment No. 34/2016 dated 26.02.2016. The Commissioner of Customs (Preventive) also passed order in Review No. 05/2016 dated 25.11.2016 against order of refund No. 164/2016 dated 24.08.2016 and the same were filed before the Hon'ble Commissioner (Appeals).
15.01.2019	The Commissioner (Appeals) disposed of both the appeals in favour of the Department by setting aside the reassessment order and subsequently the refund order based on the ratio laid down by the Hon'ble Apex Court in **Priya Blue**, **Flock India** case laws that the Adjudicating Authority has no authority to review its own order. The above ratio has been confirmed by the Hon'ble Apex Court in ITC case.

8. We have heard the learned Counsel for the parties respectively and perused the records of the case.

9. The basic question in the present appeal revolves around the jurisdiction exercised by the adjudicating authority in reviewing its own order. The said issue has already been decided by the Apex Court in the case of **ITC Ltd.,** Vs. **Commissioner of Central Excise, Kolkata - 2019 (368) ELT 216** relying on the decisions in **Collector** Vs. **Flock (India) Pvt. Ltd., - 2000 (120) ELT 285** and in **Priya Blue** (supra) laid down the law in following terms:

> "43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression `Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order

under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. The provisions under section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or reassessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In ***Hero Cycles Ltd. v. Union of India 2009 (240) ELT 490 (Bom.)*** though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).”

10. Following the ratio in the case of **ITC** (supra), this Bench in a recent decision of **M/s Holy Land Marketing Pvt. Ltd.,** Vs. **Commissioner of Customs, New Delhi - 2023 (2) TMI 46**, in categoric terms held that once an order permitting clearance of goods for home consumption is issued there cannot be any more assessment as the only recourse available is to file an appeal before the Appellate authority and therefore concluded that the Deputy Commissioner had no authority to issue an order of assessment after the goods were permitted to be cleared for home consumption.

11. Keeping in view the above principles we find that in the present case, the customs officers having found that the self assessment by the importer was not correct, reassessed the goods whereby the value of the goods was enhanced. The importer readily agreed with the said reassessment and paid the enhanced customs duty and got the goods cleared from the ICD. The fallacy in the approach of the importer was that after the goods were cleared, he made a request to the adjudicating authority to reassess the bill of entry and the adjudicating authority erroneously went ahead to reassess them by accepting the value of the goods declared by the importer. Such a procedure is neither available under the provisions of the Customs Act nor such an interpretation is discernible from any case law on the subject. The proper course for the appellant was to challenge the order of assessment enhancing the value as declared by him and therefore the Commissioner of Appeals rightly set aside the order of reassessment by the Deputy Commissioner. Once the order of assessment was no longer in existence, the claim for refund is automatically unsustainable, particularly in view of the analogy that the claim for refund is maintainable only in the event the bill of entry originally assessed was modified by way of an order in appeal, which the appellant herein had chosen not to file and rather adopted an innovative way of seeking the relief, having no sanctity in law.

12. It is relevant to consider the definitions of 'assessment', 'dutiable goods' and 'imported goods' under section 2 of the Act. These are as follows.

2(2) "assessment" means **determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-**

(a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;

(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;

(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;

(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and **includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil**;

13. It may be seen that assessment is the **determination of the dutiability of the goods and the amount of duty, tax, cess or any other sum** so payable under the Act and therefore, the goods must be dutiable for assessment. The term 'dutiable goods' has been defined in Section 2(14) and the term 'imported goods' is defined in section 2(25) as follows:

2(14) "**dutiable goods**" means any goods which are chargeable to duty and **on which duty has not been paid**;

2(25) "**imported goods**" means any goods brought into India from a place outside India but **does not include goods which have been cleared for home consumption**;

14. Thus, duty can be assessed only before the duty is paid and not thereafter and there can be no assessment or re-assessment of duty on the goods which are no longer dutiable goods. Further, if import duty has to be assessed on goods, they must be 'imported goods' in the first place. As soon as the order permitting clearance of goods for home consumption is given by the proper officer, they cease to be imported goods. This order is issued only after the duty has been paid. Therefore, once the goods are cleared for home consumption, they cease to be 'imported goods' and cease to be 'dutiable goods' and there can be no assessment or re-assessment of duty on such goods under section 17.

15. However, either side may be aggrieved by the assessment and if so, they can appeal against the assessment to the Commissioner (Appeals) under section 128. Departmental officers also have the power to recover duties not levied, short levied, not paid, short paid or erroneously refunded by issuing a notice under section 28. Unlike an appeal under section 128, a notice under section 28 is limited in scope by WHO, WHEN and WHY. Only 'the proper officer' can issue a notice under section 28 and within the normal period of limitation or extended period of limitation (if the elements necessary to invoke extended period of limitation are present) provided in that section and only to recover the duty not levied, short levied, not paid, short paid or erroneously refunded. It cannot be resorted to for any other purpose.

16. The question which arises is if the assessment is final on issue of an order permitting clearance of goods for home consumption and an

appeal can be filed by both sides against the assessment, what is the nature of this power under section 28. It has been held by the larger bench of the Supreme Court in **CANON INDIA PVT. LTD. Versus COMMISSIONER OF CUSTOMS**[1] that the power under section 28 is a power to review the earlier decision of assessment and it is not inherent in any authority but is specially conferred on the proper officer. The relevant paragraphs of this judgment are as follows.

> **12.The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods *i.e.* the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.**
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> **13.**Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.
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> **14.**It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28(4) to recover duties which

1 **2021 (376) E.L.T. 3 (S.C.)**

have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment. In other words, an officer who did the assessment, could only undertake reassessment [which is involved in Section 28(4).

17. We now examine when the scope of re-assesment under section

17. This section reads as follows.

Section 17. Assessment of duty. -

(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the the entries made under section 46 or section 50 and the self assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

Explanation. - For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.

18. As is evident, section 17 deals with self-assessment by the importer and re-assessment by the proper officer. It does not restrict the number of times the re-assessment can be done. For instance, if the Bill of Entry is filed with some details and the officer re-assesses the duty based on the declaration and thereafter, on examination, it is found that the quality or quantity or nature of the goods imported was different from what was declared, the officer will have to re-assess the duty again. There are also several cases where the importer or his Customs Broker realizes after self-assessment that it made a mistake, say, in not claiming the benefit of an eligible exemption notification, and requests the officer to recall the Bill of Entry in the system and re-assess it giving the benefit of the notification and the officer may do the reassessment. However, as soon as order permitting clearance of goods for home consumption is given, the goods cease to be 'imported goods' and 'dutiable goods' and there can no longer be any assessment or re-assessment, i.e., there can no longer be any **determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable. If this limitation was not there in section 17 read with section 2(2), 2(14) and 2(25), 'the proper officer' can re-open and re-assess duty in any Bill of Entry anytime and sections 28 and to some extent, section 129 would have become otiose**.

19. For the sake of completeness, we examine relevant parts of section 28 also. They read as follows.

> **Section 28. Recovery of duties not levied or not paid or short-levied or short- paid] or erroneously refunded. -**

(1) Where any duty has not been levied or not paid or short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts,-

(a) the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

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Explanation 1 . - For the purposes of this section, "relevant date" means,-
(a) in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, **the date on which the proper officer makes an order for the clearance of goods;**
(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;
(c) in a case where duty or interest has been erroneously refunded, the date of refund;
(d) in any other case, the date of payment of duty or interest

20. What is evident is that the relevant date to calculate the time limit to issue a notice under section 28 is the date on which an order permitting clearance of goods is given. This is also the date on which the scope of assessment under section 17ends.

21. We proceed to examine the provisions of appeal under section 128 also. The relevant part of this section reads as follows.

Section 128. Appeals to Commissioner (Appeals)

(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) **within sixty days from the date of the communication to him of such decision or order.**

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

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22. It is evident that the time limit for filing an appeal before Commissioner (Appeals) is the date on which the order of the officer is communicated to him. In case of goods cleared for home consumption, the date of such order is when the clock starts ticking for filing the appeal (unless the proper officer delays issuing a speaking order).

23. To sum up,

a) Once an order permitting clearance of imported goods for home consumption is issued, they cease to be imported goods and dutiable goods.

b) Since they are no longer dutiable goods, the question of determining the dutiability or the amount of duty, etc. under section 17, i.e., assessment or re-assessment, ends. The proper officer has no power to re-assess any Bill of Entry after this date.

c) The date on which the order permitting clearance of goods for home consumption is issued will be the relevant date for issuing a Show Cause Notice under section 28.

d) That date will also be relevant to calculate the limitation for filing an appeal before Commissioner (Appeals) under section 128.

24. We are of the considered view that the Commissioner (Appeals) had rightly observed that the Deputy Commissioner had no jurisdiction to review its own order and reassess the bill of entry once again after the goods were cleared on payment of duty and the same was bad in view of the decision of the Apex Court in **Priya Blue** (supra) and in **ITC** (supra). We find no justification to interfere with

the said order and we accordingly, affirm the view taken by the Commissioner.

25. In view of the settled legal position on the issue of jurisdiction as discussed above, the case law cited by the appellant in **M/s Bright Point India Pvt. Ltd.,** vs. **C.C. Mumbai, Air Cargo, Final Order No. A/87098/2021 dated 09.11.2021** is not applicable in the facts herein. The judgements cited on merits of valuation needs no consideration as we are deciding the issue of jurisdiction against the appellant. Hence we are not inclined to accept the submissions of the appellant.

26. Since the appeals are being dismissed on the ground of jurisdiction we need not dwell on the merits of the matter or the issue of unjust enrichment which is otherwise covered by the decision of the Apex Court in **Union of India** Vs **Solar Pesticides Pvt. Ltd.**, (supra).

27. Thus, all the appeals stand dismissed.

(Pronounced on 13th April, 2023).

(P. V. Subba Rao)
Member (Technical)

(Binu Tamta)
Member (Judicial)

Pant