

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

C.M.A.Nos.3490 and 3491 of 2017

The Commissioner of Central Excise
Office of the Commissioner of Central Excise, Customs &
Service Tax, 6/7, A.T.D. Street, Race Course Road,
Coimbatore - 641018. .. Appellant in both CMAs

Vs.

M/s.Aquasub Engineering,
Thudiyalur Post,
Coimbatore. .. Respondent in both CMAs

Common Prayer: Civil Miscellaneous Appeals filed under Section 35G of Central Excise Act, 1994, against the Final Order Nos.40457 and 40458 of 2015, dated 24.04.2015, on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Instant Civil Miscellaneous Appeals have been filed against the common Final Order Nos.40457 and 40458 of 2015, dated 24.04.2015, on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

2. Substantial question of law raised in the instant appeals is, "Whether in the facts and circumstances of the case CESTAT is legally correct in holding that uniformity of price before and after the finalization of provisional assessment is sufficient to rebut the presumption that the incidence of duty has not passed on to the buyers especially when statutorily the onus is on the respondent/assessee to prove conclusively with evidences that bar of unjust enrichment would not act against him as envisaged in Section 11B of the Central Excise Act, 1944?"

3. Supporting the above, Mr.A.P.Srinivas, learned counsel for the appellant, submitted that during the material time the final products were exempted from payment of duty and therefore, the intermediate goods were exposed to duty liability, vide proviso to Notification No.67/95 CE dated 01.03.1995, as amended. As the intermediate goods were captively consumed, in the manufacture of the exempted final products, the assessee requested for provisional assessment. On finalisation of the provisional assessment, some amounts became due to be refunded. The original adjudicating authority allowed refund, but credited to the fund, on the ground that incidence of duty was passed on to the buyers. CESTAT, Madras has not taken cognizance of the fact, that doctrine of unjust enrichment, would apply even to cases of captive Consumption. Placing reliance on the decision of the Hon'ble Supreme Court, in of Solar Pesticides Pvt Ltd reported in 2000 (116)ELT 401 SC, he submitted that even in the case of refund of duty paid, on the imported raw materials, which were consumed, in the manufacture of final products, such duty claimed as refund, could be passed on to the buyers indirectly, and therefore, submitted that the decision of the Tribunal, in upholding the order of Commissioner (Appeals), claimed the principle of unjust enrichment on such transactions. Therefore, is not legal and proper.

4. Learned counsel for the appellant further submitted that the Tribunal has not taken cognizance of the fact that during the year 2000-2001, proviso to Sub-rule (5) [inserted w.e.f. 25.06.1999] of the erstwhile Rule 9B of Central Excise Rules, 1944, stipulated that refund, arising out of finalization of provisional assessment would be subject to the question of unjust enrichment. Further, Central Excise Rules, 1944 were superseded and Central Excise Rules, 2001 came into effect from 01.07.2001. He submitted that in these Rules also, sub-rule(6) to Rule 7 prescribe, that any refund arising out of provisional assessment, would be subject to the question of unjust enrichment. According to him, this legal position, has been brought out clearly, in Para 3 of the decision of the Hon'ble Supreme Court in CCE, Chennai Vs. TVS Suzuki Ltd. reported in [2003(156)ELT 161(5.C.)].

"3. In order to get over the situation arising under Mafatlal Industries Ltd., (supra) vide notification No. 4S/99-C.E. (N. T.), dated 25-6-1999, an amendment was made in sub-rule (5) of Rule 9B by adding a proviso thereto. The effect of the proviso is that even after finalisation of the provisional assessment under Rule 9B (5), if it is found that an assessee is entitled to refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of Section 11B of the Act."

5. It is also the submission of the learned counsel for the appellant that the Hon'ble Supreme Court in CCE, MUMBAI-II Vs. ALLIED PHOTOGRAPHICSINDIA LTD. reported in [2004(106) ELT 3 (5.C.)] observed, as under:

"12. In the present case, reliance was placed by the respondent APIL on the above para in support of its contention that payment of duty under protest and payment of duty under provisional assessment are both "on account" payments under the Act. We do not find any merit in this argument. As discussed, there is a basic difference between duty paid under protest and duty paid under Rule 98. The duty paid under protest falls under Section 118 whereas duty paid under provisional assessment falls under Rule 98. That Section 118 deals with claim for refund whereas Rule 98 deals with making of refund, in which case the assessee has not to comply with Section 118. Therefore, Section 118 and Rule 98 operate in different spheres and, consequently, in Para 104 of the said judgment, it has been held that in cases where duty is paid under Rule 98 and refund arises on adjustment under Rule 98(5), then such refund will not be governed by Section 118. In the said para, it has been clarified that if an independent refund claim is made after adjustment on final assessment under Rule 98(5), agitating the same issues, then such claim would attract Section 118. This is because when the assessee makes an independent refund claim after final orders under Rule 98(5), such application represents a claim for refund and, it would not come in the category of making of refund and therefore, the bar of unjust enrichment would apply. Hence, there is no merit in the contention of the respondent M/s. APIL that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under the said Act. This argument was obviously advanced because unless the two payments are equated as contended, the respondent M/s. APIL was required to Comply with Section 118. In this matter, duty has been paid under protest. It is the case of the respondent M/s. APIL that since such payment was similar to payment under Rule 96, the respondent M/s. APIL was not required to comply with Section 118. In the light of the discussion hereinabove, we hold that the respondent was bound to comply with Section 118. Lastly, in any event, the application dated 11-2-1997 fell in the category of refund claim being made after finalisation of assessment of NIIL and, therefore, Section 118 had to be complied with in terms of Para 104 of the above judgment in the case of Mafatlal Industries Ltd. (supra). For above stated reasons, since there was

failure to comply with Section 118, the respondent was not entitled to refund."

6. Learned counsel for the appellant submitted that the decision of CESTAT, Madras, ignoring the aforesaid legal position, is not proper and correct.

7. Learned counsel for the appellant further submitted that CESTAT, Madras, has not considered the Judgment in Mafatlal Industries Ltd. v. Union of India reported in 1997 (89) E.L.T. 247 (S.C.), on the issue of unjust enrichment.

"The doctrine of unjust enrichment is just and statutory doctrine. No person can seek to collect the duty from both the ends. In other words, he cannot collect the duty from the 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 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.

A claim for refund made under the provisions of the Act can succeed only if the assessee alleges and establishes that he has not passed on the burden of the duty to any person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of duty or to the extent he has not so passed on, as the case may be. Where the burden of 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 ultimately claim its refund. But whether such person does not come forward or where it is not possible to refund the amount to him for one or the other reasons, it is just and appropriate that that amount is retained by the State, that is, by the people. There is no immorality or impropriety involved in such, proposition.

Where such a claim is made, it would be wholly permissible for the Court to call upon the assessee to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in I.T.C. In this connection, it is necessary to remember that whether

the burden of the duty has been passed on to a third party is a matter within exclusive knowledge of the manufacturer. He has the relevant evidence - best evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rule of equity but also because both the Central Excise duties and Customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these dues are indirect taxes, meant to be passed on, is statutorily recognized by Section 64-A of the Sale of Goods Act. In view of the specific provision contained in Section 11-B of the Act it would be legitimate for the Court to presume, until the contrary is established, that a duty of excise or a customs duty has been passed on. It is a presumption or fact which a Court is entitled to draw under Section 114 of the Indian Evidence Act. It is undoubtedly a rebuttable presumption but the burden of rebutting it lies on the person who claims the refund and it is for him to allege and establish that as a fact that he has not passed on the duty, and therefore equity demands that his claim for refund be allowed.

This is the, position de hors 1991 Amendment Act. Amendment Act has done no more than to give statutory recognition to the above concepts."

8. Learned counsel for the appellant submitted that law on the point is well settled and M/s. Aquasub Engineering, respondent herein, has failed to prove that, it has not passed on the incidence of duty, to its buyers and hence CESTAT, Madras in upholding the order of Commissioner (Appeals), is not correct and liable to be, set aside.

9. Learned counsel for the appellant further submitted that Section 12B of the Act, raises a presumption of law, that until the contrary is proved, every person who has paid duty of excise on any goods, shall be deemed to have passed on the full incidence of such duty, to the buyers of such goods. Though presumption, created in this Section, is rebuttable but very

strong, cogent, tangible evidence is required to be brought on record by the assessee, to rebut the same, and to claim refund of duty. M/s. Aquasub Engineering has failed to rebut the statutory presumption, by adducing any convincing and unimpeachable evidence. The fact that they showed composite price, in the invoices, does not lead to an irresistible conclusion, that they had not passed on the incidence of duty on the buyers. These invoices were prepared by them.

10. Learned counsel for the appellant submitted that it is difficult to assume, that composite price calculated and recorded by them, in the invoices, did not include the duty element. Similarly, keeping the price stable, even after payment of duty, would not lead to an irresistible conclusion that incidence of duty was not passed on to the customers. This, they might have done, by forgoing a part of their profit, in order to face the competitive atmosphere, in the market, for sale of their goods. Therefore, the decision of the Tribunal that the bar of unjust enrichment is not applicable, in cases where there is no change, in the price of final product, and no increase in the rate of duty, is not correct.

11. Learned counsel for the appellant submitted that the Tribunal in Commissioner of Central Excise, Goa v. Christine Hoden (I) Pt. Ltd. - 2003 (155) E.L.T. 271 (Tri. - Bom.) observed that keeping the price stable is not a ground, to hold that the manufacturer, had not passed on incidence of duty to the buyers. Price always will include cost of manufacture and duty element and other taxes plus the reasonable profit margin. The question whether incidence of duty has been passed on or not, is a matter of fact, which could be established by leading evidence. The fact that there was no difference in prices, even when the inputs suffered duty, does not establish that incidence of duty is passed on.

12. In Mafatlal Industries Ltd. V. UOI [1997 (89) E.L.T. 247 (S.C.)] the Hon'ble Apex Court observed that the incidence of duty can be passed on by a manufacturer by dipping into his profits. In view of the above legal position, the decision of the Tribunal in upholding the order of Commissioner (Appeals) is not legal.

13. Learned counsel for the appellant further submitted that the Tribunal has relied on the decision of CCE, Karput Vs. Corona Cosmetics and Chemicals Pvt. Ltd. to decide whether the respondents have discharged the burden that incidence of duty has not been passed on to the customers. The above decision is based on the decision of the Tribunal in the case of CCE Vs. Metro Tyres Ltd. - 1996(82) ELT 95. The main issue in Metro Tyres case involved was classification of goods. The above said

observations by the Tribunal, in that case were made before pronouncement of the judgment of the Constitution Bench of the Supreme Court in Mafatlal Industries, wherein it has been clearly observed at Para 91 of the judgment, as under:

"Just because duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing on the duty. Nor does it follow therefrom that the manufacturer is absorbing duty himself. The manner of preparing the invoice is not conclusive....."

"In view of this proposition of law propounded by the Apex Court while laying down the guidelines and the situations for invoking the doctrine of unjust enrichment the observations made by the Tribunal in the above said case cannot be given preference. Therefore, the decision of CESTAT in relying on the above case to arrive at its decision is erroneous."

14. Learned counsel for the appellant also submitted that the judgment of the Tribunal, in the said case, had been affirmed by the Hon'ble Apex Court, by dismissing the appeal of the Revenue, as reported in 1997 (94) E.L.T.A51 (Courtroom Highlights). However, it is not clear that on what grounds the appeal of the Revenue was dismissed, as the issue of classification was also involved therein, besides the claim of refund. Hence, learned counsel for the appellant submitted that the above decision is not squarely applicable to the facts of the present case. For the reasons stated supra, learned counsel for the appellant prayed for reversal of the order impugned.

15. Heard Mr.A.P.Srinivas, learned counsel for the appellant and perused the materials available on record.

16. Perusal of the order made in Appeal No.202 of 2005, dated 24.04.2015, on the file of the Commissioner of Central Excise (Appeals), Coimbatore and in the appeal filed by M/s.Aquasub Engineering, Coimbatore against the order-in-original No.93 of 2005 dated 23.06.2005 (C.No.IV/10/23/2005-RF), on the file of the Assistant Commissioner of Central Excise, Coimbatore, I Division, shows that, after considering the facts of the case, evidence and rival submissions, Commissioner of Central Excise (Appeals), Coimbatore, ordered in appeal No.202 of 2005 at Paragraph Nos.5 to 10, ordered as follows:

"5. I have gone through the facts of the case, grounds of appeal and the submissions made at the time of personal hearing. The issue arising for consideration is whether the refund claim in the facts and circumstance of the case is barred by unjust enrichment. There is no other dispute and the only question to be addressed is whether the appellants have succeeded in proving that the incidence of duty was not passed on to the

customers. The case of the appellants is that the incidence of duty under claim for refund was not passed on to the buyers either directly or indirectly. They mainly harp on the point that the question of directly passing on the incidence of duty under claim does not arise by virtue of exemption of final products and the incidence of duty could not have been passed on even indirectly in view of the fact that price of final product remained constant and did not undergo change from the year 1992 onwards. The appellants have relied on the Order-in-Appeal dated 30.04.2004 of Commissioner (Appeals), Trichy deciding the same issue for the earlier period in their favour and case laws of the Hon'ble Tribunal in order to drive home their point. They have also distinguished the cases of Allied Photographics India Ltd [2004 (166) ELT 3 (S.C)] and Solar Pesticide Pvt. Ltd [2000 (116) ELT 401 (S.C)] relied upon in the impugned Order. The issue herein calls for understanding the circumstance that has led to the present refund claim and it is as follows: since the appellants were unable to determine the cost based assessable value of stampings either captively consumed or transferred to their other units at the time of clearance itself for valuation purpose, they had requested for the provisional assessment pending finalisation of their financial accounts for the year 2001-02 as it was done in the earlier financial year and the request was conceded by the Department; When the provisional assessment became ripe for finalisation, the appellants had furnished necessary cost statement for verification and the Department had also requested the service of AD(cost), Trichy for detailed examination of cost data; As a result, it was finalised based on the cost sheet furnished by AD (cost), Trichy and found acceptable by the appellants; On finalisation, they had claimed the refund of excess duty paid and the excess duty relates to the duty paid on the difference in the values of the stampings adopted before and after the finalisation. Here the applicability of the principle of unjust enrichment is nobody's case. Hence the question reduces to whether or not the incidence of duty under claim has been passed on to the buyer. Since the expression 'incidence of duty' means the burden of duty, it includes even the duty passed indirectly in terms of Apex

Court's decision in the case of Solar Pesticide Pvt. Ltd referred herein. Hence the question more precisely is whether or not the burden of duty has indirectly been passed on to the buyer since the final product does not suffer duty because of exemption and since it is essentially a case of captive consumption of duty paid goods.

6. Under normal circumstance, a manufacturer would have occasion to indicate the duty amount in the invoice when the goods are cleared and this would form the basis to ascertain whether the duty amount under claim for refund was passed on to the customer or not. Since the clearance of stampings in the instant case is for captive consumption, the said occasion does not arise. In such case, one more occasion thrown upto the manufacturer is to indicate the duty amount in the invoice when the final product using the said input is cleared and this would help to ascertain whether the duty amount under claim was indirectly passed on to the customer in terms of the above said case law. But this occasion also does not arise in this case in view of the exemption of final product. Further, the provisional assessment herein is not a result of dispute either on excisability/dutiability or on classification/rate of duty of stampings. It is a typical case of provisional assessment for captive consumption resorted to, though at the instance of appellants, mainly for want of cost elements to arrive at the assessable value and it is not only periodical but also recurring. The Department in the said circumstance has equally no other option but to concede their request for provisional assessment. This situation is clearly distinguishable from the observation of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd [1997 (89) ELT 247 (S.C)] vide para 91 as reproduced hereunder:

"91. It is next contended that in a competitive atmosphere or for other commercial reasons, it may happen that the manufacturer is obliged to sell his goods at less than its proper price. The suggestion is that the manufacturer may have to forego not only his profit but also part of excise duty and that in such a case levy and collection of full excise duty would cease to be a duty of excise; it will become a tax on income or on business. We are unable to appreciate this argument. Ordinarily, no manufacturer will sell his products at less than the cost-price plus

duty. He cannot survive in business if he does so. Only in case of distress sales, such a thing is understandable but distress sales are not a normal feature and cannot, therefore, constitute a basis for judging the validity or reasonableness of a provision. Similarly, no one will ordinarily pass on less excise duty than what is exigible and payable. A manufacturer may dip into his profits but would not further dip into the excise duty component. He will do so only in the case of a distress sale again. Just because duty is not separately shown in the invoice price, it does not follow that the manufacturer is not passing on the duty. Nor does it follow therefrom that the manufacturer is absorbing the duty himself. The manner of preparing the invoice is not conclusive. While we cannot visualise all situations, the fact remains that, generally speaking, every manufacturer will sell his goods at something above the cost-price plus duty. There may be a loss-making concern but the loss occurs not because of the levy of the excise duty - which is uniformly levied on all manufacturers of similar goods - but for other reasons. No manufacturer can say with any reasonableness that he cannot survive in business unless he collects the duty from both ends. The requirements complained of (prescribed by Section 11B) is thus beyond reproach - and so are Sections 12A and 12B. All that Section 12A requires is that every person who is liable to pay duty of excise on any goods, shall, at the time of clearance of the goods, prominently indicate in all the relevant documents the amount of such duty which will form part of the price at which the goods are to be sold, while Section 12B raises a presumption of law that until the contrary is proved, every person who has paid the duty of excise on any goods shall be deemed to have passed on the full incidence of such duty to the buyer of such goods. Since the presumption created by Section 12B is a rebuttable presumption of law and not a conclusive presumption - there is no basis for impugning its validity on the ground of procedural unreasonableness or otherwise. This presumption is consistent with the general pattern of commercial life. It indeed gives effect to the very essence an indirect tax like the excise duty/customs duty. In this connection, it is repeatedly pointed out by the learned Counsel for the petitioners-appellants that the levy of duty

is upon the manufacturer/assessee and that he cannot disclaim his liability on the ground that he has not passed on the duty. This is undoubtedly true but this again does not affect the validity of Section 12A or 12B. A manufacturer who has not passed on the duty can always prove that fact and if it is found that duty was not leviable on the transaction, he will get back the duty paid. Ordinarily speaking, no manufacturer would take the risk of not passing on the burden of duty. It would not be an exaggeration to say that whenever a manufacturer entertains a doubt, he would pass on the duty rather than not passing it on. It must be remembered that manufacturer as a class are knowledgeable persons and more often than not have the benefit of legal advice. And until about 1992, at any rate, Indian market was by and large a sellers' market."

As a matter of fact, it would be relevant to reproduce the observation of Supreme Court in the case of Allied Photographics India Ltd., which clarifies the judgment of Mafatlal Industries Ltd., on provisional assessment. The relevant portion is reproduced hereunder:

"10. In the light of what is stated above, we now quote hereinbelow Para 104 of the judgment of this Court in the case of Mafatlal Industries Ltd. (supra) :-

"104. Rule 9B provides for provisional assessment in situations specified in clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11b, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is

allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) reagitating the issues already decided under Rule 9Bs - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."

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

12. In the present case, reliance was placed by the respondent M/s.APIL on the above para in support of its contention that payment of duty under protest and payment of duty under provisional assessment are both "on account" payments under the Act. We do not find any merit in this argument. As discussed, there is a basic difference between duty paid under protest and duty paid under Rule 9B. The duty paid under protest falls under Section 11B whereas duty paid under provisional assessment falls under Rule 9B. That Section 11B deals with claim for refund whereas Rule 9B deals with making of refund, in which case the assessee has not to comply with Section 11B. Therefore, Section 11B and Rule 9B operate in different spheres and, consequently, in Para 104 of the said judgment, it has been held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. In the said para, it has been clarified that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issues, then such claim would attract Section 11B. This is because when the assessee makes an independent refund claim after final orders under Rule 9B(5), such application represents a claim for refund and, it would not come in the category of making of refund and therefore, the bar of unjust enrichment would apply. Hence, there is no merit in the contention

of the respondent M/s.APIL that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under the said Act. This argument was obviously advanced because unless the two payments are equated as contended, the respondent M/s. APIL was required to comply with Section 11B. In this matter, duty has been paid under protest. It is the case of the respondent M/s.APIL that since such payment was similar to payment under Rule 96, the respondent M/s.APIL was not required to comply with Section 11B. In the light of the discussion hereinabove, we hold that the respondent was bound to comply with Section 11B. Lastly, in any event, the application dated 11-2-1997 fell in the category of refund claim being made after finalisation of assessment of NIIL and, therefore, Section 11B had to be complied with in terms of Para 104 of the above judgment in the case of Mafatlal Industries Ltd. (supra). For above stated reasons, since there was failure to comply with Section 11B, the respondent was not entitled to refund."

Notwithstanding the applicability, of unjust enrichment to the present refund case because of the subsequent amendment to Rule 9B(5), the fact remains that it makes a distinction between claiming of refund and making of refund and the possibility of both arising as a consequence of finalisation of provisional assessment. As already discussed, the provisional assessment in this case is for want of cost elements, essential to arrive at the assessable value and it is not only recurring but also periodical. The Department in the said circumstance has equally no other option but to concede their request for provisional assessment. As a matter of fact, the assessment was finalised based on the cost sheet furnished by AD(cost) and it was acceptable to both. The appellants had not objected to and it was not a matter of dispute at all. Hence the circumstance that has led to refund claim in this case places the present issue on a different footing, notwithstanding and even subjecting to the applicability of unjust enrichment in terms of Rule 7 of Central Excise Rules, 2002. If these circumstantial variations are not fairly appreciated, the mechanism of provisional assessment, I am afraid, would become a mere

ritual in the instant case.

7. The appellants have made a strong plea that the price of final product was kept the same during the disputed period and the practice of following a constant price was continuing irrespective of the fact that there was increase in the price in stampings, which went into the making of the final products. I find that the Department has not disputed the fact that the price of stampings was based on the cost of the raw materials used and that the price of the pumps-sets was in turn based on the price of stampings. The stampings having been subjected to provisional assessment, the presumption is that the Department was aware of the appellants' method of calculating the price of stampings on the basis of cost of relevant raw materials. It is seen from the records available on file that the appellants have filed a refund calculation for the year 2001-02 wherein details like provisional price of stampings and its final price were arrived on the basis of cost construction. The provisional assessment involves different types of stampings and the difference between the provisional price and final price given in respect of those models vary. Though the finalisation of assessment as in general resulted in excess payment of duty, it has also caused short payment in some types of stampings as in the case of models SM 132 6 and SM 1604 and the adjudicating authority has in fact allowed the adjustment of excess duty payment with the duty short paid on the said types before arriving at the duty amount eligible for sanctioning refund. In an ideal situation where the entire excess duty paid had occasioned adjustment towards the duty short paid in the course of finalisation of assessment and which is acceptable in law, an occasion for refunding the excess duty paid would not have obviously arisen but in effect it would amount to not only sanctioning but also granting the refund. If and when such adjustment is acceptable in law, it is because of the fact that there is no unjust enrichment in the circumstance of the case and as such it is a relevant factor to construe and also logical to conclude that the incidence of duty was not passed on to the buyer.

8. It is further seen from the price structure

of certain submersible pump sets given by the appellants for the period from 1996-97 to 2003-04 the list price of these pump sets remained constant and that the deductions from the list price like discount/charity only varied. Particularly for the year 2001-02 there is no difference in the discount rate and the charity collected, when compared to the previous year. This would in other words mean that irrespective of the fact that the provisional price of the stampings adopted was higher than the final price, the price of pump sets was kept constant and the difference was not loaded into the price of pumps. Had it been so, the price would not have remained the same but would have climbed up. It is also one of the contentions of the appellants that as supported by the evidences placed by them, the price of pumps remaining constant throughout, the higher, incidence of duty could not have been anticipated way back in 1992 so as to include in the price of final product and hence was not passed on by them. Therefore, when there is no denying the fact that any increase in the price of stampings would have had an impact in the price of pumps, the absence of such increase in the price of the pumps would be a clear indicator that the increase in the price of the stampings was not added to the price of pumps. Against this background, it is but logical and reasonable to construe that the price increase was not realised from the buyers. It is on record that the appellants have filed a affidavit that the price of the pumps was not increased from 1992 to 2004. In the absence of any specific objection in the impugned Order and in view of the affidavit given by the general manager as well as the certificate given by the chartered account to the effect that the price remained the same for all the models during the material period, there is no reason to doubt the same and the price structure given in respect of certain representative samples of the pumps has to be taken as applicable to all models. Under these circumstances, I am of the considered view that the evidences placed on record by the appellants have sufficiently shown that the additional burden corresponding to the excess duty admittedly paid by the appellants was not passed on to the customers who bought the pumps and the appellant is accordingly entitled to refund of the excess duty.

9. The lower authority has relied on the Hon'ble supreme Court's judgment in the case of Commissioner Vs Allied Photographics India Pvt. Ltd. referred herein. The appellants have on their part argued that the decision of the Hon'ble Supreme Court in the case of Metro Tyres (1997) has not been over-ruled and further argued that the Apex Court in Para 17 of its decision has categorically stated that it was a case of refund claim by the buyer and has not over-ruled any decision which dealt with the claim of refund by the manufacturer and hence distinguishable. A careful scrutiny reveals that though the Hon'ble Supreme Court gave the ruling that uniformity in price before and after assessment did not lead to an inevitable conclusion that incidence of duty was not passed on to the buyer since such uniformity may be due to various factors, yet this does not preclude an assessee to prove his case by showing additional evidences besides the fact of uniformity in price. This is so because the presumption under erstwhile Rule 9B(5) followed by Rule 7 of Central Excise (No.2) Rules, 2001 is rebuttable. The relevant portion in para 17 is extracted hereunder:-

".....In the present case, the refund claim is made by a buyer and not by the manufacturer. The buyer says that he has not passed on the burden to its dealers. The buyer has bought the goods from the manufacturer paying the purchase price which included cost of purchase plus taxes and duties on the date of purchase. In such cases, cost of purchase to the buyer is a relevant factor. None of the authorities below have looked into this aspect. Even the Appellate Tribunal has not gone into this relevant factor. It has merely quoted the passages from the order of the lower authority, whose order was impugned before it. Costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own account were relevant circumstances which the authorities below failed to examine. It was submitted that cost of purchase was not a relevant factor. It was submitted on behalf of the respondent that the resale price charged by the buyer was not a relevant factor. It was submitted that since the sale price of the goods before and after the assessment remained the same the burden

of excess duty was absorbed by the respondent. It was submitted that in any event the sale price of the goods increased much less than the amount of duty (differential) involved in this case and, therefore, incidence of duty was not passed on to the consumers. In this connection, reliance was placed on several judgments of the Tribunal. We have gone through these judgments. They are not applicable to the facts of this case. In the present case, we are concerned with the distributor buying the products from the manufacturer and reselling them to its dealers. Hence, the cost of purchase is a relevant factor. The facts of the cases before the Tribunal deal with sale by manufacturer to the consumer. They deal with assessee's invoice bearing a composite price. They are the cases which dealt with the claim of refund by the manufacturer. They did not deal with claim of refund by the buyer. Hence, they have no bearing on the facts of the present case."

It is evident from the Apex Court's observations that in the said case, the cost of purchase to the buyer was a relevant factor and that costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own account were relevant circumstances that needed examination. In the instant case, apart from what was examined as relevant factors and circumstances in the preceding paragraphs, the provisional assessment caused by captive consumption and the exemption of final product are also relevant factors to be considered in the instant case. Further, since the provisional assessment is periodical mainly for want of cost elements essential to arrive at the assessable value, any finalisation of assessable value is applicable only to the period under provisional assessment and cannot determine the duty liability for the subsequent period which is again subject to provisional assessment and hence no way to pass on the incidence of duty indirectly to the buyer especially when the price remains constant throughout. Moreover, the refund claim is not by the buyer but by the manufacturer-appellants and also the situation in the present case is different in that the case involves provisional assessment which was conceded by the Department as both the Department and the appellants had no other option.

Similarly, in the case of Solar Pesticides Pvt. Ltd, the question before the Hon'ble Supreme Court was that whether the doctrine of unjust enrichment would be applicable in respect of raw material imported and consumed in the manufacture of a final product. The Apex Court in para 24 has held as follows:-

"in our opinion, the principle of unjust enrichment incorporated in Section 27 of the (Customs) Act would be applicable in respect of imported raw material and captively consumed in the manufacture of a final product. Whether the incidence of the duty had been passed on to the consumer was not decided by the High Court in Solar Pesticide's case (supra) because in its opinion the principle of unjust enrichment could not apply to the cases of captive consumption. In the case of Solar pesticide Pvt. Ltd., therefore, we do not go into this question whether the incidence of duty had not been passed on by the respondent".

It was however made clear in para 27 of the order that the question as to whether the principle of unjust enrichment would, on facts, apply or not has to be decided in the circumstance of the case. In the above said case, the final product was cleared on payment of duty and therefore the cost of captively used items, which went into pricing of those dutiable final products, was considered to have included the duty burden also. In the present case, the final products are exempt and therefore the principle laid down in the case of Solar Pesticides cannot be applied, especially when the appellants have succeeded in showing that the increase in the price of captively used stampings was not included. The uniformity in price in this context is a relevant factor to be considered. Moreover, the appellants' case involves provisional assessment of the captively consumed goods and the extent of the cost of such stampings which is added to arrive at the value of pumps is known to the Department. As already held, the appellants have succeeded in showing that the difference (i.e.increase) between the provisional price and final price did not have any effect on the price of final products, in as much as the prices were constant. Therefore, the question as to whether the appellants had added the increase in the price

of stampings and thereby passed on the burden of duty indirectly, does not arise.

10. The appellants have also heavily relied on the order of Commissioner(Appeals), Trichy (Order-in-Appeal No.111/2004 (SCN) TRY-II dated 20.04.2004) passed on the same issue for an earlier period in their favour and requested to extend the ratio in this case also. It is noticed on examination that the issue is identical and related to the same appellants, though for the earlier period. It was in fact agitated before the original authority but has been totally ignored in the impugned order. Considering the above facts and circumstance of the case and in the absence of anything contrary to the above decision, I have no reason to differ from the view already held by him on the same issue."

17. Though, before the CESTAT, Madras, the Commissioner of Central Excise, Coimbatore, filed two appeals against the order in Appeal No.111 of 2004, dated 20.04.2004 and O.I.A.No.278 of 2005 dated 11.11.2005, and reiterated the grounds of appeal and submitted that the adjudicating authority has rightly credited the refund to the Consumer Welfare Fund, and that there was unjust enrichment and submitted that the lower appellate authority, has relied on photocopies of the invoice, and there was no evidence, to show that the price has not been changed and therefore he also submits that Chartered Accountant certificate submitted is only a stereotype one and ought not have been accepted by the lower appellate authority. CESTAT, Madras, after considering the rival submissions and the decisions relied on by both parties, at Paragraphs Nos.5 to 7, held as follows:-

"5. I have carefully considered the submission of both sides. The short issue in this case is as to whether refund sanctioned allowed in the impugned order is hit by unjust enrichment or not. There is no dispute on the fact that respondents opted for provisional assessment for the intermediate product manufactured by them and supplied to their own sister unit for manufacture of the final product "Power Driven Pumps" which is exempted from payment of excise duty. The period involved in both the cases is from 01.04.2000 to 31.03.2002. The Revenue has not brought any clear arguments against the impugned order but only stated that there was no clear evidence of enhancement in price and there is no evidence to show that the price remained constant. They have only stated that Chartered Accountant certificate is not acceptable whereas I find from the impugned order dated 11.11.2005 that the LAA

has dealt the issue in detail and passed an elaborate order extending reasons in para 6 to 8 and came to the conclusion that price of the final product cleared by the sister unit remained constant as the goods was exempted from excise duty. Relevant para-8 of the Commissioner (Appeals) order dated 11.11.2005 is reproduced as under:-

"The appellants have made a strong plea that the price of final product was kept the same during the disputed period and the practice of following a constant price was continuing irrespective of the fact that there was increase in the price in stamping, which went into the making of the final products. I find that the Department has not disputed the fact that the price of stampings was based on the cost of the raw materials used and the price of the pumps sets was in turn based on the price of stampings. The stampings having been subjected to provisional assessment, the presumption is that the Department was are of the appellant's method of calculating the price of stampings on the basis of cost of relevant raw materials. It is seen from the records available on file that the appellants have filed a refund calculation for the year 2001-02 wherein details like provisional price of stampings and its final price were arrived on the basis of cost construction. The provisional assessment involves different types of stampings and the difference between the provisional price and final price given in respect of those models vary. Though, the finalisation of assessment has in general resulted in excess payment of duty, it has also caused short payment in some types of stampings as in the case of models SM 132 6 and SM 1604 and the adjudicating authority has in fact allowed the adjustment of excess duty payment with the duty short paid on the said types before arriving at the duty amount eligible for sanctioning refund. In an ideal situation where the entire excess duty paid had occasioned adjustment towards the duty short paid in the course of finalisation of assessment and which is acceptable in law, an occasion for refunding the excess duty paid would not have obviously arisen but in effect it would amount to not only sanctioning but also granting the refund. If and when such adjustment is acceptable in law, it is

because of the fact that there is no unjust enrichment in the circumstance of the case and as such it is a relevant factor to construe and also logical to conclude that the incidence of duty was not passed on to the buyer"

6. From the above, it is clear that respondents opted for provisional assessment for want of cost of raw materials consumed in the manufacture of exempted goods and placed much reliance on the certificate of the Chartered Accountant. In a number of decisions of Hon'ble Apex Court and High Court as well as Tribunal, the Courts have consistently held that when there is no change in the price of the final product cleared and there is no increase in the rate of duty, the bar of unjust enrichment is not applicable. The Tribunal in the case of CCE Kanpur Vs Corona Cosmetics & Chemicals (P) Ltd. (supra) dealt identical issue. The relevant portion of the said decision is reproduced as under:-

"7. In this case, the issue is whether the respondents have discharged burden that incidence of duty has not been passed on to the customers. The contention of the respondents is that the invoices were showing the composite price of the goods and the price of the goods remained the same during the period in question and prior to that. The Tribunal in the case of C.C.E. V. Metro Tyres (supra) on similar facts, held that the assessee's invoices during the material period showing the composite price and duty not indicated separately, itself is sufficient to show that incidence of duty has not been passed on to the customers. This view was followed by the Tribunal in another case i.e. C.C.E. v. Metro Tyres Ltd. reported in 1996 (82) E.L.T.95 and the appeal filed by the revenue against this decision, was dismissed by the Hon'ble Supreme Court reported in 1997 (94) E.L.T. A 51. In view of the settled position of law, as discussed above, I find no infirmity in the impugned order. The appeal filed by the revenue is rejected."

7. As already discussed above, the respondents paid duty on the intermediate goods which are used in the manufacture of power driven pumps which are exempted from duty. There is no change in the price of the final product. Therefore, by following the above decision (supra), the bar of unjust enrichment is not applicable in the present case and I do not find any infirmity in the

impugned orders. Accordingly, both the impugned orders are upheld and Revenue's appeals are rejected. The cross objection filed by respondent gets disposed of."

18. Though, Mr.A.P.Srinivas, learned counsel for the Commissioner of Central Excise, Coimbatore, once again reiterated the very same grounds, before this Court, going through the material on record, we are not inclined to accept the same, for the reason that both the Appellate Authority and the Tribunal, have analyzed the evidence thereabove and arrived at a categorical finding of the fact that, there was no passing of incident of duty to the customers and hence, the question of unjust enrichment, does not arise. There is no perversity in the finding of the fact, warranting interference.

19. Decision of the Tribunal does not require any interference as no question of law is involved, much less substantial question of law, except that challenge to the concurrent finding of the fact.

20. For the above reasons, Civil Miscellaneous Appeals are dismissed. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

dm

To

1.THE COMMISSIONER OF CENTRAL
EXCISE O/O. THE COMMISSIONER OF CENTRAL
EXCISE CUSTOMS AND SERVICE TAX 6/7 ATD ST
RACE COURSE ROAD CMBT.

2.The Assistant Registrar,
Customs Excise & Service Tax Appellate Tribunal,
no.26 Sasthri Bhavan Annexe Building,
Haddows Road, Chennai.

3.The Commissioner, Appeals,
O/O.The Commissioner of Central Excise Appeals,
6/7 ATD Street, Race Course Road,
Coimbatore.

+1cc Mr.A.P.Srinivas Advocate, S.R.No.90570

C.M.A.Nos.3490 and 3491 of 2017

RRK(09/02/2018)