

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Orders Reserved On 19.03.2021	Orders Pronounced On 29.03.2021
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W.P.No.21161 of 2003

M/s.SRF Limited
Industrial Fabrics Division,
Viralimalai - 621 316.
Pudukkottai District.

.. Petitioner

-vs-

1. Customs, Excise and Gold Control
Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe,
1st Floor, 26, Haddows Road,
Chennai - 600 006.

2. Assistant Commissioner of Central Excise,
Central Excise Division,
Trichy.

.. Respondents

Petition under Article 226 and 227 of the Constitution of India for issuance of writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in its Final Order No.351-376/2003 dated 28.05.2003 in Appeal No.E/1506/98 and quash the same and direct the second respondent to refund the sum of Rs.24,19,932.21 along with interest at applicable rate.

For Petitioner : M/s.L.Maithili

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel

ORDER

T.S.SIVAGNANAM, J.

The petitioner, a public limited company engaged in the manufacture of industrial fabrics is aggrieved by the order dated 28.05.2003 passed by the Customs, Excise and Gold Control Appellate Tribunal in Final Order No.351-376/2003, in and by which the challenge to the order passed by the Commissioner of Customs and Central Excise (Appeals), Trichy dated 09.10.1997 was unsuccessful. The said order was passed by the first appellate authority confirming the order passed by the Assistant Commissioner, Central Excise Division, Trichy rejecting the refund claim made by the petitioner for refund of a sum of Rs.24,19,932.21.

2.The facts which are relevant for the disposal of the writ petition are noted herein below:

2.1.The petitioner manufactures various industrial fabrics such as rubberised textile fabrics falling under heading 5905.20 of the Central Excise Tariff Act, 1985. They were paying additional duty of excise at the rate of 10% advalorem on the rubberised textile fabrics upto 06.07.1990. As per the Finance Act which came into effect on 31.05.1990, the petitioner was eligible to claim NIL rate of additional duty of excise on the said product. Hence, on 21.07.1990 they filed a refund claim for the additional duty of excise paid by them on rubberised textile fabrics during the period from 31.05.1990 to 06.07.1990. Subsequently, the petitioner had raised credit notes to its customers who have received the goods, for the amount of additional duty of excise collected from them during the period for which refund was claimed by the petitioner. The original authority, namely, the second respondent herein issued a show cause notice to the petitioner calling upon them to state as to why the refund claimed by them should not be credited to the Consumer Welfare Fund in terms of Section 11B(2) r/w. Section 12C of the Central Excise and Salt Act, 1944 [hereinafter referred to as "the Act"]. The second respondent proposed that since the incidence of duty had been passed on to the buyers by the petitioner on the date of clearance of goods, the petitioner ceases to be entitled for refund. The petitioner by contending that though apparently the incidence of additional duty of excise had been passed on to the consumers by issue of invoices, at a later date the same was reversed by issue of credit notes and requested to sanction the refund claimed.

2.2.The second respondent did not accept the stand taken by the petitioner and held that at the time of issue of

invoices/gate passes, the petitioner have collected additional duty of excise from the customers during the relevant period amounting to Rs.24,19,932.21 and at a later date at the time of filing the refund claim, the petitioner had produced copies of credit notes stating that the duty collected from the buyers had been refunded to the assessee and hence not entitled for refund claim. The adjudicating authority referred to Section 11B of the Act and held that the amount of duty of excise would be refunded to the assessee if such duty relates to (1) the duty of excise paid by the manufacturer, if he had not passed on the incidence of duty to any other person, (2) the duty of excise borne by the buyer if he had not passed on the incidence of duty to any person and (3) the duty of excise borne by any other such class of applicants as Central Government may by notification in the Official Gazette specify. It was held that since the incidence of duty had been passed on by the assessee to the buyers on the relevant date, they cease to be entitled to the claim of refund and the issue of credit notes subsequently does not alter the position as there is no provision in the amended section for such an undertaking. Further the authority held that since the assessee has collected the sum representing it as excise duty from the buyers at a time when no excise duty was leviable as additional duty of excise, the issue would fall under the purview of Section 11D of the Act according to which every person who has collected any amount from the buyers on any goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government. With the above finding, the claim for refund was rejected.

2.3.The assessee preferred appeal to the First Appellate Authority, namely, the Commissioner of Customs and Central Excise (Appeals), Trichy contending that the duty was paid in excess and had not ultimately been passed on to the customers and hence, there was no justification for denying the refund. The assessee referred to the correspondences exchanged in this regard to establish that they had actually suffered the duty and the credit note had been issued prior to the date of payment to the customers who enjoyed 90 days credit from the date of issue of invoice/gate pass. The First Appellate Authority rejected the appeal by order dated 09.10.1997 and while doing so referred to the decision of the Madras Bench of CEGAT in the case of CCE vs. Addison Company [1997 (93) ELT 429], wherein it was held that refund is not admissible if credit notes have been issued not at the time of clearance of the goods but subsequently.

2.4.Aggrieved by such order, the petitioner preferred appeal to the Tribunal reiterating the grounds which were raised before the Commissioner and it is submitted that it is the petitioner/assessee who has actually suffered the duty liability by refunding the excise duty collected from the customers and the Department cannot close their eyes to this fact and cannot

do away with reality and the assessee was entitled for the refund. Further it was contended that the claim for refund cannot be rejected either on account of unjust enrichment or on the ground that the assessee has no locus standi to make a claim. The assessee relied on Section 11B(2)(d)/(e) and submitted that in terms of the said provision, they are entitled for refund. The Tribunal by the impugned order dismissed the appeal on merits. It was held that the issue is covered by the decision of the larger bench of the Tribunal in the case of S.Kumar's Ltd vs. CCE, Indore [2003 (55) RLT 399 (CEGAT-LB)], wherein it was held that the provisions of unjust enrichment are attracted even where the collected amount of excise duty had been paid back to the buyer subsequently. The larger bench of the Tribunal held that the decision in Sangam Processors Ltd. vs. CCE [1994 (71) ELT 989(T)] which was affirmed by the Hon'ble Supreme Court has to be followed and the assessee is not entitled for the refund claim as it has been proved that the incidence of duty has been passed on to the customers at the time of clearance of goods. The Tribunal also referred to the decision of CEGAT larger bench in the case of Mira Silk Mills vs. CCE Mumbai [2003 (56) RLT 152 (CEGAT-LB)]. Challenging the order of the Tribunal, the assessee has filed this writ petition.

3. Since the matter was filed as writ petition in the year 2003 and the matter has been directed to be heard by a Division Bench, the petitioner had filed a miscellaneous petition in W.M.P.No.4698 of 2021 raising substantial questions of law. The said petition was ordered on 19.03.2021. Accordingly, the writ petition is admitted to decide the following substantial questions of law, which have been raised for consideration in this writ petition:

"I. Whether the Tribunal was correct in not determining the factual position as to the person who had borne the incidence of duty?

II. Whether the Tribunal had failed to perform its statutory duty by not considering the contention and evidence placed before the Original Authority and the 1st Appellate Authority and their findings on factual aspects of the Petitioner having borne the incidence of duty?

III. Whether the presumption under Section 12B regarding the incidence of duty having passed on is a rebuttable one?

IV. Whether when the Petitioner led reliable evidence of the incidence not having been passed on to the purchaser or any other person?

V. Whether the Revenue had failed to rebut the evidence produced by the petitioner that the presumption enacted by Section 12B sufficiently

stands rebutted?

VI. Whether the Petitioner is entitled to interest under Section 11BB, 3 months from the date of filing the refund application (i.e. 21.07.1990) till the date of payment?

4. We have elaborately heard M/s.L.Maithili, learned counsel appearing for the petitioner/assessee and Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the revenue.

5. The facts which we have set out in the preceding paragraphs are not in dispute. The assessee's case largely rests upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Madras vs. Addison & Co. Ltd. [2016 (339) ELT 177(SC)]. The learned counsel for the petitioner referred to paragraph 2 of the judgment to show to us that the judgment dealt with an appeal arising out of a judgment of this Court in 2001 (129) ELT 44 (Mad.) and appeal against the judgment of the Bombay High Court in Central Excise Appeal No.100 of 2008 and other decisions of the other High Courts as well. Paragraph 8 of the judgment was referred to show as to what was the questions referred to the larger bench for decision. The learned counsel referred to paragraphs 14, 21, 34, 35 and 36 of the judgment. It is submitted by the learned counsel that Civil Appeal No.8488 of 2009 was filed against the judgment of the High Court of Bombay in Central Excise Appeal No.100 of 2008, the facts of the said case are identical to that of the assessee's case. In the said appeal, the assessee was the respondent, a 100% Export Oriented Unit [EOU] manufacturing cotton yarn. They filed an application for refund on the ground that it had paid excess excise duty. The assessee therein initially passed on the duty incidence to its customers and later returned the excess duty amount to its buyers which was supported by a certificate issued by the Chartered Accountant. The refund claim was rejected by the original authority on the ground that the assessee did not submit either the credit notes or the Chartered Accountant's certificate at the time of filing the refund application. The Commissioner (Appeals) allowed the appeal taking note of the certificate issued by the Chartered Accountant and the credit notes and held that there is no reason to doubt the genuineness of the documents produced. This order was affirmed by the Tribunal and later confirmed by the High Court of Bombay.

6. The revenue challenged the correctness of the judgment before the Hon'ble Supreme Court wherein it was held that except for a factual dispute about the genuineness of the certificate issued by the Chartered Accountant and the credit notes raised by the assessee regarding the return of excise duty paid by the assessee there is no dispute in the case of the duty being

passed on to any other person by the buyer. As it is clear, that the said assessee has borne the duty burden it cannot be stated that it is not entitled for the refund of the excess duty paid and noting the facts being different from the facts in the other appeal, namely, Civil Appeal No.7906 of 2002 the appeal preferred by the revenue was dismissed.

7.The decision in Addison's case was pressed into service by Ms.L.Maithili, learned counsel for the petitioner to support her stand that in the assessee's case also credit notes have been issued and those documents cannot be disputed and the genuineness was never questioned rather the first appellate authority and the Tribunal did not examine those documents and had it been done, it would have clearly establish that on account of issuance of the credit notes it is the assessee who has borne the burden of the duty and it has not been passed on and the refund claim is tenable. Reliance was placed on the decision of the Division Bench in the case of TVS Electronics Ltd. vs. Assistant Commissioner of Central Excise, Chennai [2017 (348) ELT 630 (Mad)], wherein the Division Bench following the decision in Addison & Company Limited remanded the matter to the Assessing Officer to examine the issue of unjust enrichment. Reliance was also placed on the decision in the case of Commissioner of Central Excise, Pune-II vs. Daimler Chrysler India Pvt. Ltd. [2016 (342) ELT 28 (Bom)].

8.Mr.A.P.Srinivas, learned Senior Standing Counsel submitted that the judgment in Addison and Company Ltd would have no application to the assessee's case and identical issue as in the case on hand was decided by the Division Bench of this Court in favour of the Revenue in the case of Chennai Petroleum Corporation Limited vs. Commissioner of GST and Central Excise, Chennai North [2021 (375) ELT 129(Mad)]. Further, it is submitted that it is an admitted case that the duty had been passed on and the plea raised by the assessee that they have issued credit notes subsequently cannot be taken into consideration as the word "buyer" in clause (e) to Proviso to Section 11B(2) cannot be restricted to the first buyer from the manufacturer.

9.We have closely and carefully examined the facts in the case of Addison and Co. Ltd. Before we go into the operative portion of the judgment, we need to take note of the facts in one of the appeals against a judgment of this Court, namely, Civil Appeal No.7906 of 2002. The respondent/assessee in the said appeal was a manufacturer of cutting tools, they filed a refund claim and a supplemental refund claim towards excise duty paid on various taxes and discounts such as turnover tax, surcharge, additional sales discount, transitory insurance, excise discount, additional discount and turnover discount. The

Department opined that the refund towards turnover discount and additional discount was to be rejected as the said assessee was not eligible for deduction from the wholesale price for determination of value under Section 4 of the Act and a show cause notice was issued as to why the refund claim involving turnover discount and additional discount should not be rejected. After hearing the said assessee the claim was rejected in respect of turnover discount and additional discount on the ground that the quantum of discount become known only at the year end.

10.The said order was reversed by the first appellate authority who held that the assessee was entitled for refund. As per the amendment to Section 11B of the Act, an application filed for refund prior to the Central Excise and Customs Laws (Amendment) Act, 1991 shall deemed to have been made under the Amendment Act and considered accordingly. The Assistant Collector of Excise issued a show cause notice directing the assessee to produce evidence in support of their refund claim. It was mentioned in the said notice that the burden of proof to show that full incidence of duty has not been passed on to the buyers is on the assessee as per Section 12B of the Act. The Assistant Collector held that the assessee is entitled for refund. The first appellate authority rejected the appeal filed by the revenue. The revenue's appeal before the Tribunal was allowed holding that the assessee would be entitled to grant of refund only if he had not passed on duty burden to his buyers. It was also held that the buyer in turn would be entitled to refund only if he has not passed on the incidence of duty to any other person. Further the Tribunal held that the event which gives rise to cause of action for refund is payment of duty made in respect of goods cleared from the factory and once the duty burden had been passed on to the buyer at the time of clearance, issuance of credit note at a later point of time would not entitle the assessee to claim any refund. The Tribunal also held that burden of duty is normally passed by the manufacturer to the dealer and to the ultimate consumer.

11.The said assessee filed an application for reference to this Court, Madras and one of the questions was whether the Tribunal after finding the duty element on the discount to its dealers, the applicant had satisfied the requirements of proviso (d) to section 11B(2) of the Act was entitled to be paid the amount claimed as refund. The second question being whether the Tribunal after finding that the burden of duty was passed on by the applicant to its various dealers by issue of credit notes was right in concluding that the ingredients of Section 11B were not satisfied. This Court by judgment dated 23.11.2000 [2001 (29) ELT 44 (Mad)] answered the reference in favour of the said assessee on the ground that the refund towards deduction of

turnover discount cannot be denied on the ground that there was no evidence to show who is the ultimate consumer of the product and as to whether the ultimate consumer had borne the burden of duty. Further, it held that Section 11B of the Act cannot be construed as having reference to the ultimate Consumer and it would be sufficient for the claimant to show that he did not pass on the burden of duty to any other person.

12. Challenging the legality and validity of the judgment of this Court, Civil Appeal No. 7906 of 2002 was filed before the Hon'ble Supreme Court. On behalf of the assessee, it was contended before the Hon'ble Supreme Court that turnover discount is an admissible deduction, the scheme of turnover discount was known to the buyer even at the time of sale, discount was given on the basis of the turnover of sales made by the buyer and the credit notes issued to the buyer contains the discounts and the duty element. It was submitted that the incidence of duty was originally passed on to the buyer. Further it was contended that trade discounts should not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. The Department contended that the verification to be done by the Department to enquire about the ultimate buyer who has actually paid the duty is not a futile exercise and the refund can be granted only to the person who has paid the duty and not to anyone else and if the ultimate consumer cannot be identified, the amount would be retained in the Fund and utilized for the benefit of Consumers.

13. The question that arose for consideration before the Hon'ble Supreme Court was whether the assessee (Addison & Co. Ltd.) is entitled for a refund and whether there would be unjust enrichment if the said refund was allowed. The Hon'ble Supreme Court noted that the Special Bench of CEGAT, New Delhi held that turnover discount was not an admissible abatement on the ground that the quantum of discount was not known prior to the removal of goods and in an appeal filed by the assessee before the Hon'ble Supreme Court by judgment dated 11.03.1997, it was held that turnover discount is an admissible deduction. The Department contended that any credit note that was raised post clearance will not be taken into account for the purpose of refund by the Department. This submission was not accepted by the Hon'ble Supreme Court by referring to the decision in Union of India vs. Bombay Tyre International Private Limited [1984 (17) ELT 329 (SC)], wherein it was held that trade discounts shall not be allowed only because they are not payable at the time of each invoice or deducted from the invoice price. Thus it was held that the assessee is entitled for filing a claim for refund on the basis of the credit notes raised by him towards trade discounts. Thus the issue in Addison and Co. Limited was as to whether the claim for refund on the basis of credit notes

raised by the assessee towards trade discounts was admissible or not. The factual position was entirely different to that of the case on hand. The Hon'ble Supreme Court then proceeded to consider the case of the assessee therein who had admitted that the incidence of duty was originally passed on to the buyer and there is no material on record to show that the buyer to whom the incidence of duty was passed on by the assessee did not pass it on to any other person and that there is a statutory presumption under Section 12B of the Act that the duty has been passed on to the ultimate consumer. Further it was held that it is clear from the facts that the duty which was originally paid by the assessee was passed on, refund claim by the assessee is for the amount which is part of the excise duty paid earlier and passed on and the assessee who did not bear the burden of duty though entitled to claim deduction is not entitled for refund as he would be unjustly enriched. The Hon'ble Supreme Court referred to paragraph 108 of the decision in the case of Mafatlal Industries Limited and others vs. Union of India and others [1997 (89) ELT 247(SC)]. The following paragraphs of the judgment would be relevant:

"19. The sine qua non for a claim for refund as contemplated in Section 11-B of the Act is that the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person. Section 11-B (2) provides that, in case it is found that a part of duty of excise paid is refundable, the amount shall be credited to the fund. Section 2 (ee) defines Fund to mean the Consumer Welfare Fund established under Section 12-C. There is a proviso to Section 11-B (2) which postulates that the amount of excise duty which is refundable may be paid to the applicant instead of being credited to the fund, if such amount is relatable to the duty of excise paid by the manufacturer and he had not passed on the incidence of such duty to any other person. Clause (e) to proviso of Section 11-B (2) also enables the buyer to receive the refund if he had borne the duty of excise, provided he did not pass on the incidence of such duty to any other person. There is a third category of a class of applicants who may be specified by the Central Government by a notification in the official gazette who are also entitled for refund of the duty of excise. A plain reading of Clauses (d), (e) and (f) of the proviso to Section 11-B (2) shows that refund to be made to an applicant should be relatable only to the duty of excise paid by the three categories of persons

mentioned therein i.e. the manufacturer, the buyer and a class of applicants notified by the Central Government. Clause (e) refers to the buyer which is not restricted to the first buyer from the manufacturer. The buyer mentioned in the above Clause can be a buyer downstream as well. While dealing with the absence of a provision for refund to the consumer in the rules this Court in *Mafatlal Industries Vs. Union of India* (supra) held as follows:-

"98.A major attack is mounted by the learned counsel for petitioners- appellants on Section 11-B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12-D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Shri Nariman. It is a colourable device - declaimed Shri Sorabjee - "a dirty trick" and "a shabby thing". The reply of Shri Parasaran to this criticism runs thus: It ill- becomes the manufacturers/Assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to subsection (2) of Section 11- B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of

duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method – says Shri Parasaran".

20. There was a further submission which was considered in the said judgment about the convenience/difficulty for the ultimate consumer to make applications for refund. In that connection it was held as follows:-

"99. We agree with Shri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12-C which creates the Consumer Welfare Fund and Section 12-D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provide for "grants" being made in favour of consumer organisations for being spent on welfare of consumers. But, this is perhaps for the reason that clause (e) of the proviso to sub-section (2) of Section 11-B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in clause (e) of Explanation B appended to Section 11-B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. A practical difficulty is pointed out in this behalf by the learned counsel for appellants-petitioners: It is pointed out that the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund – it is submitted – he has to go to the place where the duty

has been paid by the manufacturer and apply there. It is also pointed out that purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claims will be filed only by purchasers of high-priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground – assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg [(1981) 4 SCC 675 : 1982 SCC (Tax) 30 : AIR 1981 SC 2138] and other decisions cited in paras 87 and 88.)"

21. That a consumer can make an application for refund is clear from paras 98 and 99 of the judgment of this Court in Mafatlal Industries (supra). We are bound by the said findings of a Larger Bench of this Court. The word 'buyer' in Clause (e) to proviso to Section 11-B (2) of the Act cannot be restricted to the first buyer from the manufacturer. Another submission which remains to be considered is the requirement of verification to be done for the purpose of finding out who ultimately bore the burden of excise duty. It might be difficult to identify who had actually borne the burden but such verification would definitely assist the Revenue in finding out whether the manufacturer or buyer who makes an application for refund are being unjustly enriched. If it is not possible to identify the person/persons who have borne the duty, the amount of excise duty collected in excess will remain in the fund which will be utilized for the benefit of the consumers as provided in Section 12-D."

Thus the appeal filed by the revenue was allowed and the judgment of this Court was set aside.

14. Ms. L. Maithili, learned counsel for the petitioner referred to paragraph 35 of the judgment which deals with Civil Appeal No. 8488 of 2009 arising out of judgment of the High Court of Bombay. To be noted that the said case also pertains to a case of trade discount and the dispute was with regard to genuineness of the documents which was not initially produced at

the time of filing the refund claim but subsequently produced and the genuineness having been satisfied, the appeal filed by the revenue was dismissed.

15. In our considered view the said decision can be of no assistance to the case of the assessee before us as the fact situation was entirely different. Similarly, the case in TVS Electronics Limited also pertains to the discounts offered by the assessee which is passed on to the distributors [buyers] by virtue of post sales credit notes. The Division Bench by referring to paragraph 14 of the judgment in Addison & Co. Ltd., wherein it was held that the assessee is entitled for filing a claim for refund on the basis of credit notes raised by them towards discounts, remanded the matter to decide the aspect of unjust enrichment. On facts, the said decision cannot be applied to the assessee's case.

16. In Daimler Chrysler India Pvt. Ltd., the Court found that apart from noting the decisions of this Court and the High Court of Andhra Pradesh remanded the matter to verify the documents. We find in the said decision that the appeal was restored to the file of the Tribunal for examining the issues highlighted in the judgment, one of which was whether the dealer has been found to be recovering the amounts or having given credit to the buyer, then whether raising of credit notes would negate the presumption raised in Section 12B of the Act or not. It was made clear that the Court was not expressing any opinion on the issue and directed the Tribunal to take a decision. We are of the view that the decision may not render assistance to the case of the assessee.

17. The closest decision to the facts of the case on hand is the decision in Chennai Petroleum Corporation Limited, wherein the appellant assessee raised an invoice for supply of Raw Naptha which is a dutiable product and the invoice was raised by the said appellant assessee on its marketing company M/s. IOCL who in turn raised invoice on the purchaser, M/s. PPN who in turn manufactured power by use of Raw Naptha and other raw materials. It was held that if at all duty can be said to have been collected in excess on account of over valuation of the supplies, it is the consumer of the said raw materials/Raw Naptha, namely, M/s. PPN who could have been claimed refund of excise duty as per settled legal position and merely because M/s. IOCL issued credit note to the buyer, namely, M/s. PPN, it cannot be said that the incidence of excise duty was not passed on to the purchaser, M/s. PPN. It was further held that once the incidence of excise duty has been passed on, whether it further passed on to the ultimate buyer or consumer or not is not a relevant question and the appellant assessee therein cannot be said to have borne any incidence of excise duty illegally levied

and therefore they have no right to claim any refund. The Court also referred to the decision of the Constitutional Bench in Maffatlal Industries Limited which was followed in Addison and Co. Ltd.

18. Thus the decision in Addison and Co. Ltd., particularly the ratio laid down in paragraphs 19 to 21 of the judgment is a clear answer to the assessee's case. Admittedly the assessee at the time of issuance of invoices/gate passes have collected the additional duty of excise from its customers/buyers. Much after that they filed a refund claim and produced the copies of credit notes stating that the duty collected from the buyers had been refunded to the assessee and hence they are entitled for claiming refund under Section 11B of the Act. Thus, it is not disputed by the assessee that the amount of duty of excise had been passed on to its customers. As rightly argued before us by Mr. A. P. Srinivas, the verification to be done by the Department, to enquire about the ultimate buyer who has actually paid the duty is not a futile exercise as refund can be granted only to a person who has paid the duty and not to anyone else and if the ultimate consumer cannot be identified, the amount would be retained in the fund. This is more so because the word "buyer" in clause (e) to proviso to Section 11B(2) of the Act cannot be restricted to the first buyer from the manufacturer. The basis for the claim of refund was on account of the fact that on or after 31.05.1990 the rate of duty was NIL. For the period between 31.05.1990 and 06.07.1990 the assessee paid additional duty of excise and had passed on the incidence of duty to its customers at the time of issue invoices/gate passes. Therefore, the subsequent issuance of credit note is of little avail as the incidence for the excise duty is deemed to have been passed on by the assessee to its buyer and therefore not entitled for filing an application for refund under Section 11B of the Act merely because they subsequently came to know that the rate of duty was NIL and credit notes are said to have been issued to the buyer. Thus, we find that the Tribunal was right in affirming the order passed by the First Appellate Authority who confirmed the order passed by the adjudicating authority.

19. In the result, the writ petition is dismissed and the substantial questions of law are answered against the petitioner/assessee. No costs.

Sd/-

Assistant Registrar (CS VII)

//True Copy//

Sub Assistant Registrar

CSE

To

1. Customs, Excise and Gold Control
Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe,
1st Floor, 26, Haddows Road,
Chennai - 600 006.

2. Assistant Commissioner of Central Excise,
Central Excise Division,
Trichy.

+2cc to Mr.A.P.Srinivas, Advocate, S.R.No.18314 & 20332

+1cc to M/s.L.Maithili, Advocate, S.R.No.20620

Order in
W.P.No.21161 of 2003

PMK(CO)
TE (20/04/2021)



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