CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.53990 of 2014

(Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/34-36/14 dated 17/02/2014 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

M/s Samsung India Electronics Pvt. Ltd., ...Appellant
(B-1, Sector-81, Phase-II, Noida, U.P.-201305)

VERSUS

Commissioner of Central Excise, Noida ....Respondent

(Hotel Formula One, Knowledge Park-3, Greater Noida)

WITH

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APPEARANCE:

Shri Atul Gupta, Advocate &
Ms Ushmeet Kaur Monga, Advocate for the Appellants
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOS.70631-70633/2024

DATE OF HEARING : 04 June, 2024
DATE OF DECISION : 04 June, 2024

SANJIV SRIVASTAVA:

These appeals are directed against Order-in-Appeal No.NOI/EXCUS/000/APPL/34-36/14 dated 17/02/2014 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida. By the impugned order Commissioner (Appeals) have upheld the Order-in-Original Nos.409/R/AC/N-IV/2013-14, 410/R/AC/N-IV/2013-14 and 411/R/AC/N-IV/2013-14 all dated 11.09.2013 and dismissed the appeals filed by the appellant against rejection of their refund claims for the reason of unjust enrichment.

2.1 Appellants have preferred three refund claims after finalization of provisional assessment vide order dated 12.09.2005, 08.11.2006 and 31.01.2008 claiming refund claim amounting to Rs.20,03,454/-, Rs.04,26,452/- and Rs.66,80,703/-. These refund claims were preferred as directed by the finalization orders.

2.2 After scrutiny and examination, it was observed that these refund claims would not be admissible as burden of amount claimed as refunded have already been passed on by the appellant. Show cause notices were issued for rejection for these refund claims.

2.2 These show cause notices have been adjudicated by the orders referred in para-1 above rejecting refund claims. Aggrieved appellants have filed appeal before Commissioner (Appeals), which has been dismissed as per the impugned order.

2.3 Aggrieved appellants have filed these appeals.

3.1 We have heard Shri Atul Gupta & Ms Ushmeet Kaur Monga learned Counsel appearing for the appellants and Shri Manish Raj learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant learned Counsel submits that-

- The order finalizing assessment under Rule 7 of Central Excise Rules, 2002 determining the amount of duty paid in excess cannot be reviewed/revised as there does not exist any provision to do so. The Assessment Order becomes final. Therefore, the refund amount claimed by the assessee cannot be questioned once the Department has issued and accepted the finalization of assessment. Reliance is placed vide the decision of this Tribunal in the case of CCE Vs M/s CEAT Ltd. Final Order No.85668/2023.
- Exactly in similar set of facts, Commissioner (Appeals) has dismissed the appeal filed by the Revenue against Order-in-Original No.186-187/CE/Noida/2008 dated 30.12.2008 filed against Order-in-Original Nos. 608/AC/N-IV/2007-08 & 609/AC/N-IV/2007-08 dated 31.03.2008 by which the refund claims of the Respondent (assessee) were allowed. Subsequently, appeals were preferred before the Hon'ble Tribunal against the order of the Commissioner (Appeals). The Hon'ble Tribunal also dismissed the appeal filed again such order-in-appeal via Order No. A/71098-71099/2016-EX[DB] dated 28/11/2016.
- Incidence of differential duty has not been passed on to buyers.
- Duty claimed as refund is receivable in balance sheet and sufficient to show that duty has not been passed on to the customers. Reliance is placed on the decision of this Tribunal in the case of Dabur India Ltd. Vs CCE, Ghaziabad 2008 (228) ELT 131 (Tri.-Delhi) affirmed by Hon’ble Allahabad High Court as reported at 2014 (304) ELT 321 (All).
- Chartered accountant’s certificate certifies that duty burden has not been passed on and is sufficient to substantiate the bar of unjust enrichment. Reliance is placed by the decision of this Tribunal in the case of STP Ltd. Vs CC 2011 (267) ELT 110.

- No tax can be collected without the authority of law and Article 265 of the Constitution of India requires the excess tax realized must be refunded.

3.3 Learned Authorised Representative reiterates the findings recorded in the orders of the lower authorities.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 For holding against the appellant impugned order records as follows:-

> *"5.2 Since the issue involved in all the three appeals filed by the appellants is identical and common therefore all the three appeals are disposed of by this common order. The issue involved in these appeals is refund of duty paid in excess on the provisional assessed goods. The provisional assessed goods were cleared from factory of manufacture to Depot from where the goods were sold.*
>
> *5.3 It is observed that the adjudicating authority found that the claims of refund of duty in question were inadmissible to the appellants on the grounds that the appellants failed to establish that they had not passed on the burden of incidence of duty claimed as refund to their buyers. The entire amount of duty including the duty claimed as refund, had been passed on to their respective buyers in all cases of sale of their colour monitor at the time of sale Thus, the refund claims were hit by provisions as laid down in clause (d) of Sub-section 2 of Section 11-B of the Central Excise Act, 1944, i.e claims attract the provisions of unjust enrichment.*
>
> *5.4 While rejecting the claims of refund being hit by the provisions of clause (d) of Sub-section 2 of Section 11-8 of the Central Excise Act, 1944, the adjudicating authority observed that the invoices issued, by the appellants from their Depot for sale of goods, assessed provisionally, were composite vi without separately mentioning the element of*

duty, and in this situation it cannol be assumed that duty less than that what was paid provisionally has been charged; that this fact itself clearly shows that the entire amount of duty burden has been passed on to the buyers, that under Section 4 (c) (iii) of the Central Excise Act, 1944, a Depot, from where excisable goods are sold after their clearance from the factory, is defined as a place of removal, that Section 12-A of the Central Excise Act, 1944 stipulate that every person liable to pay duty of excise on any goods shall, at the time of clearance of goods, prominently indicate in all the documents relating to the assessment, sale invoices and other like documents, the amount of such duty which will form the part of the price at which goods are to be sold; that by not showing the duty element contained in the sale price separately on the invoices, not only did the appellants contravene the provisions of Section 12-A, ibid, but also rendered impossible any verification of such duty element, actually passed on the customers, by the Department, that the invoice amount at the Depot was less than the invoices amount paid in factory, then the duty passed on from the Depot must necessarily be less than that paid on the clearance from the factory is not correct and does not stand up to arithmetical accuracy, that the total invoice amount at depot vis-à-vis the total invoice amount at factory gate cannot be an accurate yardstick for deciding whether the duty incidence has been passed on to the customer and this can only be determined correctly by verifying the duty amount mentioned on the depot invoice, and that the appellants failed to establish that they had not passed on the burden of incidence of duty, claimed as refund, to their buyers; thus, the entire amount of duty, including the duty claimed as refund, had been passed on to their respective buyers in all the cases of sale of their colour monitor at the time of sale. And thus the refund claims were hit by provisions as laid down in clause (d) of

Sub-section 2 of Section 11-B of the Central Excise Act, 1944.

5.5 The appellants contended that incident of duty has not been passed on to the buyers as at the time of supply of impugned goods (Computer Monitors) they were paying excise duty based on the assessable value as per provisional assessment order at the time of clearance from factory, and were selling these computer monitor at the Depot based on the prevailing market price and were offering different kinds of discounts. The excise duty component was not being mentioned separately on the sale invoices from Depot. The incident of duty has not been passes on to their buyers is evident from the fact that in a number of invoices raised by the appellants, ex-works value of computer monitors, (ie Basic Price Excise Duty + Sales Tax) was higher than the price at which the computer monitor were ultimately were sold from Depot, (ie, Selling Price + Sales Tax). The appellants placed reliance upon the judgment of the Hon'ble Tribunal in the case of CCE v Andhra Pradesh Paper Mills Ltd. (2006 (198) ELT 237 (Tri-Bangalore)]. A careful study of the judgment reveals that the Hon'ble Tribunal while dealing with the issue of unjust enrichment held that "Central Excise invoices indicate the duty payment clearly. Therefore it is definitely possible to compare the factory gate invoices and depot invoices during the relevant period to come to the finding with regard to uniust enrichment." In the instant case, from the copies of invoices issued from the Depot it is observed that the appellants did not mention duty component in the Invoices issued from the Depot which rendered the verification of the duty component passed on impossible Therefore, the facts of the relied upon case are different from the appellants' case, I find that under Section 4 (c) (iii) of the Central Excise Act, 1944, a Depot, from where excisable goods are sold after their clearance from the factory, is defined as a place of *removal; and Section 12-A, of the Central Excise Act, 1944 stipulate that every person liable to pay duty of excise on any goods shall, at the time of clearance of goods, prominently indicate in all the documents relating to the assessment, sale invoices and other like documents, the amount of such duty which will form the part of the price at which goods are to be sold. If the appellants have not passed on any part of the duty element paid at the time of clearance from the factory then they should have mention the duty component prominently on the Depot invoices so that duty component passed on could be verified and determined, and also to determine whether or not there is unjust enrichment in the absence of duty component on the invoices issued from Depot it cannot be said that they have not passed burden of a part of duty to their buyers. I am, therefore, of the view that the appellants have failed to establish that the duty claimed as refund has not been passed on to their buyers.*

5.6 The appellants further pleaded that <u>it is settled legal position that where an assessee charges composite price from its buyers, question of passing on incidence of duty to the buyers does not arise.</u> Similarly, it is settled legal position that where the prices of excisable goods are not changed or varied <u>on change of incidence of duty on the manufacture,</u> bar of unjust enrichment is not applicable. The appellants placed reliance upon the following case laws:

(i) Addison & Co. Vs. CCE [2001 (129) ELT 44 (Mad),

(ii) Triveni Glass Ltd. Vs. CCE-2003 (162) ELT 529,

5.7 From the facts of the case involved in the case of Addison & Co. Vs CCE [2001 (129) ELT 44 (Mad) it observed that it was established fact that the duty incident claimed as refund had not been passed on but in the instant case the appellants are unable to establish that the part of duty Claimed as refund has not been passed on.

Moreover, the judgment has been appealed before the Hon'ble Supreme Court which has been admitted by the Apex court in 2003 (152) ELT A94 (SC), and the judgment as been reversed by the Hon'ble High court of Karnataka in the case of Sudhir Papers Ltd. v. CCE, Banglore, 2012 (276) ELT 304 (Kar.), wherein the Hon'ble High Court held under para 7 of the judgment as under:-

> *"It is only if the assessee claims refund on the ground that he has not passed on the burden of duty to his customer by s specific plea and substantiating the same by producing acceptable evidence, then the appropriate authority shall direct payment of the refund amount to the assessee. The question whether the burden of duty has been passed onto the customer or not is purely a question of fact. The burden of proving the said fact is exclusively on assessee. It is only on discharge of the said burden the assessee would be entitled to the refund of the said amount. The finding of the CESTAT that the events subsequent to the clearance of the goods, raising of the invoice are relevant in deciding the question of refund of duty is not warranted from any of the statutory provisions. On the contrary, the basis for claim for refund is excess duty is to be paid at the time of clearance. As indicated in the invoice, is only a subsequent event which makes that demand illegal, not warranted, not authorized and gives the assessee a right to seek for refund."*

From the above case law I observe that the Hon'ble High Court explicitly laid down that refund is admissible only when the assessee claiming refund proves by a specific plea and substantiating the same by producing acceptable evidence that he has not passed on burden of duty onto his customer. The question whether the burden of duty has been passed onto the customer or not is purely a question *of fact. The burden of proving the said fact is exclusively on assessee; and it is only on discharge of the said burden the assessee would be entitled to the refund of the said amount. In the instant case the appellants have not discharged their burden to prove that such part of duty claimed as refund has not been passed on to their customer Therefore, I am of the opinion that the case law rather support the view held by the adjudicating authority.*

5.8 I, further, proceed to examine whether or not the ratio of judgment in the case of Triveni Glass Ltd. Vs. CCE - 2003 (162) ELT 529 (Th. Del) is applicable in the instant case. In the relied case facts were that credit note were issued by the manufacturer (appellant in relied case) every month. and, such credit notes were indicating the reason as 'rate difference The credit notes were not only indicating revised price but also amount of Cenvat amounts. Thus, the credit notes clearly showing the duty element passed on to the customer. Whereas, under the present case the appellants have issued composite invoices, from their Depot, without separately mentioning element of duty. Therefore, the ratio of judgment is not applicable in the appellants' case.

5.9 The appellants relying upon the judgments in the cases of Commissioner of Customs, Jaipur v. Sigma Electronics, 2008 (200) 283 CESTAT and Steel Authority of India Ltd. v. CC, 2012-TIOL-1303 CESTAT-MAD submitted copy of certificates issued by the Chartered Accountant for respective period involved in their claims in support of their claim that they have passed on duty claimed as refund. I find that in the case of CC v. Sigma Electronics the respondent imported goods against Bills of Entry. In the case the Hon'ble Tribunal has found that the imported goods were sold below the cost of the goods. The Chartered Accountants in the certificate certified that the goods were sold below the cost of goods. The

Commissioner (Appeals) in his OIA himself found from the record and Annexure produced that the goods were actually sold below the cost. In these facts and circumstances the Hon'ble Tribunal accepted the certificate of Chartered Accountants' when it was established that the goods were actually sold below the actual cost. Therefore, I find that the facts and circumstances involved in relied case laws are different from of the present case, hence the ratio of judgment is not applicable in the appellants' case.

5.9 In view of above facts, legal provisions and judicial pronouncement I find no reason to differ from the view of the adjudicating authority that the refund claims are hit by provisions as laid down in clause (d) of Sub-section 2 of Section 11-B of the Central Excise Act, 1944, Ie, claims attract the provisions of unjust enrichment. I, therefore, uphold the findings of the adjudicating authority that the refund claims are hit by provisions as laid down in clause (d) of Sub-section 2 of Section 11-B of the Central Excise Act, 1944, i.e. claims attract the provisions of unjust enrichment."

4.3 The present refund claims have been filed consequent upon the finalization of provisional assessment in terms of Rule 7 of Central Excise Rules. At the time of finalization of provisional assessment all the excess payments and short payments were to be correlated and adjusted for determination of the total excise duty due. However, the authority finalizing the provisional assessment

- while demanding the duty short paid did not allow for the adjustment of excess payment by the appellant,
- he directed to file a separate refund claim under Section 11B of Central Excise Act, 1944.

4.4 In these proceedings of refund, the refund has been rejected holding that refund is hit by the principles of unjust enrichment. Such approach is neither contemplated in terms of the provisions of Rule 7 of Central Excise Rules, 2002 and

Section 11B of Central Excise Act. In case of CCE Vs M/s CEAT Ltd. Final Order No.85668/2023 dated 22.02.2023, wherein Mumbai Bench of this Tribunal has observed as under:-

> *"4.2 We observe that the grounds raised by the Revenue cannot be sustained in view of the decision of Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. [1997 (89) ELT 247 (SC)] wherein the following has been held:-*
>
> ***"95.****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 asssessed 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 of 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) re-agitating the issues already decided under Rule 9B - 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."

4.5 Further, in the case of Toyota Kirloskar Auto Parts Ltd. [2012 (276) ELT 332 (Kar.)], Hon'ble Karnataka High Court has held as follows:-

"5. The substantial question of law which arises for consideration in this appeal is whether the Tribunal was right in confirming the demand of interest under Rule 7(4) of the Central Excise Rules, 2002 without harmoniously reading the provisions of Rule 7(5) of the Central Excise Rules, 2002?

6. Rule 7 reads as under :-

***"Rule 7. Provisional assessment.** - (1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him.*

(2) The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

(3) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may

be, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule (1) :

Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reasons to be recorded in writing, be extended by the Commissioner of Central Excise for a further period not exceeding six months and by the Chief Commissioner of Central Excise for such further period as he may deem fit.

(4) The assessee shall be liable to pay interest on any amount payable to Central Government, consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under Section 11AA or Section 11AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

(5) Where the assessee is entitled to a refund consequent to order for final assessment under sub-rule (3), subject to subrule (6), there shall be paid an interest on such refund at the rate specified by the Central Government by notification issued under Section 11BB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of refund.

(6) Any amount of refund determined under sub-rule (3) shall be credited to the Fund :

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

(a) the duty of excise paid by the manufacture, if he had not passed on the incidence of such duty to any other person; or

(b) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person."

7. A perusal of the aforesaid provision makes it clear that, where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the competent authority as provided in the said provision, to permit him to pay the duty on provisional basis at such rate or on such value as may be specified by him. If the authority is satisfied, he may pass an order permitting such payment and taking all necessary steps for payment of any short fall in the duty payable at the end of assessment. Thereafter, a final assessment order is to be passed. If after the final assessment, if it is found that there is a short fall in payment of duty, sub-rule (4) provides for payment of interest on such short payment of duty. Whereas sub-rule (5) provides for refund of excess duty paid.

8. Therefore, it is clear that after a final assessment order is passed, if the duty paid in terms of provisional assessment is less than the duty payable after the final assessment, the assessee is liable to pay the interest on the short fall. In the entire scheme of Rule 7, there is no indication that when an assessee is permitted to pay duty in pursuance of a provisional assessment order, if he is dealing with more than one goods, they have to be treated separately. Even though the duty payable under the Act is to be calculated under each head of each case ultimately it is the total duty payable for all the goods which are the subject matter of the provisional assessment and final assessment which is to be taken into consideration. If after taking into consideration the duty payable in respect of all the goods and the duty paid in pursuance of the final assessment order, if still the assessee is due in any duty, *then for the short fall in payment of duty, the assessee is liable to pay interest."*

4.4 Commissioner (Appeals) has in the impugned order examined the decision referred to by the Revenue in their appeal before him and dealt with in para 9 of the impugned order. We do not find any reason to differ with the same."

4.6 In the case of appellants themselves while dismissing the appeal filed by the revenue, Commissioner (Appeals) has vide order in appeal No 186-187/CE/APPL/NOIDA/08 dated 30.12.2008, observed as follows:-

"I find that while finalizing the provisional assessment for the financial year 2002-03, the Deputy Commissioner, vide Memorandum Order No. 07DC/N IV/2004/1573 dated: 27/02/2004 has discussed the nature of discounts offered by the respondents to their customers and also examined the products wise details of the clearance and value shown in the clearance documents from the factory as well as from the depots on the basis of documents submitted by the respondents and segregated the products on which the duty paid provisionally by the respondents were short paid by Rs. 56,46,682/- from the duty actually payable on the same, based on the prices indicated on the corresponding deport invoices and duly certified by the Chartered Accountant. Also the products which have been actually sold at a relatively lower prices from the depot due to passing of such discounts, the duty paid in excess amounting to Rs. 83,85,016/- attributable to the difference of the duties paid provisionally and which were actually realized from the buyers has specifically been examined and segregated in the said order.

Likewise while finalizing the provisional assessment for the financial year 2003-04 the Joint Commissioner vide Memorandum Order No. 01/JC/N-4/2005 dated 08/07/2005 has discussed the nature of discounts offered *by the respondents to their customers and also examined the product wise details of the clearance and value shown in the clearance documents from the factory as well as from the depots on the basis of documents submitted by the respondents and segregated the products on which the duty paid provisionally by the respondents were short paid by Rs. 30,17,930/- from the duty actually payable on the same. based on the prices indicated on the corresponding deport invoices and duly certified by the chartered accountant. Also the products which have been actually sold at a relatively lower prices from the depot due to passing of such discounts, the duty paid in excess amounting to Rs.1,03,69,969/- attributable to the difference of the duties paid provisionally and which were actually realized from the buyers has specifically been examined and segregated in the said order.*

As both the refund orders have arisen on the basis of the aforesaid finalization of provisional assessment orders, the department having accepted the said orders, now cannot challenge the findings given in these orders nor can question the basis for determination of the said amount of refund at this stage. Also the department's allegation regarding passing of duty incidence to the customers by the respondents in view of the depot's invoice showing composite price and not indicating the excise duty separately does not hold force as it is a matter of record that the corresponding goods were sold from the depot at a much lower price in comparison to the prices at which the goods were provisionally cleared from the factory., therefore the differential duty claimed as refunds is borne by the respondents and have not been passed on to the customers. Also I find that in the identical matter of WEP Peripherals Ltd V/s CCE reported in 2007(213)ELT 18, the Hon'ble Tribunal has held that since normal transaction value is less than the stock transfer price, the appellants discharged higher duty to exchequer, but when the goods *are sold from depots, duty collected is on normal transaction value therefore the differential duty is borne by the appellants and they held that the unjust enrichment does not arise in this case. I find that the ratio of the said judgment is squarely applicable in the instant case.*

Regarding the plea taken by the department in the grounds of appeal that no break up has been provided of the amounts shown in Schedule of the relevant Balance sheet so as to ascertain what amount has been shown as pending with "the department which is attributable to the refund on account of finalization of provisional assessment and regarding non examination of the balance sheet for the succeeding year by the adjudicating authority in the respective orders, I find that in both the orders, the adjudicating authority has specifically mentioned that that in Schedule 6 of the Balance Sheet for the relevant periods, under the lead Current Assets, Loans and Advances, the refund amounts has been shown as receivable balances with the Customs and Excise authorities which totally amount to Rs, 12,30,61,000/- (in the 1st order) and Rs. 3,50,279,000/- (in the second order) in the relevant balance sheets. The department's claim for not providing break up of the aforesaid amounts is not tenable in view of the facts that in both the orders, it has been specifically mentioned by the adjudicating authority that the respondents had submitted break up of the figure duly certified by the Chartered Accountant M/s KTS & Associates certifying that the amount claimed as refund has been shown in the Accounts as recoverable from Government in their books of accounts and that has not been passed on a their customers. It is also mentioned in the said orders by the adjudicating a thority that the respondents have also submitted copies of the ledger accounts of their buyers showing the quantum of trade discount at the credit side of their party's ledger account. Accordingly it has been held by the adjudicating authority *that the statutory presumption of unjust enrichment envisaged in Section 12 B as well as the first proviso to Section 11B92) of the Central Excise Act 1944 has been adequately rebutted by the respondents. I find that during this stage also, the respondents have provided the copies of documents containing such break up amounts recoverable which specifically includes the amount due as refund on account of provisional assessment which amply justifies their assertions. Thus, the issue of unjust enrichment has been specifically gone into by the adjudicating authority and only on being fully satisfied, have the refunds been granted.*

Moreover, the department while preferring these appeals have not questioned the authenticity of the certificate issued by the said Chartered Accountant nor questioned the entries made in the ledger accounts and the balance sheet and no material is brought on record by the department to falsify such certificates/records by adducing material or evidence in support of it's claim regarding the non discharge of the burden cast upon the respondents to prove that the duty burden on the products has not been passed on to their buyers.

Further, I find that the Hon'ble Tribunal in a plethora of judgments has held that if in the balance sheet amount of refund is shown as recoverable, such extra duty burden was held to be not passed on to the customers but borne by the manufacturer itself and accordingly have allowed the refunds. Some of these judgments relied upon are cited below:-

(i) CCE v. N.G. Thakkar & Sons - 2004 (166) E.L.T. 115;

(ii) Jaipur Syntex Ltd. v. CCE-2002 (143) E.LT 605;

(iii) Hero Honda Motors Ltd. v. CC-2000 (126) EL.T. 1014

(iv) CC v. Maruti Udyog Ltd. - 2003 (155) ELT. 523;

(v) Sipani Automobiles Ltd. v. CC-2004 (176) E.LT. 807;

(vi) Bhoruka Steel Ltd. v. CC-2005 (188) E.L.T. 28;

(vii) Corning S.A. v. CCE-2005 (192) E.LT 355 (T) = 2005 (70) RLT 344

(viii) Beekay Hosiery Industries v. CC-2005 (188) ELT 301;
(ix) Toyota Kirloskar Motor Ltd. v. CCE-2005 (187) E.L.T. 499;

(x) Transformers & Electricals v. CC-2005 (188) EL.T. 60

(xi) Dabur India Ltd V. CCE -2008(228) ELT 131;

The ratio of the aforementioned decisions are squarely applicable in the instant case.

In view of the above, I find that the respondents have properly rebutted the assumption of passing the incidence of excess excise duty to their customers or to any other person. And the principle of unjust enrichment has been properly examined by the adjudicating authority in the impugned orders. Therefore I find no infirmity in the orders of the adjudicating authority on these aspects and the objections raised in the grounds of appeal filed by the department cannot be sustained being contrary to the facts on record and established legal provisions as discussed supra."

Upholding the above order Tribunal, by Final Order No.71098-71099 of 2016 dated 30.11.2016 has held as follows:-

"5. The learned counsel for the respondent submitted that once the order for finalization of assessment is issued and it is accepted by the Department, then department cannot question the quantum of refund arising out of it after filing of the refund claim. He has further contended that the issue of unjust enrichment has been properly examined at the original and appellate stage and therefore, department's contention in the grounds of appeal in respect of unjust enrichment is not tenable in Law. He contended that after thoroughly verifying all the evidences, it was held that duty burden had not been

passed on to Customers and that the Revenue has not placed any evidence to rebut the findings of lower Authorities through grounds of Appeal before this Tribunal.

6. Having considered the rival contentions, we do not find any merit in the grounds of appeal extended by Revenue. Therefore, we do not interfere with the impugned Orders-in-Appeal and reject both the appeals filed by Revenue. The respondent shall be entitled to consequential benefits, as per law."

4.7 On the basis of above, we are of the view that appellants have sufficiently discharged the burden cost upon them to establish that they have not passed the incidences of excise duty paid and claimed by them as refund under these applications of refund. In the case of CCE Vs Dabur India 2014 (304) ELT 321 (All) Hon'ble Allahabad High Court has observed as follows:-

"17. *The Tribunal has also relied to the balance sheet which is brought on record by the respondent stating about the amount recoverable as excise duty. The Commissioner in its order dated 6-11-2006 which was in favour of the department has observed that the amount was shown as recoverable from the department in the balance sheet. In the rejoinder affidavit, the respondent has brought on record the extract of details of the amount under the heading "Excise Duty Recoverable" for the year, 2004-05 which was submitted before the Superintendent on 5-10-2005. The same has been annexed as Annexure-R.A.-1 which mentions at Code 7108 EXCISE DUTY RECOVERABLE - 61,929,376.47/-. The reference has been made to the balance brought on the record as Annexure-3 to the appeal. In Part-B of schedule H the amount of Rs. 632.14 Lacs was mentioned as the balance with Excise Authorities which included also the amount which was recovered from the Excise Department. Thus balance sheet supports the case of the respondent.*

18. *When the payment of differential excise duty was made by the respondent under protest and the M.R.P. has not been raised by the respondent, we fail to see that how the incidence of such duty shall be treated to have been passed on the buyer of such goods. The Assistant Commissioner Central Excise had referred to the letter dated 18-12-1997 sent by the respondent by which it was mentioned that respondent has not change maximum retail price or wholesale price and is paying the duty under protest.*

19. *The conclusion recorded by the Assistant Commissioner Central Excise that the amount of Rs. 1,14,78,517/- paid by the respondent was part and parcel of M.R.P. amount that has been realised by them from their buyer during the period of 1994 to 1997 and has to be deemed to have been passed to the buyer, is without any basis and based on surmises and conjunctures. The differential excise duty having been paid by the respondent themselves under protest on different dates in the year 1998, there is no basis to come to the conclusion that the incidence of duty was passed to buyers. The judgment of the Apex Court relied by the learned counsel for the appellant was a case where Tribunal did not decide as to whether assessee has passed the incidence of excise duty to the consumer In view of the above, the order of the Tribunal was set aside and Tribunal was directed to decide the appeal afresh. It is useful to quote the following observation of the Apex Court :-*

Civil Appeal No. 2711 of 1999

In view of the decision of this Court in Civil Appeal No. 921 of 1992, we allow this appeal, set aside the judgment of the Tribunal and direct it to decide the appeal of the Revenue afresh on the question as to whether the principle of unjust enrichment would, on facts, apply or not.

Civil Appeal No. 6113 of 1999

In a claim for refund of duty, the respondent raised two contentions. Firstly that the duty had not been passed on to the consumer and the principle of unjust enrichment did not apply. The second contention was that in any event, in view of the decision of the Bombay High Court in the case of Solar Pesticides (India) Limited v. Union of India, the principle of unjust enrichment was not applicable in cases of captive consumption. Neither the Assistant Commissioner nor the Commissioner (Appeals) accepted any of the two contentions. It was held that the respondent had failed to prove that the incidence of duty in respect of the imported goods had not been passed on.

On appeal filed by the assessee, the Tribunal allowed the same following the decisions of the Bombay High Court in Solar Pesticides (India) Limited v. Union of India, which we have now held is not a good law. The Tribunal did not decide as to whether the assessee had passed on the incidence of duty to the consumer. That contention would require consideration. Accordingly, we allow this appeal, set aside the judgment dated 6-7-1999 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi and direct it to decide the appeal by the assessee afresh on the question as to whether the incidence of duty on the imported raw material had been passed on by the importer to any other person.

20. *The above judgment does not help the appellant in the present case. On the other hand the Division Bench judgment relied by the respondent in the case of Commissioner of Central Excise, Ghaziabad v. U.T. Ltd. - 2013 (295) E.L.T. 37 (Allahabad) upheld the judgment of the Tribunal which had taken almost the similar view. Paragraph 4 of the aforesaid judgment is to the following effect :*

Shri Ashok Singh, learned counsel for the appellant contended that the Tribunal had only affirmed the finding *of the Commissioner (Appeals) without recording its own finding on the question of unjust enrichment. The Tribunal in paragraphs 3 and 4 observed as follows :*

"3. After hearing both the sides and on perusal of the records, it is seen that the main contention of the ld. DR is that the refund claim is hit by principles of unjust enrichment. He submits that the Commissioner (Appeals) erroneously followed the decision of the Gujarat High Court and ignored the decision of the Hon'ble Supreme Court. On perusal of the order of the Commissioner (Appeals), I find that the Commissioner (Appeals), examined the principle of unjust enrichment in the impugned order as under :-

"I find that the contention of the department that the amount of Rs. 10,94,263/- was deposited by the party on their own has not been shown in the balance sheet of relevant year 1997-98 in the schedule of loans and advances to be recovered for the department is not sustainable as the party had deposited this amount under protest as an advance payment of central excise duty pending enquiry and investigation and intimated this fact to the Additional Director General of DGAE, Central Excise, New Delhi vide their letter dated 6-12-1997 and has also shown in their Balance Sheet of the company for whole of the group in the relevant year 1997-98 in the schedule of "OTHER CURRENT ASSETS".

4. I find that the Revenue had not disputed the above facts of examination of balance sheet in their Grounds of Appeal. So, it is evident from the record that the Commissioner (Appeals) allowed the refund claim after examining the unjust enrichment. Hence, I do not find any reason to interfere the order of the Commissioner (Appeals).

Accordingly, the appeal filed by the Revenue is rejected."

21. *In view of the forgoing discussions, we answer both the above questions in favour of the respondent and against the revenue."*

4.8 In view of the above discussions, we find that the burden cast upon the appellants to establish that they have borne the incidence of duty claimed as refund has been suitably discharged and the refund cannot have been rejected on this account.

4.9 Rule 7 of Central Excise Rules which specifically provided that issue of unjust enrichment needs to be examined at time of finalization of provisional assessment. Said rule is reproduced below:

RULE 7 Provisional assessment. —.

(1) …...

(2) …...

(3) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule (1) : Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reasons to be recorded in writing, be extended by the Principal Commissioner of Central Excise or Commissioner of Central Excise, as the case may be for a further period not exceeding six months and by the Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise, as the case may be for such further period as he may deem fit.

(4) ……

(5) Where the assessee is entitled to a refund consequent to an order of final assessment under sub-rule (3), then, subject to sub-rule (6), there shall be paid an

interest on such refund as provided under section 11BB of the Act.

(6) Any amount of refund determined under sub-rule (3) shall be credited to the Fund :

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –

(a) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person; or

(b) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person.

Thus when finalization order has been made in terms of Rule 7, directing the appellant to file refund claim it implies that authority finalizing the provisional assessment has examined the issue of unjust enrichment while making such direction. The refund claim made under Section 11B, could not have been rejected without the order made under Rule 7 being set aside by the appellate authority in appropriate proceedings. Hon'ble Supreme Court has in case of ITC Ltd. [2019 (368) E.L.T. 216 (S.C.)] observed as follows:

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 re-assessment 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) E.L.T. 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).*

In the case of BT (India) Pvt Ltd. [2023-TIOL-1502-HC-AHM-ST] Hon'ble Delhi High Court has observed as follows:

> *69. At the stage of consideration of the application for refund, it would be impermissible for the second respondent to question whether the services rendered by the petitioner amounted to an „export of service" or even dwell upon issues which related to its principal claim of not being liable to pay service tax. The recognition of such a power being available to be wielded while considering an application for refund would clearly be contrary to the principles propounded in ITC Limited. The acceptance of such a contention would amount to recognising the existence of an adjudicatory function inhering in the refund sanctioning authority and would clearly be abhorrent to the principles enunciated in the said decision of the Supreme Court.*

4.10 In view of the above discussions, impugned order lacks merit and the same is set aside.

5.1 Appeals are allowed.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp