

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL  
BANGALORE**

REGIONAL BENCH - COURT NO. 1

**Central Excise Appeal No. 20765 of 2017**

*(Arising out of Order-in-Appeal No.MYS-EXCUS-000-APP-078 to 87/16-17 dated 19.01.2017 passed by the Commissioner of Central Excise (Appeals), Mysore.)*

**JK Tyres & Industries Ltd.**

Truck Radial Plant-II  
KRS Road,  
Mysore – 570 016.

Appellant(s)

**Versus**

**Commissioner of Central  
Excise**

**Mysore II Division,**  
S1 & S2, Vinaya Marga  
Siddartha Nagar,  
Mysore – 570 011.

Respondent(s)

**WITH**

- 1. Central Excise Appeal No. 20766 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**
- 2. Central Excise Appeal No. 20767 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**
- 3. Central Excise Appeal No. 20768 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**
- 4. Central Excise Appeal No. 20769 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**
- 5. Central Excise Appeal No. 20770 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**
- 6. Central Excise Appeal No. 20771 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**
- 7. Central Excise Appeal No. 20772 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**

**8. Central Excise Appeal No. 20773 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**

**9. Central Excise Appeal No. 20774 of 2017 (JK Tyres and Industries Ltd. vs. Commissioner of Central Excise, Mysore-II Commissionerate)**

*(All arising out of Order-in-Appeal No.MYS-EXCUS-000-APP-078 to 87/16-17 dated 19.01.2017 passed by the Commissioner of Central Excise (Appeals), Mysore.)*

**Appearance:**

Shri Ravi Raghavan, Advocate  
Ms. Sneha Philip, Ms. Shraddha Pandey, Advocates

For the Appellant

Shri Rajiv Kumar Agrawal, AR  
Shri K. A. Jathin, AR

For the Respondent

**CORAM:**

**HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)**

**HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)**

**Final Order No. 21406 to 21415 /2023**

Date of Hearing: 26.10.2023

Date of Decision: 19.12.2023

**Per : D.M. MISRA**

These appeals are filed against Order-in-Appeal No.MYS-EXCUS-000-APP-078 to 87/16-17 dated 19.01.2017 passed by the Commissioner of Central Excise (Appeals), Mysore.

2. Briefly stated that facts of the case are that the appellants are engaged in the manufacture of pneumatic tyres, tubes and flaps of rubber falling under Chapter 40 of Central Excise Tariff Act, 1985.

3. The appellants are clearing the goods from their factory to various depots on the basis of provisional price. From the Depots, the goods are ultimately sold to their customers. The Appellants allow various discounts to their customers viz. quantity discount, prompt payment discount, product discount, cash discount etc. Since the exact quantum of discounts are not known at the time of sale of the goods from the depots, consequently, they have resorted to provisional assessment in accordance with Rule 7 of the Central Excise Rules, 2002 and discharge duty at the factory gate on the provisional price at the time of its clearance.

4. After computing the exact quantum of discount, they pass the same to the customers by raising credit notes and consequently approach the department for finalisation of provisional assessment. Considering the evidences of passing on of different discounts to customers, the assessing authority finalise the provisional assessment by adjusting the duty short paid with the duties excess paid in a particular month. After netting off the duty for the month, duty short paid is recovered and excess duty paid is allowed as refund subject to verification of fulfilment of the bar of unjust enrichment. In the present case, the adjudicating allowed the refund of excess duty paid after due adjustment between the duty short paid to that of duty excess paid. Aggrieved by the adjustment of excess duty to that of duty short-paid during the period of provisional assessment, the Revenue filed appeals before the learned Commissioner (A).

The learned Commissioner (A) setting aside the orders of the adjudicating authority allowed the Revenue's Appeal. Hence, the present appeals.

5. At the outset, the learned advocate for the appellant has submitted that the appellants are passing on various discounts viz., quantity discount, prompt payment discount, product discount, cash discount, slab discount, special discount, quarterly discount, etc., during the relevant period on the sale effected from their depots to various customers. Since the exact quantum of discounts are not known at the time of clearance of the goods from the factory, the appellant paid duty on the provisional price resorting to provisional assessment in accordance with Rule 7 of the Central Excise Rules, 2002 which has been allowed by the Assessing authority. On finalization of the assessment on the basis of data of exact quantum of discount passed on to customers from the depots, the duty short paid is adjusted against excess paid payment during a month, after netting off, the appellant either discharge duty or claim refund of duty excess paid during the month. The Revenue has objected to the adjustment of excess duty paid against short payment during a month. He has submitted that the Ld. Commissioner(A) wrongly held that the excess duty paid cannot be adjusted against the duty short-paid to arrive at the liability on finalisation of assessment for a particular month. In other words, it is wrongly held that the duty short paid cannot be for setoff against the duty excess paid to arrive at the net liability or refund of duty, but it is necessary that the duty short paid to be

recovered and the duty excess paid cannot be adjusted without testing the incidence of said duty whether passed on to any other person.

5.1 He has submitted that adjustment of excess duty paid to short paid in a month pursuant to finalisation of provisional assessment is permissible notwithstanding the bar of unjust enrichment under Section 11B of CEA, 1944 for allowing refund of excess duty. The assessment is finalised under Rule 7 of CER, 2002, whereas refund of excess duty arise only after finalisation of assessment; which would always be subject to unjust enrichment. During the course of finalisation of assessment, if it is established that the assessee has paid excess duty, the amount should be set off against the duty short-paid during the month to arrive at the net liability of duty and refund payable subsequent to finalisation of assessment.

5.2 In support, he has placed reliance on the judgment of the Hon'ble Karnataka High Court in appellant's own case in **Principal Commissioner of Central Tax, Mysore vs. M/s. Vikrant Tyres Ltd.: 2021-VIL-729-KAR-CE**. Further, he has submitted that the Hon'ble Karnataka High Court in the case of **Toyota Kirloskar Auto Parts Pvt. Ltd. vs. CCE, LTU, Bangalore: 2012 (276) ELT 332 (Kar.)** held that inter adjustment of duty short-paid and excess duty-paid is permitted and interest is not chargeable if the duty-paid in excess than short-paid. It is his contention that reliance placed by the

learned Commissioner (A) on the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Madras vs. Addison & Co. Ltd.: 2016 (339) ELT 177** is misplaced as the said judgment has been considered by Hon'ble Karnataka High Court in **Vikarant Tyres' case(supra)**. Further, he has submitted that in any case the duty of incidence is borne by the appellant and has not been passed on to the ultimate consumer. He has also submitted that Department accepted credit notes/debit notes as valid documents for transferring the amount under the trade and commercial parlance. In the event credit notes are raised and benefit of discount is passed on to the customers, the burden of excise duty cannot be said to have been passed on and the assessee is entitled to refund of the same. In support, he referred to the judgment in the case of **Sudhir Papers Ltd. vs. Commissioner of Central Excise, Bangalore-I: 2012 (276) ELT 304 (Kar.)**.

6. Per contra, the learned Authorised Representative Shri Rajiv Kumar Agrawal, Commissioner for the Revenue has submitted that the learned Commissioner (A) referring to Section 12B of the Central Excise Act, 1944 observed that the incidence of duty is deemed to have been passed on to the ultimate consumer, hence, the burden lies on the assessee to prove that the incidence of duty has not been passed on to the ultimate consumer. Therefore, the department is right in presuming that duty incidence is passed on to the ultimate consumer as per the provisions of Section 12B of Central Excise Act, 1944 once excess duty is claimed to have been paid and the burden is on

the assessee to rebut the said statutory presumption. Besides, under Section 11B of Central Excise Act, 1944, the assessee is always required to prove that the incidence of duty of the refund amount has not been passed on by him to any other person and thus he is eligible to the refund. The word 'any other person' used in Section 11B does not limit it to the person who buys the goods but also includes the ultimate consumer, therefore, the argument of the department on the issue of unjust enrichment is correct and sustainable.

6.1 He has further submitted that while finalising the assessment, excess amount of duty paid be subjected to passing on the test of unjust enrichment as per the provisions of the Section 12B of the Central Excise Act, 1944 and the duty short-paid be recovered separately. Otherwise, the Appellant shall be unduly benefitted by recovering the excess duty from the customer and also receiving the said duty as refund under Section 11B of CEA, 1944 in the garb of adjustment. He has vehemently argued that under Rule 7 of the Central Excise Rules, 2002 there is no mandate in netting off the duty i.e., adjustment of the duty short paid against the excess payment of duty so as to arrive at the net result of duty liability or refund as the case may be. The purpose of the said provision is to arrive at the appropriate duty payable at the time of clearance of goods from the factory premises and to determine the liability or refund. He has submitted that the Hon'ble Supreme Court in **Addison & Co. Ltd.** case (supra) laid down applicability of the

principles of unjust enrichment to cases where the discounts are passed on by way of issuing credit notes.

6.2 The Ld. A.R has also referred to the principle of law laid down by the Larger Bench of the Tribunal in the case of **Excel Rubber Ltd.: 2011(3) TMI 527-CESTAT-New Delhi-LB.** in support of his argument that principles of unjust enrichment is applicable to all refunds arise during the course of finalisation of provisional assessment. Further, he has referred to the judgment of Hon'ble Madras High Court in the case of **TVS Electronics Ltd. vs. CCE, Chennai: 2017 (348) ELT 630** wherein the Hon'ble High Court following the judgment of the Hon'ble Supreme Court in **Addison & Co. Ltd.** case held that the mandatory exercise has to be undertaken by the manufacturer in order to establish passing the test of unjust enrichment. This judgment has been followed subsequently in the case of **Commissioner of Central Excise, Chennai-III vs. National Plywood Industries Ltd.: 2017 (353) ELT 196 (Mad.).** Also, he has referred to the judgment of the Hon'ble Bombay High Court in the case of **CCE, Pune-II vs. Daimler Chrysler India Pvt. Ltd.: 2016 (342) ELT 28 (Bom.),** in support of his argument that the appellants are required to establish that the burden of duty has not been passed on to the ultimate consumer.

7. Heard both sides and perused the records.

8. The short question involved in these present appeals for determination is, whether the principles of unjust enrichment be applicable to the amount excess paid before adjusting the same with the amount short-paid while finalising provisional assessment under Rule 7 of the Central Excise Rules, 2002.

9. Undisputedly, the appellant has resorted to provisional assessment under Rule 7 of the Central Excise Rules, 2002 at the time of clearance of the goods from the factory to the depots, since certain conditional discounts passed on to the customers on sale from depots subsequently, the exact quantum of which is known only after its clearance from factory and sale from depots. When the exact amount of discount is ascertained, the admissible discounts are calculated on month-to-month basis and the assessable value at the time of clearance from the factory is redetermined and the duty payable is accordingly arrived at. Consequently, the difference between the duty paid and the duty payable is calculated and the assessment is finalized. The result of the said exercise may end up with recovery of differential duty short paid or refund of excess paid.

10. The Revenue's contention is that after determination of the exact duty payable on finalization of assessment, excess duty paid cannot be adjusted against duty short paid, without testing its incidence of excess duty whether passed on to any other person in compliance with the statutory presumption under section 12B of CEA, 1944. It is their argument that netting of

duty by passing the statutory presumption is not laid down under Rule 7 of Central Excise Rules, 2002. Accordingly, duty liability is calculated against the duty provisionally paid at the time of clearance of the goods from the factory and the amount payable. During the said exercise for a particular month, the result could be excess payment of duty in certain cases and short payment in other cases. The assessing authority after adjusting the duty excess paid against the short-paid, arrives at the net result i.e., either excess payment or short-paid during the month is recoverable or refundable. Consequently, the recovery/refund is accordingly directed. The Revenue's objection is that the duty excess paid cannot be adjusted against the duty short-paid during a particular month/period of assessment to arrive at the net result of refund or liability. It is the Revenue's contention that there is no specific provisions under Rule 7 of the Central Excise Rules, 2002 directing such adjustment/netting off duty.

11. Revenue has referred to the judgment of the Hon'ble Madras High Court in the case of **TVS Electronics Ltd.** case (supra) which followed the judgment in **Addison & Co. Ltd.** passed by the Hon'ble Supreme Court in directing that the refund amount arising due to provisional assessment be subjected to unjust enrichment.

12. The appellant's contention on the other hand is that the very purpose of provisional assessment is for adjustment of

excess duty-paid to short-paid during a particular period and determining the net effect of the duty, that is, either by way of payment or seeking refund of the amount paid. In support they referred to the judgment of jurisdictional High Court in the case of **Vikrant Tyres Ltd's case and in Toyota Kirloskar Auto Parts Pvt. Ltd's case**(supra).

13. The Revenue's argument may seem attractive in view of the judgment of Hon'ble Madras High Court in **TVS Electronics's case(supra)**, but we find that the jurisdictional Hon'ble Karnataka High Court in the appellant's own case taking note of the judgment of the Hon'ble Supreme Court in **Addison & Co. Ltd.** case and in the context of finalisation of provisional assessment for different period of the same assessee held as follows:

"14. In Addison & Co. Ltd., supra, the Hon'ble Apex Court has held that the assessee had admitted the incidence of duty was originally passed on to the buyer. No material was placed 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. It has been thus held that the sine qua non for a claim for refund as contemplated in Section 11B of the Act is that the claimant has to establish that the amount of duty of excess 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.

15. in the aforesaid judgment, the Hon'ble Apex Court has observed that the refund of excess duty paid can be allowed only in cases where the burden of duty has not been passed on any other person including the ultimate customer as well and moreover, Hon'ble Apex Court was considering the case of normal refund and not adjustment at the time of finalisation of provisional assessment. Hence, it is distinguishable. Thus, the authorities were conscious of Rule 7(6) and the factual

findings of the authorities held in favour of the assessee is not challenged by the Revenue.

16. Nextly, it is also significant to note that the methodology and manner of challenge made by the Revenue. Indisputedly, for the assessment years from 2002-03 to 2008-09 refund claim of the manufacturer assessee was allowed and in the same has reached finality. The Revenue as cherry picked the assessment years in question to challenge, giving a finality to the other assessment years. In this context, it would be preferable to refer to the judgment of the Hon'ble Apex Court in the case of **Commissioner of Central Excise, Allahabad vs. Surcoat Paints (P) Ltd. [2008] E.L.T. 4 (SC)** wherein, the Hon'ble Apex Court has held that the Revenue having accepted the decision given by the Tribunal in another case of the same nature, is precluded from challenging the similar order passed in respect of another unit. If so, in the very same assessee's case if the refund orders are accepted for particular years, the same cannot be challenged relating to other years. Revenue cannot pick and choose the assessment years for challenging the orders having similar effect. Moreover, as observed by the First Appellate Authority, the issue of unjust enrichment has been raised for the first time on the sanction of refund order consequent on finalisation of provisional assessment. The authorities have admitted that the credit notes were issued by the assessee to their dealer representing various discounts which have been actually passed on, in accordance with marketing circulars/policies. It is also observed that on verification of sample depot invoices at the time of completion of provisional assessment, that the assessee has not issued any cenvatable invoice from the depot which are prescribed document for availment of cenvat credit under Cenvat Credit Rules, 2004. Thus, it cannot be held that the assessee has not subjected to the test of unjust enrichment."

14. It has been brought to our notice that the said judgment of the Hon'ble Karnataka High Court has been accepted by the Revenue as communicated through their letter dated 17.11.2023. Needless to mention, the principle laid down by the jurisdictional High Court is binding on the Tribunal in view of the judgment of the Larger Bench of the Tribunal in the case

of **Collector of Central Excise, Chandigarh vs. Kashmir  
Conductors: 1997 (96) E.L.T. 257 (Tri.-LB).**

15. Following the said judgments, the impugned order is set aside and the appeals are allowed with consequential relief, if any, as per law.

*(Order pronounced in Open Court on 19.12.2023.)*

**(D.M. MISRA)  
MEMBER (JUDICIAL)**

**(R. BHAGYA DEVI)  
MEMBER (TECHNICAL)**

rv