CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/20683/2018-SM

[Arising out of Order-in-Appeal No. MYS-EXCUS-000-APP-196-197-198-17-18 dated 01/02/2018 passed by the Commissioner of Central Tax, Mysore (Appeals)]

JK Tyre & Industries Ltd.
Off The Road Tyre Plant,
Plot No. 85/B, Metagalli
Mysore – 570 016
Karnataka

Appellant(s)

Versus

Commissioner of Central Tax,
Mysuru Commissionerate
No. S-1 & S2, Vinaya Marga
Siddhartha Nagar
Mysore – 570 011
Karnataka

Respondent(s)

Appearance:

Mr. Dattatray D Bhat, Advocate
Gurukrupa, #44,
Sheshadripuram College Road,
Bangalore – 560 020
Karnataka

For the Appellant

Mr. K.B. Nanaiah, Assistant Commissioner (AR)

For the Respondent

Date of Hearing: 30/11/2018
Date of Decision: 30/11/2018

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 21820 / 2018

Per : S.S GARG

The present appeal is directed against the impugned order dated 01.02.2018 passed by the Commissioner (Appeals) whereby the

Commissioner (Appeals) has upheld the Order-in-Original in respect of *unjust enrichment* aspect. Briefly the facts of the present case are that the assessees are manufacturer of pneumatic tyres and other parts and had opted for provisional assessment under Rule 7 of the CER 2002 in respect of the goods cleared for the year 2015-16 on the ground, that the transaction value can only be determined after confirming various discounts that are offered at later dates and not known at the time of clearances from the respective factories. As per the request of the assessees, the clearances from the factory gate to the depots were ordered to be provisionally assessed as per Rule 7 of the CER for the year 2016-17. After calculating all the applicable discounts for the transactions it was seen that they had short paid duties in respect of certain transactions and had also excess paid duties of excise in respect of certain other transactions as per the Table given in appeal memorandum. After considering the submissions of the assessees the adjudicating authority held that netting off (adjustment) of the duty paid in excess and the short paid for every month cannot be undertaken since the amount claimed to be paid excess by the assessee was hit by *unjust enrichment*. The lower authority also held that as per Section 12B of the Central Excise Act, it is deemed unless otherwise proved that the incidence of duty is passed on to the ultimate consumer. Hence the excess duty claimed to be paid by the assessee has been collected from the consumers and it was held that the excess duty paid is liable to be credited to Consumer Welfare Fund. Aggrieved by the order of the adjudicating authority, appellant filed appeal before the Commissioner who upheld the order in respect of *unjust enrichment.*

2. Heard both the parties and perused the records.

3. Learned counsel for the appellant submitted that the impugned order is not sustainable in law and the same is contrary to the facts and the binding judicial precedent on the same issue. He further submitted that this issue is no more *res integra* and has been settled by the Karnataka High Court in the case of ***Toyota Kirloskar Auto Parts Pvt. Ltd. Vs. CCE, LTU, Bangalore – 2012 (276) E.L.T. 332 (Kar.).*** He further submitted that on the identical issue in the appellant's own case the Division Bench of this Tribunal vide its Final Order Nos. 20596 – 20603/2018 dated 11.04.2018 has relied upon the decision of the Karnataka High Court in the case of **Toyota Kirloskar Auto Parts Pvt. Ltd.** and the decision of the Tribunal in the case of **Indian Telephone Industries**. He further submitted that in the earlier decision both the authorities have held that *unjust enrichment* is not applicable whenever there is a provisional assessment and in an appeal filed by the Revenue, the Tribunal dismissed all the appeals of the Revenue.

4. On the other hand the learned AR defended the impugned order and submitted that even in the cases of provisional assessment, before grant of refund of excess duty paid, the same needs to be subjected to test of *unjust enrichment* which is built into Section 11B of the Central Excise Act. He specifically referred to the decision of the Apex Court in the case of ***Addison and Company – 2016-TIOL-146-SC-LB*** wherein the Apex Court has observed that refund of excess duty paid can be allowed only in cases where the burden of duty has not been passed on to any other person who includes the ultimate consumer as well.

5. After hearing the submissions of both the parties and on perusal of the material on record, I find that this issue is no more *res integra* and has been settled by various decisions of the Tribunal wherein it has been consistently held that in a case of provisional assessment, doctrine of *unjust enrichment* is not applicable. Here it is pertinent to refer to the finding of the Division Bench in the appellant's own case in the order dated 11.04.2018 wherein the Tribunal has held as under:

> *"5. After hearing both sides and on perusal of record, we note that the refunds involved in all the present appeals have been granted by the original authority and the same have also been upheld by the Commissioner (Appeals). The only reason for challenging the impugned orders by Revenue is that such refunds have been granted without considering the aspect of unjust enrichment. Revenue has argued that even in the case of provisional assessment finalization, refund can be granted only subject to the test of unjust enrichment.*
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> *5.1. We note that an identical issue came up before the Tribunal in the case of* ***Indian Telephone Industries*** *which was decided vide* ***Final Order Nos. 21010 – 21011/2016 dated 20.10.2016,*** *wherein while disposing the Revenue's appeal the Tribunal observed as follows:*
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> *"6. The learned advocate on behalf of the respondent-assessee defended the impugned order. He submitted that the decision of the Larger Bench in the case of Excel Rubber Ltd. (supra) as well as the decision of the Hon'ble Karnataka High Court in the case of Toyota Kirloskar Auto Parts Pvt. Ltd. (supra) were considered in the Three-Member Bench decision in CESTAT, Delhi in the case of Hindustan Zinc Ltd. Vs. CCE reported in 2015-TIOL-2427-CESTAT-DEL. In this decision, it has been held that adjustments at the*

time of finalization of provisional assessments would be permissible without putting the excess duty paid to the test of unjust enrichment. He also submitted that the Bangalore Bench of CESTAT has already decided an identical issue in their own case for a different period vide Final Order No. 20185/2016. In this decision, the benefit of adjustment stands extended in their favour of the respondent-assessee by following the decision in the case of Hindustan Zinc Ltd. (supra).

7. We have heard both sides and gone through the records in detail. We find that the decision cited by the learned advocate in the respondent's own case dealing with the finalization of provisional assessments for a different period, needs to be followed for the periods before us. The Tribunal held as follows in the cited case:

"4. After hearing both the sides, we find that the short issue required to be decided is as to whether the duty excess paid by the assessee during the period of provisional assessment is required to be adjusted towards the duty short-paid by them, upon finalization of such provisional assessment. Learned counsel for the respondent has relied upon various decisions of the Tribunal laying down that such adjustment is required to be done. However, reference can be made to latest decision in the case of Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur: 2015-TIOL-2427-CESTAT-DEL. wherein there was originally difference of opinion between the two Members of the Bench and the issue was decided by the third Member. It was held that the assessee is entitled for adjustment of excess paid duty with the short-paid duty during the period of provisional assessments, upon finalization of the assessments. Inasmuch as the issue is decided by the majority decision of the Tribunal in favour of the assessee, we find no merits in the Revenue's appeal. The same is accordingly rejected."

Since the facts involved in the present two appeals as well as the issues are identical, we find no merits in the Revenue's appeals. By following the earlier order of the Tribunal, we reject the Revenue's appeals."

5.2. We note that the facts in the present case is identical to that in the above case and hence is required to be followed.

5.3. We have also considered the decision of the Apex Court in the case of **Addison and Company** *cited supra by Revenue and are of the view that the facts in the present case are different from that before the Apex Court inasmuch as in Addison case, the Apex Court was considering a case of normal refund and not adjustments at the time of finalization of provisional assessment. Hence the case is distinguishable.*

6. By following the decision of the Tribunal in the case of ITI Ltd., we find no reason to interfere with the impugned orders which are sustained and all the appeals filed by Revenue are dismissed."

By following the ratio of the above said decisions in the appellant's own case, I am of the view that the impugned order is not sustainable in law and therefore the same is set aside by allowing the appeal of the appellant.

(Operative portion of the Order was pronounced
in Open Court on **30/11/2018**)

(S.S GARG)
JUDICIAL MEMBER

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