

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT No. III

Excise Appeal No. 42611 of 2017

(Arising out of Order-in-Appeal No. 41/2017 dated 14.09.2017 passed by Commissioner of GST and Central Excise (Appeals), No. 1, Foulke's Compound, Anai Road, Salem – 636 001)

M/s. TVS Motor Company Ltd.

No. 4, Harita,
Hosur – 635 126.

...Appellant

Versus

Commissioner of GST and Central Excise

Salem Commissionerate,
No. 1 Foulke's Compound,
Anai Road,
Salem – 636 001.

...Respondent

And

Excise Appeal No. 42612 of 2017

(Arising out of Order-in-Appeal No. 42 /2017 dated 14.09.2017 passed by Commissioner of GST and Central Excise (Appeals), No. 1, Foulke's Compound, Anai Road, Salem – 636 001)

M/s. TVS Motor Company Ltd.

No. 4, Harita,
Hosur – 635 126.

...Appellant

Versus

Commissioner of GST and Central Excise

Salem Commissionerate,
No. 1 Foulke's Compound,
Anai Road,
Salem – 636 001.

...Respondent

APPEARANCE:

For the Appellant : Shri Raghavan Ramabadran, Advocate

For the Respondent : Smt. Anandalakshmi Ganeshram, Assistant Commissioner / A.R.

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 28.10.2024
DATE OF DECISION : 27.03.2025

FINAL ORDER Nos. 40400-40401 / 2025

Per Mr. VASA SESHAGIRI RAO

Excise Appeal No. E/42612/2017 has been filed by M/s. TVS Motor Company Limited aggrieved by the Order-in-Appeal No. 41/2017-ST dated 14.09.2017 passed by Commissioner of GST & Central Excise (Appeals), Coimbatore for setting aside the impugned Order-in-Original No. (*denovo* proceedings) 08/2016 dated 05.08.2016 passed by the Deputy Commissioner of Central Excise, Hosur-II Division sanctioning a refund of Rs.12,46,26,107/- upon finalisation of provisional assessments for the period between 1999-2000 to 2004-2005.

2.1 Brief facts are that the Appellant, engaged in the manufacture of Two Wheelers and Three Wheelers at Hosur, Mysore and Himachal Pradesh are clearing their final products directly to the dealers situated in various states and also through their subsidiary company viz. M/s. Sundaram Auto Components Limited for further sale to ultimate Customers. It appears that the Appellant is extending discounts to dealers from the selling price and as they had encountered certain practical difficulties in quantifying the actual abatements at the time of

removal of excisable goods from their factory gate, requested for Provisional Assessment which was ordered by the jurisdictional Central Excise Authorities.

2.2 The Appellant was claiming abatements on the expenditure and discounts as detailed below:

- i. Cost of Transportation (Primary Transport) including Transit Insurance.
- ii. Free Service Coupon Charge (FSC)
- iii. Pre-delivery Inspection Charges (PDI) in respect of Three Wheelers.
- iv. Authorised Service Centre Incentives (ASC)
- v. Cash Discount and other Trade Discount in respect of Two Wheelers and Three Wheelers.

2.3 While finalising the provisional assessments for the period from 01.04.1999 to 31.03.2005, the abatements claimed by the Appellant were not allowed by the department. Being aggrieved, the Appellant filed an appeal before CESTAT, Chennai which *vide* Final Order No. 40166-40169 & 40178-40185 dated 04.02.2016 held that the Appellants were eligible for the abatements claimed. Thereafter, the Adjudicating Authority *vide* the Order-in-Original No. (De-novo proceedings) 08/2016 dated 05.08.2016 sanctioned the refund of Rs.12,46,26,107/- upon finalisation of provisional assessments for the period between 1999-2000 to 2004-2005. Aggrieved, the Department filed an appeal before the lower Appellate authority who *vide* impugned Order-in-Appeal No. 41/2017-ST dated 14.09.2017 allowed the appeal filed by revenue and set

aside the order granting refund to the Appellants on the grounds of not conducting verification as set out by the Hon'ble Supreme Court in the case of Addison & Co. Ltd. to conclusively ascertain as to who ultimately borne the burden of excise duty and whether incidence of duty has not been passed on at any stage till the stage of ultimate end user and the refund claim being hit by bar of unjust enrichment and so ordered for crediting the amount to the Consumer Welfare Fund established under Section 12C of the Central Excise Act, 1944.

2.4 Similarly, Excise Appeal No. E/42611/2017 has been filed by the Appellant, aggrieved by the Order-in-Appeal No. 42/2017 -ST dated 14.09.2017 passed by Commissioner of GST & Central Excise (Appeals), Coimbatore for setting aside impugned Order-in-Original No. 14/2016 dated 26.08.2016 passed by the Deputy Commissioner of Central Excise, Hosur-II Division granting refund of Rs.6,92,88,245/- upon finalisation of provisional assessment during 2015-2016.

2.5 Thus refunds arose consequent to finalisation of provisional assessments for the period from 1999-2000 to 2004-2005 and subsequently for the period from 2015-2016. As the main issue involved in these two appeals is compliance to the principle of the doctrine of

unjust enrichment, both these appeals are being taken up together for disposal.

3. The main grounds of appeal filed by the Appellant are as follows:-

(i) It was submitted that some abatements were provisionally deducted at the time of removal while some others were deducted only at the time of finalisation of provisional assessment and the differential abatements were re-quantified as eligible abatements which qualify for sanction of refund. However, the impugned order denied the refund claim on the ground that the incidence of duty had been passed on to the ultimate buyers.

(ii) Further, it was submitted that the abatement claimed on Free Service Charges (FSC) emanates from the Customers as against the assumption in the impugned order that abatements are passed on by the Appellant to the dealers first. In this regard, it was submitted that the actual FSC charges would be known to the Appellant from related documents like Free Service Coupons and services rendered to Customers, which were periodically submitted by dealers to their area offices. Only on verification of the free services rendered, the dealers are

reimbursed. When the ultimate customers are not charged for the free services, it cannot be said that the burden of duty on such FSC was passed on to ultimate customers by the dealers.

(iii) It was put forth that trade discounts extended for the benefit of the ultimate Customers are being reimbursed by the Appellant only where the proof of extension of benefit stands proved by the dealers. If the discounts are not extended to Customers through the invoice, a separate voucher is issued passing off the discount which is acknowledged by the Customer against which the Appellant reimburses the dealer. In all types of discounts, the ultimate consumer first gets the benefit from the dealer who in turn gets reimbursed from the Appellant. In view of the fact that the expenditure incurred by the Appellant and dealers is duly established from the credit notes, Chartered Accountants Certificate, Extract of ledger accounts, *etc.*, it is proved beyond doubt that the abatements under different heads claimed by the appellant had actually been passed onto the Customers. In the above circumstances, it was averred that the findings in Para 9 of the impugned order that the appellant didn't provide evidence to prove that incidence of duty borne by them was not passed on at any stage in the transaction is incorrect.

(iv) It was contended that the impugned orders do not dispute the fact that the abatements/ discounts passed on were including excise duty. Invariably, the credit notes issued to dealers include duty element. Thus when the discounts/ abatements are passed on, the benefit of reduction in the excise duty on such discount / abatement also stood transferred. The fact that expenditures are incurred, the benefit of abatements given to dealers and in turn to ultimate Customers are not all in dispute. That being the case, the refund claim cannot be denied on the reasoning that proof for passing the test of unjust enrichment was not produced by the Appellant.

(v) It was contended that the impugned order without appreciating the factual position and overlooking the fact that the requirement in Addison's case was fully met, rejected the refund claim placing reliance on the Addison's case and hence merits to be set aside.

(vi) Regarding abatement claimed towards freight, it was averred that the freight charges are borne by the Appellant only and not passed onto the dealers and hence it cannot be presumed that the expenses

along with excise duty burden were passed on by the dealers to their Customers. Hence refund claim cannot be denied on the ground of unjust enrichment.

(vii) It was submitted that the Pre-delivery Inspection (PDI) expenses were reimbursed to dealers after verification of actual expenditure incurred by the dealers and hence there is no scope for passing on the burden of excise duty on the PDI to ultimate Customers by dealers. The reimbursement of PDI including the excise duty component was made by the Appellant by way of credit notes which fact was not disputed by the department. Hence it was contended that the refund claim could not be rejected on the grounds of unjust enrichment.

(viii) It was contended that the goods are cleared on payment of excise duty to dealers who do not avail any CENVAT credit and the credit notes issued returning the abatements/ discounts to the dealers proves that the incidence of duty was borne by the Appellant only. The Appellant places reliance on the decision of the CESTAT, Chandigarh in the case of *Johnsons Mathey (India) Ltd. Vs. Commissioner of*

Central Excise [2017 (3) TMI 1449-CESTAT, Chandigarh] wherein it was held that when the buyer had not availed CENVAT Credit of excise duty paid, the debit note issued by the buyer is a substantial evidence to pass the bar of unjust enrichment in the light of the decision of the Hon'ble Apex Court in the case of Addison & Co. Hence the presumption of unjust enrichment under Section 12 B of Central Excise Act stands rebutted.

(ix) It was vehemently contended that Paragraphs 35 and 36 of the judgement in the case of Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd. [2016 (339) ELT 177 (SC)]* reproduced as under is applicable to the facts of the case of the Appellant.

"35. *The respondent-Assessee is a 100 per cent Export Oriented Unit (EOU) manufacturing cotton yarn. The respondent filed an application for refund of an amount of Rs. 2,00,827/- on 14-8-2002 on the ground that it had paid excess excise duty at the rate of 18.11 per cent instead of 9.20 per cent. The Assessee initially passed on the duty incidence to its customers. Later the Assessee returned the excess duty amount to its buyers which was evidenced by a certificate issued by the Chartered Accountant on 2-8-2002. The refund claim was rejected by the Deputy Commissioner of Central Excise, Kolhapur Division vide an order dated 24-9-2002 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. Not satisfied with the genuineness of the documents the Deputy Commissioner rejected the refund claim. The Commissioner (Appeals), Central Excise, Pune allowed the appeal filed by the Assessee by taking note of the certificate issued by the Chartered Accountant and the credit notes dated 29-7-2002. The Appellate Authority accepted the Assessee's*

contentions and held that there was no reason to doubt the genuineness of the documents produced. The Appellate Authority allowed the appeal of the Assessee and the said order was confirmed by the Customs, Excise and Service Tax Appellate Tribunal vide judgment and order dated 6-10-2005. The said order of Central Excise and Service Tax Appellate Tribunal was further confirmed by the High Court of Judicature at Bombay in Customs Excise Appeal No. 100 of 2008 filed by the Revenue. The Revenue has filed the above Civil Appeal challenging the validity of the judgment of the High Court in Central Excise Appeal No. 100 of 2008.

36. *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 the excess duty paid by the Assessee, there is no dispute in this case of the duty being passed on to any other person by the buyer. As it is clear that the Assessee has borne the burden of duty, it cannot be said that it is not entitled for the refund of the excess duty paid. In view of the facts of this case being different from Civil Appeal No. 7906 of 2002, the appeal preferred by the Revenue is dismissed."*

(x) It was contended that the presumption of passing on the incidence of duty in terms of Section 12 B of the Central Excise Act is not applicable for duty provisionally paid, otherwise the concept of provisional assessment loses its significance. It was submitted that if the presumption under Section 12 B is applied for provisional duty payment also, no refund could accrue on account of finalisation of provisional assessment which is contrary to Rule 7(4) of Central Excise Rules, 2002 which allows refund of excess duty. It was submitted that the presumption for duty paid provisionally is applicable only in cases where the buyer takes CENVAT Credit of Provisional duty paid or where the price is ex-duty. However, in the appellants case herein, the buyer-dealer

including the ultimate customer does not avail CENVAT Credit and the price of the vehicles is not ex-duty but always cum duty.

(xi) It was contended that the doctrine of unjust enrichment is applicable only in case of refund claim yet to be granted and not in case of refund already granted. In this regard reliance was placed on the decision of the Hon'ble High Court of Madras in the case of *Madras Rubber factory Vs. Assistant Collector of central Excise, Madras* [1981 (8) ELT 565 (Mad.)] wherein it was held that the argument against unjust enrichment should have been considered before the refund was originally ordered. Further reliance was placed on the following judgements:

- i. *Collector of Central Excise, Ahmedabad Vs. Nayan Tobacco Products* [2002 (149) ELT 1361 (Tri.-Del.)]
- ii. *Gujarat State Fertilisers & Chemicals Ltd. Vs. Commissioner of Central Excise* [2006 (205) ELT 458 (Tri.-Mum.)]
- iii. *Commissioner of Central Excise, Bombay-II Vs. Mansukh Dyeing and Printing Mills* [1999 (113) ELT 179 (Tribunal)]
- iv. *Doothal Tea Estates Kanoj Plantation (P) Ltd. Vs. Commissioner of Central Excise* [2001 (135) ELT 386 (Tri.-Kol.)]

(xii) It was averred that the impugned Order-in-Original granting refund was issued only after pre-audit mandated by CBEC vide Circular No. 857/15/2007-CX dated 02.11.2007 and hence the

department cannot take a different stand after grant of refund.

(xiii) It was contended that when it was not disputed that the Appellant has not passed on the burden of duty to its buyers, they are bound to be given the refund of excess duty paid under doctrine of restitution in terms of the judgement of the constitutional bench of the Hon'ble Supreme Court in *Mafatlal Industries Ltd. Vs. Union of India* [1997(89) ELT 247(SC)] which was reiterated in the following cases:

- i. *Mahabir Kishore Vs. State of Madhyapradesh* [1989 (43) ELT 205 (SC)]
- ii. *Shahkari Khand Udyog Mandal Limited VS Commissioner of Central Excise* [2005 (181) ELT 328 (SC)]

4.1 The Ld. Counsel Shri Raghavan Ramabhadran, appearing for the Appellant submitted that once it is an admitted position that the Appellant has borne the incidence of duty, there is no further burden of proof cast on the Appellant as per the decision in *Addison & Co.* case. Further reliance was placed on decisions of the Hon'ble Tribunal in *Johnsons Maththey India Ltd. Vs. Commissioner of Central Excise* [2017 (3) TMI 1449 CESTAT Chandigarh] and *M/s. JK Tyre Industries Ltd. Vs.*

Commissioner of Central Excise [2020 (3) TMI 368-CESTAT-Chennai] wherein the above discussed precedents of Addison Case, have been followed. It was further submitted that the decision of the Hon'ble Madras High Court in *TVS Electronics Ltd. Vs. Asst. Commissioner of Central Excise, Chennai [2017 (348) ELT 630 (Mad.)]* is nothing but a reflection of the principle laid down in the Addison case. In the said decision, the Hon'ble High Court remanded the matter back to undertake the verification of who had borne the burden of duty to pass the test of unjust enrichment but he has submitted that it was not applicable to the facts of the present case and therefore the finding in Paragraph 10 of the impugned order is incorrect.

4.2 It was contended that the doctrine of "unjust enrichment" was made applicable to Provisional assessments by way of insertion of Rule 9B(5) of the Central Excise Rules, 1944 w.e.f. 26.05.1999 vide Notification No. 45/99-CE (NT) dated 25.06.1999 and till such date the said doctrine is not applicable.

5. The Ld. Authorised Representative Ms. Anandalakshmi Ganeshram representing the Department reiterated the findings of the lower Adjudicating Authority. She has argued that the

Appellants are not eligible for refunds being hit by the bar of unjust enrichment. It was stressed that the Appellant failed to produce any evidence to prove that the duty incidence was not passed on to the ultimate customer. It was submitted forcefully that the judgement of the Hon'ble High Court of Madras in the case of TVS Electronics Ltd. is squarely applicable to the facts of the case and further contended that the decision rendered by the Hon'ble Supreme Court in the case of Addison and Co. Ltd. that the refund of excise duty paid could be allowed only in case where the burden of duty has not been passed on to any other persons which includes ultimate buyer of motor vehicles, is applicable to the facts of the case. She has also adverted to the provisions of Section 12B of the Act *ibid* to support the contention that every person who has paid the duty of excise on any goods would be deemed to have passed on the full incidence of such duty to the buyer of such goods. She contested that as there was no verification done as to who have finally borne the excise duty and as there was no evidence produced by the Appellant that the duty burden has not been passed to the ultimate customer, the refund claims would be hit by bar of unjust enrichment.

6. Heard both sides and carefully considered the submissions and evidences on record.

7. The questions for determination in this appeal are:-

- i. Whether the appellant is required to prove conclusively that the incidence of duty burden has not been passed on to the ultimate buyer, so as to be eligible for refund? and,
- ii. Whether the refunds allowed to the appellant consequent to finalisation of Provisional assessments are hit by the bar of unjust enrichment, in the light of the Hon'ble Supreme Court's judgment in the case of Commissioner of Central Excise Vs. Addison & Co. Ltd.?

8. When the appellant sells motorcycles and three-wheeler vehicles to their dealers, the excise duty paid is borne by such dealers who are the purchasers of these vehicles. These goods are in turn sold by the dealers to the ultimate customers who are the actual persons who have borne the Central Excise duty burden.

9. Section 12B of the Central Excise Act, 1944 reads as follows:-

"SECTION 12B. Presumption that the incidence of duty has been passed on to the buyer. -

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

The provisions of Section 12B of the Central Excise Act, 1944, presume that excise duty burden is borne by the ultimate customer though the same is a rebuttable presumption.

10. It is evident from the records that the Original Authority in the *denova* Order-in-Original No. 08/2016 dated 05.08.2016 has arrived at the decision that the appellant has borne the excise duty burden and not passed on to the dealers after scrutinizing the credit notes, Chartered Accountant's certificate, extract of ledger for discounts, etc., and ordered for sanction of the refunds. Whereas in the impugned orders dated 14.09.2017, the Commissioner of GST and Central Excise (Appeals), Coimbatore has held that refund claims were hit by the bar of unjust enrichment as the appellant has not conclusively established that the burden of excise duty in relation to which such refunds are claimed has not been passed on by him to any other person (ultimate consumer) and the verification process done by the Original Adjudicating Authority was only confined to the first buyers i.e., Dealers. Whether the incidence of duty was passed on to any other downstream buyer was not verified by the Original Adjudicating Authority and

also from the records, it was ascertained that the assessee has not submitted any such evidence. Relying on the Hon'ble Supreme Court's decision in the case of *M/s. Addison & Company Ltd. Vs. Collector of Central Excise, Madras* [1997 (91) ELT 532 (SC)] which has laid down on the issue of unjust enrichment that the assessee can succeed only if he establishes that he has not passed on the burden of duty to another person or persons, the Lower Appellate Authority has rejected the appeals filed. It was held that the appellant in order to be eligible for refund must establish in each and every case that the amount has not been passed on to another person / ultimate customer.

11.1 Now, we find it expedient to refer to 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 relevant portion of the order has been reproduced below. Discussion relating to turnover discount as to its eligibility as a deduction has been omitted as the issue under consideration is relating to interpretation of the doctrine of 'unjust enrichment'.

"5. *The respondent in the above appeal is a manufacturer of cutting tools. The respondent-Assessee filed a refund claim for Rs. 40,22,133/- on 19-7-1988 and a supplementary refund claim for Rs. 5,44,688/- on 15-6-1989 towards excise duty paid on various taxes and discounts such as turnover tax, surcharge, additional sales*

discounts, transitory insurance, excise discounts, additional discounts and turnover discounts. The said claim was later on revised to Rs. 40,37,938/- on 17-8-1988. The claim of the Assessee was that the said amount was deductible from the excise duty.

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7. The Assistant Collector passed an Order-in-Original dated 27-10-1992 holding that the Assessee is entitled for the refund claimed by him. The Collector of Central Excise by Order-in-Appeal dated 20-10-1993 rejected the appeal filed by the Revenue and upheld the order dated 27-10-1992 of the Assistant Collector of Central Excise, Madras Vth Division. The Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT), South Zone Bench of Madras allowed the appeal filed by the Revenue against the order dated 20-10-1993 of the Collector of Central Excise. The Tribunal held that the Assessee would be entitled to grant of refund only if he had not passed on the duty burden to his buyers. It was also held that the buyer in turn, would be entitled to claim refund only if he has not passed on the incidence of duty to any other person. It was further held by the Tribunal 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 has 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 and the dealer to the ultimate consumer.**

8. The Assessee filed an application for reference of questions arising out of the final order dated 7-12-1996. The Tribunal referred the following questions for consideration of the High Court by its order dated 28-8-1998, taking note of the fact of the existence of divergent views on the point.

"1. Whether by passing on the duty element on the discount to its dealers the applicant had satisfied the requirements of proviso 'd' to Section 11B(2) of the Central Excise Act, 1944 and was therefore, entitled to be paid the amount claimed as refund?

2. 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 11-B were not satisfied."

9. The High Court of Madras answered the reference in favour of the Assessee by its judgment dated 23-11-2000. The High Court held 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 the duty. According to the High Court, 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. **It was further held by the High Court that the claim for refund made by the manufacturer is not dependent on the identification of the ultimate consumer. The word 'buyer' used in Section 12B of the Act does not refer to ultimate consumer and has reference only to the person who buys the goods from the person who has paid duty i.e. the manufacturer.** The High Court concluded that the Tribunal committed an error in holding that the Assessee was not entitled for refund despite the Assessee proving that the duty was not passed on to its buyers. Challenging the legality and validity of the said judgment of the High Court, the Commissioner of Central Excise, Madras has filed Civil Appeal No. 7906 of 2002.

10. We have heard Mr. Atmaram N.S. Nadkarni, Additional Solicitor General and Mr. K. Radhakrishnan, Senior Advocate for the appellant and Mr. N. Venkatraman, Senior Advocate for the respondent. The learned Additional Solicitor General submitted that a claim for refund can be entertained only when the claimant has not passed on the duty to any other person. By referring to the statement of objects and reasons for the amendment made to the Central Excises & Customs Laws (Amendment) Act, 1991, the learned Additional Solicitor General submitted that the Act had given effect to the recommendations of the Public Accounts Committee whereby **the refund of any duty was proposed to be made only to the person who ultimately bears the incidence of such duty.** He submitted that it would be necessary for a verification to be done to find out as to who actually bore the burden of duty. **According to him such verification would not stop with the manufacturer and his buyer but would extend to the ultimate buyer i.e. the consumer.** He submitted that there can be no claim for refund on the basis of post clearance transactions. He further submitted that there is a presumption, though rebuttable, that the full incidence of the duty has passed on to the buyer of the goods. The learned Additional Solicitor General has strongly relied upon *Mafatlal Industries Ltd. and Others v. Union of India And Ors.*, reported in (1997) 5 SCC 536 = [1997 \(89\) E.L.T. 247](#) (S.C.) to support his contentions on unjust enrichment.

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12. While referring to the relevant provisions of Section 11B, 12A and 12B of the Act, Mr. Venkatraman submitted **that the buyer mentioned in the said provisions would be the buyer of the goods from the manufacturer Assessee.** He stressed upon Clauses 'a' to 'f' of the Proviso to Section 11B(2) in support of his submission that the only persons eligible to make a claim for refund would be the

manufacturer, his buyer and a class of persons as notified by the Central Government. On the basis of the above submission, he states that **there is absolutely no necessity for any verification to be made as to who is the ultimate consumer and as to whether he had borne the burden of the duty.** According to him, if the manufacturer is entitled for a refund towards an admissible deduction, such refund has to be given to him if he did not retain the benefit. He also stated that the judgment of this Court in *Mafatlal Industries Ltd. & Ors. v. Union of India (supra)* which was relied upon by the learned Additional Solicitor General would, in fact, support his case. He further submitted that the identity of the Excise duty is lost at the sales conducted downstream as the duty becomes part of the price.

13. In reply to the submissions of Mr. Venkatraman, Sr. Advocate, the Ld. Additional Solicitor General stated 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. He stated that **the refund can be granted only to the person who has paid the duty and not to anyone else. If the ultimate consumer cannot be identified, the amount would be retained in the Fund and utilized for the benefit of Consumers.**

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15. The following provisions of Central Excise Act, 1944 are relevant for appreciating the point of unjust enrichment:-

SECTION 11B. Claim for refund of duty. -

“(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, (40 of 1991), such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act :]

[Provided further that] the limitation of [one year] shall not apply where any duty has been paid under protest.

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(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty of excise as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Commissioner of Central Excise];

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

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

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

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty has not been passed on by the persons concerned to any other person.

3. Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

4. Every notification under proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as

the case may be, but without prejudice to the validity of anything previously done thereunder.

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16. *In the instant case, the Assessee has admitted that the incidence of duty was originally passed on to the buyer. There is no material brought 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. There is a statutory presumption under Section 12B of the Act that the duty has been passed on to the ultimate consumer. It is clear from the facts of the instant case that the duty which was originally paid by the Assessee was passed on. The refund claimed by the Assessee is for an amount which is part of the excise duty paid earlier and passed on. The Assessee who did not bear the burden of the duty, though entitled to claim deduction, is not entitled for a refund as he would be unjustly enriched.*

It will be useful to refer to the relevant para of Mafatlal Industries v. Union of India (supra) in this connection.

*“108. (iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. **The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund.** But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.*

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched”.

17. Section 11B(2) of the Act contemplates that the amount of refund determined by the Authorities shall be credited to the fund. The Proviso to Section 11B(2) permits the refund to be paid to the applicant instead of being credited to the fund if such amount is relatable to the manufacturer, the buyer or any other such class of applicants as notified by the Central Government.

18. Mr. Venkatraman interpreted the said provision to mean that the only persons who were entitled for claim of refund are the manufacturer, his buyer and any other class of persons as notified by the Central Government. There is no dispute about the fact that no notification has been issued by the Central Government as contemplated in Clause (f) to proviso to Section 11B(2) of the Act. **He contested that the claim for refund can be made only by the manufacturer or his buyer and any enquiry pertaining to unjust enrichment should be restricted only to the manufacturer and his buyer. The ultimate buyer/consumer will not figure in the scheme of Sections 11B, 12A, 12B and 12C of the Act. This submission was accepted by the High Court in the impugned judgment. We do not approve the findings of the High Court in this regard.**

19. 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 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 11B(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 12C. There is a proviso to Section 11B(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 11B(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 11B(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.**

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 11B(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 12D.**

22. **The High Court proceeded on an erroneous assumption of fact as well. It was held by the High Court that there is no unjust enrichment as the burden has not been passed on. The High Court's interpretation of Section 11B is also not correct.**

23. In view of the above findings, the judgment of the High Court is liable to be set aside. The Assessee is not entitled to refund as it would result in unjust enrichment. The Appeal is allowed and the judgment of the High Court is set aside.

25. The Assessee i.e. Andhra Pradesh Paper Mills Ltd. manufactures Paper and Paper boards. There is no dispute that excise duty is paid by the Assessee and the same is passed on to its buyers. Applications were filed by the Assessee for refund of amounts towards trade discounts that were given to its buyers. The refund claim is on the basis of credit notes raised by the Assessee subsequent to the sale/removal of goods. The credit notes that were raised by the Assessee were towards trade discounts which included the component of excise duty. The refund claims of the Assessee were rejected by the Assistant Commissioner of Central Excise, Rajahmundry Division. The Commissioner Customs, Central Excise (Appeals), Hyderabad confirmed the said orders in the appeals filed by the Assessee. The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Division, Bangalore dismissed the appeals filed by the Assessee.

26. The Assessee approached the High Court of Andhra Pradesh by filing Central Excise Appeals. By a judgment dated 19-2-2014, the High Court of Andhra Pradesh

allowed the Central Excise Appeal Nos. 9, 10 and 51 of 2004 and 21 of 2005. The appeals were allowed, as being squarely covered by the judgment of the Madras High Court in *Addison and Company Ltd., Madras v. Collector of Central Excise, Madras* reported in (1997) 5 SCC 763 = [1997 \(91\) E.L.T. 532](#) (S.C.).

27. The Revenue has filed Special Leave Petitions against the said judgment dated 19-2-2014. Special Leave Petition (C) Nos. 12282, 16141 and 16142 of 2016 were filed by the Revenue against the judgment dated 1-7-2015 of the Division Bench of the Andhra Pradesh High Court which followed its earlier judgment dated 19-2-2014. The issues involved in the above Civil Appeals are similar to that of Civil Appeal No. 7906 of 2002.

28. The Appeals filed by the Revenue are allowed, in terms of the judgment in Civil Appeal No. 7906 of 2002.

Civil Appeal No. 14689 of 2015

29. The above Civil Appeal is filed by the Commissioner of Central Excise and Customs challenging the judgment of the Andhra Pradesh High Court in Central Excise Appeal No. 21 of 2004. The Respondent-Assessee manufactures Pesticide formulations which are used as pesticides in agricultural farms. The Pesticides are sold at the factory gate and also through depots. The Assessee submitted an application for refund towards allowable discounts after the removal of goods from the factory. Credit notes were issued by the Assessee in favour of the buyers towards trade discounts which also contained a component of the excise duty. There is no dispute regarding the fact of payment of the excise duty originally by the manufacturer being passed on to his buyers. The refund claim of the Assessee was rejected by the Deputy Commissioner vide Order-in-Original No. 58 of 2002 dated 30-12-2002. The above said order was reversed by the Commissioner of Customs and Central Excise by his order dated 12-3-2003.

30. The Revenue filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Division, Bangalore which was allowed. The Assessee preferred an appeal to the High Court aggrieved by the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Division, Bangalore. The High Court following its own judgment in *Andhra Pradesh Paper Mills v. Commissioner of Central Excise* allowed the appeal. The point in this appeal is identical to the issue in Civil Appeal No. 7906 of 2002. **The Appeal filed by the Revenue is allowed in terms of the judgment in Civil Appeal No. 7906 of 2002.**

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33. *In Central Excise Appeal No. 34 of 2005 filed by the Union of India through Commissioner of Central Excise, Jaipur, the High Court of Judicature for Rajasthan at Jodhpur confirmed the order of the Central Excise and Service Tax Appellate Tribunal. Challenging the said judgment of the High Court dated 26-11-2008, the Union of India has filed the above Appeal. The contention raised by the Revenue before the High Court regarding the presumption under Section 12-B of the Act was rejected by the High Court by holding that once the Assessee shows that he has not passed on the duty to his buyer, then the burden shifts to the Revenue. The submission that there is a presumption of the duty being passed on to the ultimate consumer was not accepted by the High Court. The High Court held that the claim for refund should be accepted once the Assessee shows that he has raised a credit note regarding the excess duty. The High Court had further held that passing on the burden of excise duty to the ultimate buyer cannot be left in the realm of presumption.*

34. *In Civil Appeal No. 7906 of 2002, we have already held that in the claim for refund of excess duty paid can be allowed only in case where the burden of duty has not been passed on to any other person, which includes the ultimate consumer as well. The findings in the Order-in-Original and the Order-in-Appeal are that the excise duty paid originally at the rate of 8.8 per cent was passed on from the Assessee-processor to the owner of the fabric and later to the customers. The point in this Appeal is also identical to that of Civil Appeal No. 7906 of 2002. The above appeal of the Revenue is allowed."*

11.2 An in-depth examination of the Hon'ble Supreme Court's judgment in the case of Addison & Co. Ltd. (*supra*) makes it clear that there is a presumption that the full incidence of duty burden has been passed on to the buyer of the goods. The refund of any duty can be made only to the person who bears the incidence of duty and it is necessary to conduct verification as to ascertain who actually have borne the burden of duty. It has been categorically laid down that refund can be granted only to the person who has paid the duty and borne the duty and not to anyone else. If the ultimate customer cannot be identified the amount should be credited to the Consumer Welfare Fund established

under Section 12 C of the Central Excise Act, 1944 to be utilised for the benefit of consumers in general. The word 'buyer' referred to in Clause (e) to proviso to Section 11B(2) of the Act cannot be restricted to the first buyer from the manufacturer but includes the ultimate customer. Thus, it was finally concluded that the claim for refund of excess duty paid can be allowed only in case where the burden of duty has not been passed on to any other person which includes the ultimate customer as well.

11.3 In Paragraph 9 of the above judgment as extracted above, the Hon'ble Apex Court had not approved the finding of the Hon'ble High Court of Madras to the effect that the claim for refund made by the manufacturer is not dependent on the identification of the ultimate customer and the word 'buyer' used in Section 12B of the Act does not refer to ultimate consumer and has reference only to the person who buys the goods from the person who has paid duty i.e. the manufacturer. It was also not approved of the contention that refund can be made only to the manufacturer or his buyer and any enquiry pertaining to unjust enrichment should be restricted only to the manufacturer and his buyer and the ultimate buyer or customer will not figure in the Scheme of Sections 11B, 12A, 12B and 12C of the Act. The Court has held that

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 excise in relation to which such refund is claimed was paid by him and that the incidence of duty has not been passed on by him to any **other person**. The 'buyer' referred to Clause (e) to Section 11B(2) of the Act *ibid* is not restricted only to the first buyer from the manufacturer and the buyer mentioned in the above Clause can be a buyer downstream as well.

12. We find that the appellant who are the manufacturers of Motor Cycles and three wheelers are availing abatement in respect of (i) Cost of Transportation (Primary Transport) including Transit Insurance (ii) Free Service Coupon Charge (FSC) (iii) Pre-delivery Inspection Charges (PDI) (iv) Authorised Service Centre Incentives (ASC) and (v) Cash Discounts and Trade Discounts. The eligibility for these abatements was finally decided by the Tribunal Chennai *vide* Final Order Nos. 40166-40163 & 40178-40185 dated 04.02.2016. In *denovo* adjudication, the Original Adjudicating Authority has sanctioned the refunds after due examination of credit notes issued, the Chartered Accountant's Certificate, extract of ledgers for discount, etc. However, we find that Lower Appellate Authority had set aside these refund sanctioning orders on account

of non-compliance to unjust enrichment principle relying on the Hon'ble Apex Court's judgment in the case of Addison & Co. Ltd.

13. The appellant had submitted that abatement claimed towards freight charges was borne by them and not passed on to the dealers and so, it could not be presumed that the expenses along with excise duty burden was passed on by the dealers to their customers. On the issue of Free Service Charges (FSC), it was the submission of the appellant that their ultimate customers could not be charged at all as the dealers were reimbursed on the basis of the free services rendered and so there is no question of passing on the burden on FSC to the ultimate customers. As far as the Pre-Delivery Inspection (PDI) charges are concerned, the actual expenditure incurred was reimbursed to the dealers after verification of the documents produced and as such there is no scope for passing on the burden of excise duty on the PDI to the ultimate customers by the dealers. In respect of trade discounts extended, the appellant has argued that these were given to the ultimate customer and the dealers were reimbursed on production of proof of extension of benefits to the customer. All along the appellant was arguing that abatements under different heads had actually been passed on to the customers.

14. Further, the appellant has put forth the argument that the dealers were not availing any CENVAT credit and relying on the Tribunal Chandigarh's decision in the case of *Johnsons Mathey (India) Ltd. Vs. Commissioner of Central Excise [2017 (3) TMI 1449-CESTAT, Chandigarh]* wherein it was held that when the buyer had not availed the CENVAT credit of excise duty paid, the debit note issued by the buyer is enough evidence to pass the bar of unjust enrichment. The Ld. Counsel for the appellant had also submitted that presumption under Section 12B of Central Excise Act is not applicable to provisional assessment cases. It has been put forth that the doctrine of unjust enrichment is applicable only in case of refund claim to be sanctioned but not to the cases where the refunds have been already sanctioned relying on Hon'ble High Court of Madras in the case of *Madras Rubber factory Vs. Assistant Collector of central Excise, Madras [1981 (8) ELT 565 (Mad.)]*. The appellant has also mentioned about pre-audit of the refund claim before sanction and as such Department could not take a different stand after grant of refund. The appellant has not passed on the burden of duty to its buyer as such they are bound to be given refund of excess duty paid on the basis of doctrine of restitution relying on the decision of the constitutional bench of the Hon'ble Supreme Court in the

case of *Mafatlal Industries Ltd. Vs. Union of India* [1997(89) ELT 247(SC)]. The doctrine of unjust enrichment was made applicable to the provisional assessment by way of insertion of Rule 9B(5) of Central Excise Rules, 1944 w.e.f. 26.05.1999 and as such the doctrine of unjust enrichment is not applicable to their appeals. We find all these submissions of the appellant were considered by the Lower Appellate Authority in Paragraph Nos. 13 to 18 and adequately countered.

15. *Per Contra*, the Ld. Authorised Representative has submitted that the appellant has not produced any evidence to prove that the duty incidence has not been passed on to the ultimate customer. The ratio decidendi in the cases of Addison's & Co. Ltd., by the Hon'ble Supreme Court and M/s. TVS Electronics Ltd., by the Hon'ble Madras High Court is clearly applicable to these appeals on the fact of unjust enrichment. It was emphatically submitted that the refund of excise duty paid could be allowed only in case where the burden of duty has not been passed on to any other persons including ultimate customers.

16. In view of above discussion, we have to affirm the decision of the Lower Appellate Authority regarding applicability of the above Hon'ble Apex Court's judgment

in the case of Addison & Co. Ltd. to the facts of these appeals. The appellant has proved by raising credit notes that the burden of duty has not been passed on. But however, as originally the excise duty paid at the time of sale of the Motor Cycles to the dealers and further sales effected by the dealers to the ultimate customers, the incidence of excise duty burden must have been naturally passed on to the ultimate customers which is the reasonable presumption in terms of Section 12B of the Central Excise Act, 1944. The appellant would be eligible for refunds sanctioned only when it is proved that incidence of duty has not only been passed on to the dealers but also by the dealers to the ultimate customers. Herein, the appellant has proved that the excise duty burden has been borne by him and not passed on to the dealers. But whether there is any evidence as to their dealers having not passed on the duty incidence to the ultimate customers of Motor Cycles is not forth coming as a second stage verification has not been carried out. As such, we have to hold that the appellant is required to prove conclusively that the incidence of duty burden has not been passed on to the ultimate buyers so as to be eligible for the refund claims arising on account of finalisation of provisional assessment after allowing abatements.

17. However, to finally decide as to whether there is compliance to the principle of unjust enrichment in these appeals before being eligible for refunds in terms of Hon'ble Supreme Court's judgment in the case of M/s. Addison's & Co. Ltd., the following facts as emerging from these appeals have to be considered. It is not known as to how much and what kind of abatements were considered at the time of sale of Motor Cycles to their dealers for provisional payment of excise duty. It is on record that certain abatements were taken into consideration to ascertain the transaction value for clearance of Motor Cycles by the appellant though it is not clear as to whether all abatements as discussed in Paragraph 2.2 as above have been considered or not and also quantum of such abatements as the transaction value and excise duty payment arrived would be dependent upon such quantification arrived at.

18. At this juncture, we refer to the ratio of the decision in the case of *TVS Electronics Ltd. Vs. Assistant Commissioner of Central Excise, Chennai [2017 (348) ELT 630 (Mad.)]* following the judgement in the case of Addison's case cited *supra*. The relevant extracts of the said judgement have been reproduced below for the sake of convenience:-

"9. With respect to the aspect of unjust enrichment, the Bench at Para 19 of the judgment notes that the sine qua non for a claim of refund in terms of Section 11B of the Central Excise Act is the establishment by the claimant that such duty in relation to which the refund is claimed was, in fact, paid by him and has not been passed on to any other person. The Bench thereafter, at Para 21 of the judgment, extracted below, interprets the word 'buyer' in Clause (e) to proviso to Section 11B (2) of the Act to mean any buyer not restricted to the first buyer. In such an event, **the burden is on the manufacturer to establish that the incidence of duty borne by him has not been passed on to at any stage in the transaction till the goods reach the hands of the end-user.**

10. This is thus, a mandatory exercise that is to be undertaken by a manufacturer in order to establish nil unjust enrichment. While this may be easier achieved in cases where the transaction is direct as between the manufacturer and end-user, the level of difficulty increases with the number of intermediaries involved.

11. The assessment, thus, stands remanded to the file of the Assessing Officer, who will determine the issue of refund after furnishing adequate opportunity to the appellant for establishing nil undue enrichment in its hands. The exercise as set out by the Supreme Court is to be undertaken scrupulously in order to ensure that the incidence of duty has, in fact, not been passed on at any stage till the stage of ultimate end-user. The substantial question of law is accordingly answered in the above terms and the appeal allowed by way of remand."

19. We also find that the Hon'ble High Court of Madras had an occasion to decide on a similar issue in the case of *SRF Ltd. Vs. CEGAT, Chennai [2021 (377) E.L.T. 737 (Mad.)]* wherein it was held as follows:-

"18. Thus the decision in *Addison & 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 31-5-1990 the rate of duty was NIL. For the period between 31-5-1990 and 6-7-1990 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."

20. The facts in these appeals are similar. So, it is necessary to ascertain who has actually borne the incidence of duty till the stage of ultimate customer. The appellant has argued that the decision of Hon'ble Madras High Court in the case of M/s. TVS Electronics Ltd., is not applicable to these appeals. We find that Hon'ble High Court has remanded the issue for undertaking verification as to who had ultimately borne the burden of duty to pass the test of unjust enrichment following the Hon'ble Apex Court's judgment in the case of M/s. Addison & Co. Ltd. We do not approve of the appellant's contention in this regard as the Original Adjudicating Authority has done limited verification to the extent of the appellant have not passed on the burden of excise duty incidence to their dealers only. No verification as to

who have ultimately borne the excise duty burden and its extent has not been examined.

21. In view of the aforesaid discussion, we are of the considered view that sanction of the refund claims by the Original Adjudicating Authority without conducting verification as to whether the dealers of the Motor Cycles have not passed on the incidence of duty to the ultimate customer is not legal and proper. Refund of excess excise duty paid at the time of provisional assessments, could be legally sanctionable only to those persons which include ultimate customers who must have borne the burden of excise duty paid. After considering the various submissions of the appellant regarding availment of abatements and in compliance to the decision of Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Madras Vs. Addison & Co. Ltd.* [2016 (339) ELT 177 (SC)] and the decision of the Hon'ble High Court of Madras in the case of *TVS Electronics Ltd. Vs. Assistant Commissioner of Central Excise, Chennai* [2017 (348) ELT 630 (Mad.)], the appeals have to be remanded to the Original Adjudicating Authority with a direction to conduct verification as to whether the incidence of excise duty burden has been passed on or not to the ultimate customers. The presumption that the dealers of the appellant have passed the duty burden to the final customers of Motor cycles / Autos needs to be

rebutted. It is made clear that the verification to be carried out will not stop with the appellant and its dealers but would extend to the final buyers of these goods. The appellant is hereby directed to produce all evidence as to who have ultimately borne the excise duty burden.

22. Thus, the appeals are allowed by way of remand.

(Order pronounced in open court on 27.03.2025)

Sd/-

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-

(P. DINESHA)
MEMBER (JUDICIAL)

MK