

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH - COURT NO. – I

Excise Appeal No. 26376 of 2013

(Arising out of **Order-in-Appeal** No.13,16&17/2013 (H-III) CE & 4 to 7/2013(H-III)CE (D),
dated 28.02.2013 passed by Commissioner of Customs, Central Excise & Service Tax,
(Appeals- I & III), Hyderabad)

Sagar Cements Ltd.,
Mattampally Village & Mandal,
Nalgonda District,
Telangana – 508 204.

..

APPELLANT*VERSUS*

**Pr. Commissioner of Central Tax
Rangareddy - GST**

..

RESPONDENT

GST Bhavan,
H.No. 1-98/7/43,
VIP Hills, Jaihind Enclave,
Madhapur, Hyderabad,
Telangana – 500 081.

WITH**Excise Appeal No. 26377 of 2013**

(Arising out of **Order-in-Appeal** No.13,16&17/2013 (H-III) CE & 4 to 7/2013(H-III)CE (D),
dated 28.02.2013 passed by Commissioner of Customs, Central Excise & Service Tax,
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GST Bhavan,
H.No. 1-98/7/43,
VIP Hills, Jaihind Enclave,
Madhapur, Hyderabad,
Telangana – 500 081.

AND**Excise Appeal No. 26402 of 2013**

(Arising out of **Order-in-Appeal** No.13,16&17/2013 (H-III) CE & 4 to 7/2013(H-III)CE (D),
dated 28.02.2013 passed by Commissioner of Customs, Central Excise & Service Tax,
(Appeals- I & III), Hyderabad)

Sagar Cements Ltd.,
Mattampally Village & Mandal,
Nalgonda District,
Telangana – 508 204.

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APPELLANT*VERSUS*

**Pr. Commissioner of Central Tax
Rangareddy - GST**

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RESPONDENT

GST Bhavan,
H.No. 1-98/7/43,
VIP Hills, Jaihind Enclave,
Madhapur, Hyderabad,
Telangana – 500 081..

APPEARANCE:

Shri Y Sreenivasa Reddy, Advocate for the Appellant.

Shri V Srikanth Rao, Authorised Representative for the Respondent.

CORAM: HON'BLE Mr. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30340-30342/2024

Date of Hearing: 10.06.2024

Date of Decision: 19.07.2024

[ORDER PER: A.K. JYOTISHI]

M/s Sagar Cements Ltd., (SCL) (herein after referred to as appellant), are engaged in manufacture of Cement falling under Chapter Heading No. 252329 of the First Schedule to the Central Excise Tariff Act, 1985. They are clearing the goods on payment of the duty to the customers, dealers, stockists etc. They have filed several refund claims for different period on account of excess duty paid on account of issue of credit notes to dealers and stockists after the clearance of the goods. The appellants also submitted Chartered Accountant's certificate stating that they had not recovered excess duty on credit notes passed on to their customers and thus, they had not passed on the burden of duty incidence to their customers.

2. In Appeal No. E/26376/2013, the Department after having examined the refund claim, issued a show cause notice dated 28.09.2012, asking the appellant as to why the refund claim of Rs. 61,40,933/- should not be rejected, in view of the fact that in their case, the incidence of duty has been passed on and the appellants have not given any evidence to the effect that the incidence has not been passed on to the ultimate customers. In other words, on grounds of unjust enrichment under Section 11B read with provisions of Section 12B of Central Excise Act they are not entitled for refund. Additionally, it was also alleged that in the facts of the case, the

appellants had not intimated the quantum of discount at the time of clearance and also not opted for provisional assessment, hence, were otherwise also not eligible for deduction of certain discounts from the transaction value and therefore not eligible for refund of duty paid on such discounts passed on at a later date.

3. The Adjudicating Authority, after going through the submissions of the appellant and CBEC's Excise Manual of supplementary instructions and also the judgment in the case of MRF Ltd., Vs CCE, Madras [1997 (92) ELT 309 (SC)], observed that the appellants had neither declared the marketing policy nor produced any evidence with regard to offering the discounts of any nature to the customers before effecting clearance and have never intimated the department about their intention of offering discounts to the customers on post sale basis through credit notes and infact had not opted for provisional assessment, therefore, the value adopted for payment of duty for delivering at the time and place of removal alone will represent the transaction value. Though, he has not said in so many words that the refund is not eligible on grounds of merits itself, in view of this observation, it is quite obvious that on merit also the refund was not considered by the Original sanctioning authority. He, however, further analysed the claim from the angle of unjust enrichment and after going through the facts of the case and the statutory provisions, where the burden was on the appellant to prove that the duty paid by him was not passed on to customers or to the party, concluded that appellants has failed to satisfy that they had not passed on the duty incidence to ultimate customers and therefore rejected the claim of refund.

4. The appellants went in appeal to the Commissioner (Appeals), who took up this appeal along with 3 more appeals pertaining to different periods on the identical issue. The Commissioner (Appeals) also took up Departmental appeals filed in respect of certain Order-in-Originals including the impugned Order-in-Original. The appellants 3 appeals and cross objections as well as Department's 4 appeals were disposed by way of common order no. 84,102 and 103/2012 (H-III) CE and 02-05/2013 (H-III) CE(D) dated 28.02.2013 after going through the submissions of both the appellants and department as well as various decisions and judgments cited by both the sides. It was held that the claim for refund were not admissible, both on merits and as well as on the grounds of unjust enrichment, and therefore he allowed the appeals of the Department and rejected the claims made by the appellants.

5. In the appeal no. E/26376/2013, E/26377/2013 & E/26402/2013 the appellants have come against the common impugned order passed by the Commissioner (Appeals). The main grounds of appeal is that the Appellate Authority has relied upon certain circulars, which requires that provisional assessment is must for refund of duty paid in excess. The Learned Advocate for the appellant have also submitted that in view of various judgments and some of the judgments in their own case passed by Hon'ble Tribunal, the Commissioner (Appeals) has not considered the case laws cited in this regard and has taken a contrary view. He also points out that in the impugned order Commissioner (Appeals) has taken into account the Department's contention that the refund was not admissible for the reason that the appellant had not informed the nature of discount to the Department, even though the appellant had brought to the notice of the Adjudicating Authority that Department's appeal is beyond the scope of

show cause notice in as much as it alleges that the appellant had not informed the quantum of discount to the Department only. The Learned Advocate says that in the impugned order there is reliance on the MRF case, which basically relates to price revision at a later date subsequent to the clearance of goods, whereas, in the present case the issue involved is determining the quantity discount and the same could be determined only after the quantity sold is ascertained and will not be known at the time of clearance of goods. He also relies on the judgments of the Tribunal in the case of Commissioner of Central Excise, Hyderabad Vs TFL Quinn India Private Ltd., reported at [2011 (267) ELT 641 (Tri-Bang)], wherein, it was held that as long as the nature of discount is known at the time of clearance of goods and or irrovakably allowed to the customer, failure to follow the procedure for provisional assessment alone would not disentitle the assessee for abatement and consequential refund and that the assessable value will not include the discounts allowed. He has also relied on the judgment in the case of M/s Bipco Industries (Tools) Private Ltd., Vs CCE, Vaapi [2009 (247) ELT 811 (Tri-Ahmd)], wherein, it was held that non-intimation regarding following discounts and not resorting to provisional assessment are procedural in nature and refund cannot be denied on such grounds. Learned Advocate has also relied on two orders of Hyderabad Bench dated 29.01.2016 and 31.01.2017 in their own case and in their favour on identical issue and submitted that said orders have attained finality.

6. On the other hand, Revenue is contesting these appeals particularly on two grounds namely the non-admissibility of refund on merit itself as also on the grounds of unjust enrichment as the assessee has not been able to discharge the burden of proof that the incidence of duty has not been passed on to the ultimate customer. Learned AR is also relying on the judgments

passed by Hyderabad Bench in the case of Commissioner of Central Excise and Service Tax, Hyderabad Vs Sirpur Paper Mills Ltd., [2018 (360) ELT 544 (Tri-HYD)] and judgment of Hon'ble Supreme Court, Larger Bench in the case of CCE, Madras Vs Addison & Co. Ltd., [2016 (339) ELT 177 (SC)] in support of their submissions that they are not entitled for refund. He also inferred that case in their own favour were appealed against by Department in the Hon'ble High Court but later on withdrawn on the grounds of low monetary value.

7. Heard both the sides and perused the records.

8. Since all the three appeals are arising out of the same order of the Commissioner (Appeals) and the facts are also identical, we propose to take up all the three appeals together for disposal. The factual position with regard to these appeals are as under:

Sl. No.	Appeal No.	Amount of Refund (Rs.)	Period	OIO No. & Date	OIA No. & Date
1.	E/26376/2013	61,40,933	Oct 2011 to Dec 2011	112/Ref/2012 dt. 25.10.2012	13,16&17/2013 (H-III) CE & 4 to 7/2013(H-III)CE (D), dated 28.02.2013
2.	E/26377/2013	74,72,822	Jan 2012 to Mar 2012	113/Ref/2012 dt. 25.10.2012	13,16&17/2013 (H-III) CE & 4 to 7/2013(H-III)CE (D), dated 28.02.2013
3.	E/26402/2013	57,58,757	July 2011 to Sept 2011	104/Ref/2012 dt. 24.09.2012	13,16&17/2013 (H-III) CE & 4 to 7/2013(H-III)CE (D), dated 28.02.2013

9. The brief fact of the case is that the appellants are clearing cement, on which central excise duty is charged on MRP basis, to their dealers, distributors etc., either directly or through its depots. As per their common practise, the appellants were extending quantity discount and prompt payment discounts to their dealers where the quantity discount rates would

be intimated to the dealers and known at the time of clearance of goods but the quantum of discount will be known only after certain period depending on quantity lifted by dealer. Similarly, in the case of receipt of cash discount, it depends on payment at the earliest. They have submitted the copies of the policy documents and circulars showing the rate of discount and MRP etc. As per the practise, at the end of each month, basing on the quantity which a dealer has lifted, the appellants are extending the discount by issuing credit notes to the dealers for the amount of discount which is inclusive of the duty paid on the goods. These discounts are reflected in the ledger account of the appellants. Further, these credit notes were inclusive of central excise duty and therefore they were filing refund claims in respect of such excess excise duty paid. They also claimed that since they are refunding the excess excise duty to their dealers, stockers etc., by way of credit notes, they have not enriched themselves and unjust enrichment is not applicable.

10. The case of the Revenue is that the value adopted for the payment of duty for the delivery at the time and place of removal represents transaction value under Section 4(1) of Central Excise Act, 1944 and therefore discounts passed on the subsequent to clearance cannot be allowed as a discount, more so, when quantum of discounts are not known to the customers at the time of clearance. The Commissioner (Appeals) has relied on the judgment of Hon'ble High Court in the case of Sangam Processors reported in [1994 (71) ELT 989 (Tri)] for rejecting the refund on merit, whereas appellants have relied on the judgment of Hyderabad Tribunal in Final Order No. A/30107/2017 dated 31.01.2017 in their own case, which relied on the judgment of Hon'ble Supreme Court in the case of Addison and Company holding that refund of duty cannot be denied. The Learned Advocate had

also relied on certain judgments in support that when the amount is reflected as receivable in their Balance sheet and Chartered Accountant certificate had certified, the appellant could not have passed on the duty burden as it would be deemed as if the same has not been passed on. He relied on the following case laws:

- a) Shree Krishna Nylon Pvt Ltd., Vs CCE, Mumbai
[2015 (327) ELT 626 (Tri-Mum)]
- b) Indian Oil Corporation Ltd., Vs CCE, Vadodara
[2019 (370) ELT 487 (Tri-Ahmd)]

Further, in support of their submission that the Addison case is not applicable where the credit notes were issued, they have relied on certain judgments of Co-ordinate Benches as under:

- a) Dupen Laboratories Pvt Ltd., Vs CCE, Daman
[2014 (7) TMI 146 – CESTAT – Ahmedabad]
- b) Birla Corporation Ltd., Vs CCE, Lucknow
[2017 (358) ELT 443 (Tri-All)]
- c) Dabur India Ltd., Vs CCE, Patna
[2024 (6) TMI 170 – CESTAT-Kolkata]
- d) M/s Gillette India Ltd., Vs CCE, Chandigarh-I
[2023 (11) TMI 154 – CESTAT- Chandigarh]

11. Learned Advocate also submits that since the appellants have paid duty on MRP and not on transaction value, hence irrespective of whether the duty paid is less or more, the MRP would remain the same and hence, no presumption arises that the appellant had passed on the duty to the ultimate consumer. They have mainly relied on judgments given in identical facts of the case for earlier period by the Hyderabad Bench in their favour and therefore according to them the issue is no longer res-integra. We have perused these orders. In the Final Order No. A/30128/2016 dated 29.01.2016, the Tribunal was dealing with the rejection of the refund claim on identical set of facts for the period June 2011 involving refund of an

amount of Rs. 17,98,058/- on account of excess excise duty paid on account of discounts passed on to the dealers and stockists, subsequent to clearance. In para 4 of the order, the Tribunal dealt with the issue of non-disclosure of quantum of discount to the stockists at the time of clearance and non-opting for provisional assessment. It was also observed that the Department had not disputed that the discounts were actually given and that the appellants having paid duty at higher value. Therefore, relying on the case of Balmer Lawrie and Company Ltd., which in turn had relied on the judgment of CCE, Nagpur Vs Oriental Explosives (P) Ltd., [2008 (222) ELT 205 (Bom)], the refund was found to be admissible as the appellant had satisfied the first three parameters of supplementary instruction, except for opting for provisional assessment, which was also held to be a merely procedural in nature. The Order No. A/30107/2017 [2017 (3) TMI 292 CESTAT-Hyderabad], relying on their earlier order dated 29.01.2016 observed that Commissioner (Appeals) has rejected the refund on merit on the grounds of appellant not being able to meet condition (iv) of TRU's Circular dated 30.06.2000, which was held to be a procedural breach in the case of Balmar Lawrie & Co. Ltd., Vs CCE, Kolkata [2015 (315) ELT 100 (Tri-Kol)].

12. As far as unjust enrichment was concerned in the given set of facts, relying on the Chartered Accountant's certificate certifying that in the credit note they had not recovered excess duty and that the duty has been borne by them and has not been passed on, the principle of unjust enrichment is not invocable, the Tribunal relied on certain judgments passed by Hon'ble High Court of Andhra Pradesh in the case of AP Paper Mills which distinguished the judgment of relied upon by the Revenue in the case of Sirpur Paper Mills Ltd., and Grasim Industries Vs CCE, Bhopal [2011 (27)

ELT 164 (SC)] and held that the appellants were eligible for refund of excess duty on account of discounts offered after clearance. In another order in their own case dated 31.01.2017 [2017 (3) TMI 292 - CESTAT-HYD], the Tribunal was dealing with the rejection of refund of Rs. 23,80,130/- for the period April 2011 to May 2011 and in this case, also relying on the earlier judgment dated 29.01.2016, of Hyderabad Bench as also the Hon'ble Supreme Court judgment in the case of Addison and Company Ltd., came to the conclusion that they were entitled for refund both on merits as well as non-invokation of unjust enrichment. Therefore, there is a merit in the contention of the appellant that the matter is no longer res-integra as the facts of the case were considered by the Tribunal and decided in their favour. However, whether said orders would have effects on both the issues or otherwise needs to be further analysed.

13. However, per contra, the Learned AR has mainly relied on one judgment of Hyderabad Bench of the Tribunal in the case of Sirpur Paper Mills Ltd., [2018 (360) ELT 544 (Tri-Hyd)] and also on the judgment of Larger Bench of Hon'ble Supreme Court in the case of Addison and Company Ltd., cited supra. According to him, in the case of Sirpur Paper Mills Ltd., there is a clear observation that in view of the ratio laid down by the Apex Court in the Addison judgment, while the trade discount cannot be disallowed merely on the grounds that they were not paid at the time of each invoice or deducted from the invoice price before clearance, it would not be admissible on the grounds of unjust enrichment. In other words, the rejection of refund on grounds of merits was not held to be sustainable, however, the same was not found eligible on the grounds of unjust enrichment.

14. We find that as far as the issue of refund on merit is concerned, apart from the fact that the matter is no longer res-integra, the refund of the nature claimed by way of credit note, post clearance, would be admissible, however, what is important to note is even if when a refund becomes eligible on merit, it has to clear the bar of unjust enrichment. Various judgments have been cited by Revenue in support of their claim that in the facts of the case, the bar of unjust enrichment is applicable. We have perused such judgments and we find that under different circumstances various orders of the Tribunal and courts and even Hon'ble Supreme Court have held that the bar of unjust enrichment would be invokable if it is not proved that the burden has not been passed on by the appellants. In fact, in the order dated 31.01.2017, Tribunal's reliance on para 36 of the judgment in the case of Addison and Company, is not relevant to the facts of the case. It has to be noted that in the case of Addison and Company Ltd., the Hon'ble Supreme Court was dealing with various appeals emanating from different set of facts and only in respect of Civil Appeal No. 8488 of 2009, where the facts were slightly different, the Hon'ble Supreme Court held that "in that case, the assessee had borne the burden of duty, it cannot be said that it is not entitled for the refund of the excise duty paid". In the case in hand, it is not a disputed fact that initially the full excise duty is collected by the appellants from their dealers, distributors, stockists etc., who in turn again sold their product downstreams to ultimate customers. While excess excise duty collected later on is passed on to such dealers/distributors etc., by appellants by way of credit note, they have clearly failed to prove that such dealers, stockists have not passed on original central excise duty paid at the time of clearance on such goods to customers/ultimate customers.

15. This issue as to whether in the given set of facts, it was not possible to identify the persons who ultimately borne out the amount of excise duty collected in excess and therefore such excess amount will remain in the fund which will be utilised for the benefit of the customers as provided under Section 12D of the Central Excise Act, 1944 needs to be examined. The appellants have not been able to establish that they had not passed on the excess excise duty to their ultimate customer. Merely because they were selling on MRP basis, it would not absolve them from the fact that they had not passed on the original duty charged by the appellant to the ultimate customer and therefore even if they are entitled for refund on merit, they would still not be entitled for refund on the grounds of unjust enrichment under Section 11B.

16. We find that the judgment by Larger Bench of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Madras Vs Addison and Co. Ltd., the Addison and Company case law is squarely applicable to the facts of the case in as much as while the appellant is entitled for refund on merits but clearly they are not entitled for refund on the grounds of unjust enrichment as they have not been able to clear the bar of unjust enrichment. The relevant para of the judgment is cited below for ease of reference:

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

plain reading of Clauses (d), (e) and (f) of the proviso to Section 11-B (2) shows that refund to be made to an applicant should be relatable only to the duty of excise paid by the three categories of persons mentioned therein i.e. the manufacturer, the buyer and a class of applicants notified by the Central Government. Clause (e) refers to the buyer which is not restricted to the first buyer from the manufacturer. The buyer mentioned in the above Clause can be a buyer downstream as well. While dealing with the absence of a provision for refund to the consumer in the rules this Court in [Mafatlal Industries Vs. Union of India](#) (supra) held as follows:-

“98. A major attack is mounted by the learned counsel for petitioners- appellants on Section 11-B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12-D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. “We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto”, intoned Shri Nariman. It is a colourable device — declaimed Shri Sorabjee — “a dirty trick” and “a shabby thing”. The reply of Shri Parasaran to this criticism runs thus: It ill- becomes the manufacturers/Assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. Clause (e) of the proviso to sub-section (2) of Section 11- B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a “trial and error” method — says Shri Parasaran”.

17. Similarly, as far as the issue of refund on merit of the case is concerned, para 14 of the order is also quite relevant wherein, interalia, it was held that the appellants were entitled for refund on the basis of credit notes raised by him towards turnover discounts. Para 14 is cited below for ease of reference.

14. We have considered the submissions made by the Counsel carefully and examined the material on record. The questions that arise for consideration in this case are whether the Assessee is entitled for a refund and whether there would be unjust enrichment if the said refund is allowed. It was held by the Special Bench of CEGAT, New Delhi by its judgment dated 17.03.1994 in [Collector of Central Excise, Madras Vs. Addison & Co. Ltd.](#) that the turnover discount is not an admissible abatement on the ground that the quantum of discount was not known prior to the removal of the goods. In an appeal

filed by the respondent-Assessee, this Court by its judgment dated 11.03.1997 in [Addison & Co. Ltd. Vs. Collector of Central Excise, Madras](#) (supra) held that the turnover discount is an admissible deduction. This Court approved the normal practice under which discounts are given and held that the discount is known to the dealer at the time of purchase. The Additional Solicitor General submitted that any credit note that was raised post clearance will not be taken into account for the purpose of a refund by the Department. We do not agree with the said submission as it was held by this Court in [Union of India Vs Bombay Tyre International](#) (supra) that trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. It is the submission of the Assessee that the turnover discount is known to the dealer even at the time of clearance which has also been upheld by this Court. It is clear from the above that the Assessee is entitled for filing a claim for refund on the basis of credit notes raised by him towards turnover discount.

18. We also observe that the Commissioner (Appeals) has in the impugned order examined the facts of the case to decide whether refund is entitled on merit or otherwise. He has also examined the clarification issued by the Board vide Circular F.No. 354/81/2000-TRU as well as the supplementary instruction at para 2.5 (iv) of Para III of Chapter 3. Para 10 of the impugned order is reproduced below:

10. The said Circular dt: 30.06.2000 (supra) and/or para 2.5 (iv) of part II of Chapter 3 of supplementary instructions, clarified the position of the law that the "quantity discount" could have been an eligible abatement from transaction value, in case:

- (i) such discount was known prior to the clearances and was offered as a common practice;
- (ii) it was established that the discount for a given transaction had actually been passed on to the buyer of the goods.
- (iii) it was extended as per the commercial considerations, irrespective of the fact whether the quantum of such discount of any description for a transaction was known prior to the clearances or not (similar to year-end discount); and
- (iv) the assessee disclosed the intention of allowing such quantity discounts to the department and necessarily made a request for provisional assessment in terms of Rule 7 of Central Excise Rules, 2002.

19. Further, in para 11, he has observed that the facts on record has revealed that the first 3 parameters were satisfied with regard to quantity discount offered by the appellant but the appellant did not opt for provisional assessment under Rule 7 of Central Excise Rules as required under para 4 and therefore in the absence of provisional assessment, the said quantity

discount cannot be the basis for claiming refund. We have also gone through the order of Hyderabad Bench in their own case order dated 29.01.2016. Since the only ground on which the said discount was not found eligible on merit by the Commissioner (Appeals) was non-following of provisional assessment and the rest of the conditions were admittedly fulfilled and has not been disputed by the Revenue. Whereas, in their own case the Tribunal has observed that the condition for provisional assessment is not a sacrosanct requirement in the light of the judgment laid in CCE, Nagpur Vs Oriental Explosives (P) Ltd., [2008 (222) ELT 205 (Bom)]. In this case also there is no dispute that the refund claim was filed within one year from the date of clearance of good hence the criteria of provisional assessment would be irrelevant. Therefore, keeping in view the earlier orders of Hyderabad Tribunal, cited supra as also the impugned order were admittedly all grounds were found to have been fulfilled the refund to be eligible on merits in the facts of the case.

20. In so far as applicability of Section 12B is concerned, Commissioner (Appeals) has relied on various judgments including Grasim Industries Vs CCE, Bhopal [2003 (153) ELT 694 (Tri-LB)], Sangam Processors (Bhilwara) Ltd., Vs Collector of Central Excise, Jaipur [1994 (71) ELT 989 (Tri)], Grasim Industries Ltd., Vs CCE, Bhopal [2011 (271) ELT 164 (SC)]. He has placed reliance on Sangam Processors Ltd., [1994 (70) ELT A.182 (SC)] = (Rajasthan Spinning & Weaving Ltd., - [1991 (102) ELT A.115 (SC)]) judgment passed by Three Member Bench of Hon'ble Supreme Court to come to the conclusion that in the given fact of the case principle of doctrine of unjust enrichment would be applicable. We find that though the appellants have also relied on various case laws, all these case laws have been dealt with adequately by the Commissioner (Appeals) who has given

reasons for relying on certain judgments for coming to the conclusion that in the facts of the case, the principle of unjust enrichment would be applicable. We also find that the issue of applicability of unjust enrichment in the facts of the case are also covered by the ratio of judgment of Larger Bench of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Madras Vs Addison and Company Ltd. Since the appellants have failed to prove that they had not passed on the excess excise duty to their ultimate customer, they would be hit by the provision of Section 12B. Therefore, while the refund is eligible on merits, the same cannot be disbursed to the appellant and is required to be dealt with in accordance with the provisions under Section 12D. Therefore, part of the observations of the Commissioner (Appeals) as regards non-entitlement of the refund on merit is not sustainable. However, his order is sustainable as regards applicability of unjust enrichment in the facts of the case.

21. Appeals disposed off accordingly.

(Order pronounced in open court on 19.07.2024)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)