Commnr.,Central Excise, Madras vs M/S. Adison & Co. Ltd on 29 August, 2016

Equivalent citations: AIR 2016 SUPREME COURT 4007, AIR 2016 SC (CIVIL) 2728, 2016 (10) SCC 56, (2016) 8 SCALE 308, 2016 (4) KCCR SN 511 (SC)

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Bench: L. Nageswara Rao, Amitava Roy, Anil R. Dave

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 7906 of 2002

Commissioner of Central Excise, Madras

.... Appellant(s)

Versus

M/s Addison & Co. Ltd.

… Respondent(s)

WITH

CIVIL APPEAL No. 8488 of 2009

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 25055 of 2009)

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 18426 of 2015)

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 18423 of 2015)

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 18425 of 2015)

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 23722 of 2015)

CIVIL APPEAL No. 14689 of 2015

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 12282 of 2016)

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 16142 of 2016)

CIVIL APPEAL No. _____of 2016
(Arising out of SLP (C) No. 16141 of 2016)

J U D G M E N T

L. NAGESWARA RAO, J.

The above Appeals have been listed before us because of an order dated 16.07.2008, by which there was a reference to a Larger Bench in view of the importance of the questions involved.

2. Civil Appeal No. 7906 of 2002 arises from the judgment dated 23.11.2000 passed by the Madras High Court in R.C. No. 01 of 1999. Civil Appeal No. 14689 of 2015 was filed by the Revenue against the judgment dated 26.11.2014 in Central Excise Appeal No. 21 of 2009. Special Leave Petition (C) Nos. 18426 of 2015, 18423 of 2015, 18425 of 2015, 23722 of 2015, 12282 of 2016, 16142 of 2016 and 16141 of 2016 are filed against the judgment of the Andhra Pradesh High Court in Central Excise Appeal Nos. 21 of 2005, 9 of 2005, 51 of 2004, 10 of 2005, 44 of 2004, 38 of 2004 and 18 of 2005 respectively.

3. Civil Appeal No. 8488 of 2009 is filed against the judgment dated 20.08.2008 passed by the Bombay High Court in Central Excise Appeal No. 100 of 2008 and Special Leave Petition (C) No. 25055 of 2009 is filed by the Union of India against the judgment dated 26.11.2008 of the High Court of Rajasthan at Jodhpur in D.B. Central Excise Appeal No. 34 of 2007.

4. Civil Appeal No. 7906 of 2002 will be taken as the lead matter as SLP (C) Nos. 18426, 23722, 18425, 18423 of 2015 and 12282, 16141 and 16142 of 2016 and Civil Appeal No. 14689 of 2015 were disposed of by the Andhra Pradesh High Court by following the Madras High Court's impugned judgment in Civil Appeal No. 7906 of 2002. Civil Appeal No. 8488 of 2009 and SLP No. 25055 of 2009 will be dealt with separately as the facts and the point involved are slightly different.

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 19.07.1988 and a supplementary refund claim for Rs. 5,44,688/- on 15.06.1989 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 17.08.1988. The claim of the Assessee was that the said amount was deductable from the excise duty. The Department was of the opinion that the refund towards turnover discount and additional discount was to be rejected as the Assessee was not eligible for deduction from the wholesale price for determination of value under Section 4 of the Central Excises & Salt Act, 1944. On 23.08.1989 a notice was issued to the respondent to show cause as to why the refund claim involving turnover discount and additional discount should not be rejected. After hearing the Assessee, the Assistant Collector by an order dated 06.12.1989 rejected the refund claim amounting to Rs.26,37,462/- and Rs.17,17,808/- in respect of turnover discount and additional discount respectively on the ground

that the quantum of discount become known only at the year end. The Collector of Central Excise Appeals set aside the said order dated 06.12.1989 of the Assistant Collector by his order in appeal dated 21.02.1990 and held that the Assessee was entitled to refund.

6. As per the amendment made to Section 11-B of the Central Excise Act, 1944, (hereinafter referred to as "the Act") an application filed for refund prior to the Central Excises & Customs Laws (Amendment) Act 1991 shall be deemed to have been made under the Amendment Act and considered accordingly. The Assistant Collector of Excise issued a show cause notice dated 13.02.1992, directing the Assessee to produce evidence in support of the refund claim. It was mentioned in the said notice that the burden of proof to show that the full incidence of duty has not passed on to the buyers is on the Assessee as per Section 12-B of the Act.

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 07.12.1996. The Tribunal referred the following questions for consideration of the High Court by its order dated 28.08.1998, 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 sub Section 11-B (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 11-B 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 12-B 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 Vs. Union of India And Ors., reported in (1997) 5 SCC 536 to support his contentions on unjust enrichment.

11. Mr. N. Venkatraman, Senior Advocate appearing for the Assessee contended that turnover discount is an admissible deduction, the scheme of turnover discount was known to the buyer even at the time of sale, discount was given on the basis of the turnover of sales made by the buyer and that the credit notes issued to the buyer contains the discounts and the duty element. Though there is a confusion from the pleadings and the order passed by the High Court regarding the passing of the incidence of duty, Mr. N. Venkatraman had fairly submitted that the incidence of duty was originally passed on to the buyer. He submitted that the turnover discount should be allowed to be deducted from the sale price as held in Union of India and Others Vs. Bombay Tyre International Pvt. Ltd. reported in (1984) 1 SCC 467 and (2005) 3 SCC 787. He contends that in the said judgments it was held that trade discounts should not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price. He also placed reliance on IFB Industries Ltd. Vs. State of Kerala reported in (2012) 4 SCC 618 to support his submission that to qualify for exemption, discounts need not be shown in the invoice itself.

12. Mr.Venkatraman further submitted that the eligibility of the Assessee for refund of amounts towards turnover discounts is no longer in doubt as this Court by its judgment dated 11.03.1997 in Addison & Company Ltd., Madras Vs. Collector of Central Excise, Madras reported in (1997) 5 SCC

763 had held that turnover discount is an admissible deduction. He stated that Section 4 read with Section 11-B of the Act permits the respondent to claim for refund of turnover discount given after the sale, provided the scheme of discount has been agreed upon prior to the removal of the goods. The Assessee while issuing a credit note for the turnover discount has returned the duty component forming part of the said discount. As the Assessee has not retained the duty component of the turnover discount, he does not stand to benefit from both ends and hence he is entitled for claiming a refund of the excess duty paid. The refund to which the Assessee is entitled to would not result in any unjust enrichment. While referring to the relevant provisions of Section 11-B, 12-A and 12-B 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 11-B (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. Vs. 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.

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 removable 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.

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.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause f of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.] [Explanation. — For the purposes of this section, -

(A) “refund” includes 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) “relevant date” means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, Or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

[(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;] (ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;] (eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]

(f) in any other case, the date of payment of duty.] SECTION 12A. Price of goods to indicate the amount of duty paid thereon. — Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

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. SECTION 12C. Consumer Welfare Fund. — (1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund.

(2) There shall be credited to the Fund, in such manner as may be prescribed, -

(a) the amount of duty of excise referred to in sub-section (2) of section 11B or sub-section (2) of section 11C or sub-section (2) of section 11D;

(b) the amount of duty of customs referred to in sub-section (2) of section 27 or sub-section (2) of section 28A, or sub-section (2) of section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund.

SECTION 12D. Utilisation of the Fund. — (1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India".

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 12-B 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 Vs. 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 11-B (2) of the Act contemplates that the amount of refund determined by the Authorities shall be credited to the fund. The Proviso to Section 11-B (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 11-B (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 11-B, 12- A, 12-B and 12-C 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 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".

20. There was a further submission which was considered in the said judgment about the convenience/difficulty for the ultimate consumer to make applications for refund. In that connection it was held as follows:-

"99. We agree with Shri Parasaran that so far as the provisions of the Act go, they are unexceptionable. Section 12-C which creates the Consumer Welfare Fund and Section 12-D which provides for making the Rules specifying the manner in which the money credited to the Fund shall be utilised cannot be faulted on any ground. Now, coming to the Rules, it is true that these Rules by themselves do not contemplate refund of any amount credited to the Fund to the consumers who may have borne the burden; the Rules only provide for "grants" being made in favour of consumer organisations for being spent on welfare of consumers. But, this is perhaps for the reason that clause (e) of the proviso to sub-section (2) of Section 11-B does provide for the purchaser of goods applying for and obtaining the refund where he can satisfy that the burden of the duty has been borne by him alone. Such a person can apply within six months of his purchase as provided in clause (e) of Explanation B appended to

> Section 11-B. It is, therefore, not correct to contend that the impugned provisions do not provide for refunding the tax collected contrary to law to the person really entitled thereto. A practical difficulty is pointed out in this behalf by the learned counsel for appellants-petitioners: It is pointed out that the manufacturer would have paid the duty at the place of "removal" or "clearance" of the said goods but the sale may have taken place elsewhere; if the purchaser wants to apply for refund — it is submitted — he has to go to the place where the duty has been paid by the manufacturer and apply there. It is also pointed out that purchasers may be spread all over India and it is not convenient or practicable for all of them to go to the place of "removal" of goods and apply for refund. True it is that there is this practical inconvenience but it must also be remembered that such claims will be filed only by purchasers of high-priced goods where the duty component is large and not by all and sundry/small purchasers. This practical inconvenience or hardship, as it is called, cannot be a ground for holding that the provisions introduced by the 1991 (Amendment) Act are a "device" or a "ruse" to retain the taxes collected illegally and to invalidate them on that ground — assuming that such an argument is permissible in the case of a taxing enactment made by Parliament. (See R.K. Garg [(1981) 4 SCC 675 : 1982 SCC (Tax) 30 : AIR 1981 SC 2138] and other decisions cited in paras 87 and 88.)"

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 11-B (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 12-D.

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 11-B 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.

Special Leave Petition (C) Nos. 18426, 23722, 18423, 18425 of 2015 and 12282, 16141 and 16142 of 2016.

Leave granted.

24. Civil Appeals arising out of Special Leave Petition (C) Nos. 18426, 23722, 18423 and 18425 of 2015 are filed by Commissioner of Central Excise, Vishakapatnam, challenging the legality of judgment dated 19.02.2014 of a Division Bench of the High Court of Andhra Pradesh in Central Excise Appeal Nos. 51 of 2004 and 10, 9 and 21 of 2005. Civil Appeals arising out of SLP (C) Nos. 12282, 16141 and 16142 of 2016 are filed by the Commissioner of Central Excise, Vishakapatnam against the judgment dated 01.07.2015 of a Division Bench of the High Court of Andhra Pradesh in Central Excise Appeal Nos. 44 and 38 of 2004 and 18 of 2005. These three appeals were disposed of by the High Court in terms of its earlier judgment dated 19.02.2014.

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 Assessees 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 19.02.2014, 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 Vs. Collector of Central Excise, Madras reported in (1997) 5 SCC 763.

27. The Revenue has filed Special Leave Petitions against the said judgment dated 19.02.2014. Special Leave Petition (C) Nos. 12282, 16141 and 16142 of 2016 were filed by the Revenue against the judgment dated 01.07.2015 of the Division Bench of the Andhra Pradesh High Court which followed its earlier judgment dated 19.02.2014. 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.

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 12.03.2003.

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 Vs. 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.

Special Leave Petition (C) No. 25055 of 2009 Leave granted.

31. The Assessee is engaged in the processing of man-made fibre. Prior to 11.06.2001 the CENVAT credit admissible on the declared inputs used in the manufacture of process of man-made fibre was 45 per cent. The net duty payable on the fibre was 55 per cent of the effective duty. On 11.06.2001, a notification was issued increasing CENVAT credit from 45 per cent to 50 per cent which resulted in the net duty payable being 50 per cent. The Assessee continued to pay the effective duty at 55 per cent for a short period between 11.06.2001 to 13.06.2001. The effective duty of excise is 16 per cent and the duty payable from the personal ledger account prior to the notification dated 11.06.2001 was 8.8 per cent and after 11.06.2001 the duty payable is 8 per cent. The Assessee made an application for refund of Rs. 61,146/- paid in excess on 31.07.2001. The said application for refund was rejected by an Order-in-Original dated 12.08.2002 by the Assistant Commissioner, Bhilwara on the ground that the Assessee was a job worker engaged in the processing of grey fabric and that the said fabric was returned to the owners of the fabric who sold the processed fabric in the market. It was also held that the incidence of the duty was passed on to the ultimate customers/consumers before the debit notes were raised by the owners of the fabric. As the duty paid at 8.8 per cent was passed on by the owner of the fabric to the ultimate consumer the processor was not entitled for a refund.

32. The Assessee approached the Commissioner Appeals, II Customs & Central Excise, Jaipur by filing an appeal which was rejected by an order dated 27.02.2003. The Central Excise and Service Tax Appellate Tribunal by its order dated 11.05.2005 allowed the appeal filed by the Assessee on the ground that the incidence of duty was not passed on by the Assessee to the customers. The customers protested to the charging of the net duty payable at 8.8 per cent instead of 8 per cent in spite of the notification issued on 11.06.2001. This protest was made without any delay so the question of passing the incidence of duty by the owners of the fabric to their customers does not arise.

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.

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 14.08.2002 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 02.08.2002. The refund claim was rejected by the Deputy Commissioner of Central Excise, Kolhapur Division vide an order dated 24.09.2002 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 29.07.2002. 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 Central Excise and Service Tax Appellate Tribunal vide judgment and order dated 06.10.2005. The said order of Central Excise and Service Tax Appellate Tribunal was further confirmed by the High Court of Judicature at Bombay in Central 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.

37. As held above, Civil Appeal Nos. 7906 of 2002 and 14689 of 2015 are allowed. Civil Appeals arising out of Special Leave Petition (C) Nos. 18426 of 2015, 18423 of 2015, 18425 of 2015, 23722 of 2015, 12282 of 2016, 16142 of 2016, 16141 of 2016 and 25055 of 2009 are also allowed in terms of

the judgment in Civil Appeal No. 7906 of 2002. Civil Appeal No. 8488 of 2009 is dismissed. No order as to costs.

.....J. [ANIL R. DAVE] .....J. [AMITAVA ROY] .....J. [L. NAGESWARA RAO] New Delhi, August 29, 2016