IN THE HIGH COURT OF TRIPURA
A G A R T A L A

W.P.(C) NO.35 OF 2010

Sri Rabindra Ch. Paul,
Proprietor,
M/S Rajat Trading (Importer & Exporter),
Netaji Subhas Road, P.S. West Agartala,
District West Tripura

………………… Petitioner

– Vs –

1. The Union of India,
   represented by the Secretary to the Govt. of India,
   Ministry of Finance, Department of Revenue, New Delhi.

2. The Assistant Commissioner,
   Customs Division, Agartala, West Tripura.

..………….Respondent

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. D.K. Biswas, Advocate

For the respondents : Mr. P. Datta, Advocate

Date of hearing : 14.01.2015

Date of judgment & order: 22.01.2015

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER

By means of this petition, the writ petitioner, who carries on the business of importing cement etc., has challenged clause (2) of the Notification No.102/2007-Customs, dated

14.09.2007, Annexure-1 to the writ petition, which provides that:

> **"2. The exemption contained in this notification shall be given effect if the following conditions are fulfilled:**
>
> **(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;**
>
> **(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;**
>
> **(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;**
>
> **(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;**
>
> **(e) the importer shall, inter alia, provide copies of the following documents alongwith the refund claim:**
>
> > **(i) document evidencing payment of the said additional duty;**
> >
> > **(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;**
> >
> > **(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods."**

2. Further, the order dated 01.01.2010 passed by the Assistant Commissioner, Customs Division, Agartala, Annexure-

2 to the writ petition has been called in question for refusing three numbers of refunds amounting to ₹2,01,233 in aggregate for assigning the purported reasons therein. In exercise of the power conferred by Section 25 of the Customs Act, 1962, the benefits of exempting additional duty of the customs is available under sub-section (5) of Section 3 of the Customs Tariff Act, 1975, has been granted for the goods falling within the First Schedule to the Customs Tariff Act, 1975 when imported to India for subsequent sale.

3. Section 25 of the Customs Act, 1962 provides that, if the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon. To operationalise that scheme as provided by the notification dated 14.09.2007, Annexure-1 to the writ petition, a circular under No.6/2008-Cus, dated 28.04.2008, has been issued by the Govt. of India by giving the detailed procedure for purpose of having exemption of 4% additional duty of customs. The said notification is not, however, under challenge. Later on, by another circular under No.16/2008-Cus, dated 13.10.2008, clarification of the notification dated 28.04.2008 has been made

on the procedure to be followed for making 4% CVD refund in terms of the said notification dated 14.09.2007 (Annexure-1 to the writ petition). Even the circular No.16/2008-Cus, dated 13.10.2008 has not been questioned or challenged by the petitioner.

4. There is no dispute as regards the petitioner's entitlement to have 4% refund of the additional customs duty for importing cement for sale to the sellers. It is to be clarified that at the time of importing the cement, the importer has to pay the custom duty including the additional custom duty, but subsequently 4% additional customs duty as paid by the importer be refunded after complying certain requirements as detailed in the circular No.6/2008 read with the circular No.16/2008. The petitioner has claimed for refund for the following four numbers of bills as mentioned in the impugned order dated 01.01.2010 :

B/E Nos.
(i) 1742/IMP/Agt/LCS/2008-09 dated 05.01.2009 for Rs.44,052/-,
(ii) 1838/IMP/AGT/LCS/2008-09 dated 24.01.2009 for Rs.79,242/-,
(iii) 2033/IMP/AGT/LCS/2008-09 dated 24.02.2009 for Rs.38,336/-,
(iv) 2066/IMP/AGT/LCS/2008-09 dated 04.03.2009 for Rs.39,603/-.

5. It appears from the impugned order dated 01.01.2010 that the petitioner did not submit necessary documents duly filled or stamped by the authorities and accordingly, the observation as follows has been made in the impugned order :

"On receiving the refund claims, all the documents submitted along with the refund claim were properly scrutinized and the following discrepancies were noted :

a. The party has submitted only one rfund claim application for four Bill of Entries,

b. All the invoices and packing list were submitted without attestation.

c. Sl.No.9(h) to sl.No.9(r), Sl.No.10 and Sl.No.11 of the refund application were not filled up.

d. The claimant has submitted all the documents in Xerox form.

e. The claimant has submitted the Xerox copies of Tax invoice (Form XXI), Tripura Value Added Tax Act, 2005 evidencing for selling of the imported cement while the said invoices are found not fulfilling the condition of Para 2(b) of Notification No.102/2007-Cus., dt. 14.09.2007. In that Notification, it has been clearly mentioned that the importer, while issuing the invoice for sale of goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no Credit of the additional duty of Customs levied under sub-section (5) of Sec.3 of the Customs Tariff Act, 1975 shall be admissible but in the invoices it is noted that no such declaration are given to the effect that the seller is not taking 4% CVD from the buyer.

f. The claimant has submitted the Xerox copies of VAT Challan (Form XVIII) and return Form (Form X) under the Tripura Value Added Tax Act, 2005 evidencing payment of VAT while the party has not submitted a certificate from the Chartered Accountant, who either certifies the importer's financial records under the Companies Act, 1956 or any ST/VAT Act of the State Government or the Income Tax Act, 1961, confirming the payment against the aforesaid documents (as mentioned in Para 2(vi) of the circular 16/2008-Cus, dt. 13.01.2008). Since, to entertain the Xerox copy by Customs authority for consideration of the refund, the above mentioned certificate is required.

g. The Xerox copies of Challans and TR-5, evidencing payment of duty have not been verified by the concerned unit.

h. The Xerox copies of Bill of Entries are illegible and not verified by the concerned unit.

i. The claimant has not produced the Certificate from the Statutory Auditor/Chartered Accountant who certifies the importer's annual financial accounts under the Companies Act or any statute, explaining how the burden of 4% CVD has not been passed on by the importer and to fulfil the requirement of unjust enrichment (as mentioned at Para 6.2 of the Circular No.6/2008-Cus, dt. 28.04.2008.

Therefore, the refund claim application along with all the documents submitted by the said assessee had been returned to the said assessee for resubmission of the claim application along with all the requisite correct enclosurers."

6. In response thereto, the petitioner re-submitted the refund claim application alongwith the following documents :

A. One refund claim application for Bill of Entries Nos.1742/IMP/AGT/LCS/2008-09,DT.05.01.2009 and 1838/IMP/AGT/LCS/2008-09 DT.24.01.2009 since those were processed in one month i.e. January 2009, which is duly filled in.

B. Two refund claim applications for Bill of Entries Nos.1742/IMP/AGT/LCS/2008-09,DT.24.02.2009 and 2066/IMP/AGT/LCS/2008-09 DT.04.03.2009 which are duly filled in.

C. All the invoices and packing list were submitted in original.

D. All the documents were submitted in original.

E. The claimant had submitted the Xerox copies of Tax Invoice (Form XXIX), Tripura Value added tax Act, 2005 under Rule 6(6)(i) of VAT Rules.

F. Two certificates from the Chartered Accountants Firm i.e. Saikat Datta & Associates.

G. Verified copies of Challans and TR-5, evidencing payment of duty.

H. Quad triplicate copy of Bill of entries.

I. Xerox copy of statement of Accounts and Audit Report for the year ended 31.03.2009 audited by the Chartered Accountants firm i.e. S. Guha & Associates under section 44AB of the Income Tax Act, 1961.

7. But, that time also the documents with the refund claim application could not fulfil the condition of para 2(b) of the Notification No.102/2007-Cus., dated 14.09.2007 read with para 7.2 of the Circular No.6/2008-Cus., dated 28.04.2008 and particularly, the requirement of the condition that the duty burden has not been passed on by the importer to any other person for the purpose of having refund of 4% CVD as mentioned in para 6 of the Circular No.6/2008-Cus., dated 28.04.2008 and para (vii) of the circular No.16/2008-Cus., dated 13.10.2008. On accommodating the petitioner overcome said difficulty, the Assistant Commissioner, Customs Division, Agartala, proposed the personal hearing, where the petitioner had been permitted to appear with the original statutory forms, which are as under :

1. **Bill of Entries [as above mentioned].**
2. **Challans for payment of Customs duties of the said Bill of Entry Nos.**
3. **Tax Invoices [Form XXIX under Rule 6(6)(i) of TVAT Rules].**

4. **Return Form [Form X under Rule 18(1) of TVAT Rules].**

5. **Challan for payment [Form XVIII under Rule 31 of TVAT Rules].**

6. **Purchase statement [Form XXXVII under Rule 16(7) of TVAT Rules].**

7. **Certificate issued by the Chartered Accountants firm explaining HOW the burden of 4% CVD/ACD has not been passed on by the importer.**

8. **Audited Balance Sheet for the Financial Year 2008-09 and evidences in respect of the Chartered Accountant firm certification of the importer's financial records under the Companies Act, 1956 or any ST/VAT Act of the State Government or the Income Tax Act, 1961.**

9. **Any other document sin support of the refund claim.**

8. The petitioner had requested the Assistant Commissioner, Customs Division, Agartala, to change the date of hearing from 23.12.2009 to 14.12.2009 and, accordingly, that was granted. The petitioner was represented by one authorised person to present his case. The said representative, at the time of personal hearing, contended that all the required documents for having the 4% ACD refund have been submitted and in respect of 'unjust enrichment' clause, the petitioner M/S Rajat Trading had produced the Chartered Accountant's certificate to show that the petitioner did not transfer 4% ACD to the buyer. However, such plea was not accepted, observing that :

"Gone through the facts of the case & the documents submitted by the party. I have also gone through the provisions of Notification No.102 dated 14.09.2009, Circular No.06/2008-Customs dated 28.04.2008 and the preceding and subsequent amendments thereafter (vide Notification No.102/2007-Customs dated 14.09.2007 and Circular No.16/2008-Cus., dated 13.10.2008]. As envisaged in the Circular No.06/2008-Customs dated 28.04.2008 it has been mentioned that the purpose of granting this exemption is to ensure that the importer pays either 4% CVD or the appropriate ST/VAT and not both. Further, it is not the intention of the Government to allow the importer to recover the 4% CVD from the buyer as well as to allow claim of refund of this amount collected from customers. Also the principle of unjust enrichment needs to be examined in each case before sanction of refund under this notification.

To check the misuse of this notification, various devices has been formulated and enshrined in the Circular itself. Some of the important mechanisms to verify the genuinity of the refund claim are –

(i) Declaration for non-admission of Cenvat Credit.

(ii) In terms of the requirement under para 2(d) of the said notification, it is stated that appropriate ST/VAT is to be paid by the importer on sale of goods. The importer can then claim the refund of 4% CVD paid at the time of import.

(iii) In terms of the requirement under para 2(b) of the said Notification, it is stated that the importer, while issuing the invoice for sale of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible.

(iv) A certificate from the statutory auditor/Chartered Accountant, who certifies the importer's annual financial accounts under the Companies Act or any statute, correlating the payment of ST/VAT on the imported goods (in respect of which refund

is claimed) with the invoices of sale, would be required along with the original tax/duty payment documents as proof of payment of appropriate ST/VAT for the purpose of para 2(d) & (e) of the said notification.

(v) It has been clarified by the Board in Circular No.16/2008-Cus, dated 13.10.2008 that the 'statutory auditor/Chartered Accountant' mentioned in the earlier Board's circular refers to "Chartered Accountant" within the meaning of section 2(1)(b) of the Chartered Accountants Act, 1949. However, it is clarified that the Customs field formations shall accept the certificate given only by such a Chartered Accountant who either certifies the importer's financial records under the Companies Act, 1956 or any ST/VAT Act of the State Government or the Income Tax Act, 1961, in order to fulfil the requirement of the condition that the incidence of duty burden has not been passed on by the importer to any other person for the purpose of refund of 4% CVD. A certificate by any other independent Chartered Accountant would not be acceptable for this purpose.

I have gone through the documents submitted by the party alongwith the refund claims I am of the view that the refund claim has been filed within the stipulated time period. On opportunity for re-submission being given pointing to the lacunae of the original refund application, the said assessee re-submitted the refund applications alongwith all the related relied upon documents. All the related documents were scrutinized.

An opportunity for personal hearing was also given to the said assessee. During the personal hearing, Sri Rabindra Chandra Paul, the proprietor of M/s Rajat Trading and the authorized Representative Sri Samir Chakraborty appeared before me and held that they have produced all the documents required for the sanctioning of the refund of the 4% ACD. The authorized representative further stated that in respect of the provision of 'Unjust Enrichment' in connection with the refund claims filed by M/s Rajat Trading, the Chartered Accountant has already certified

that M/s Rajat Trading has not transferred the 4% CVD to the buyer. So, he requested for early sanction of the 4% CVD in favour of M/s Rajat Trading.

<u>I have also very carefully gone through the case file and the records and documents placed in this instant file. It appears that the said assessee vide their letter dated 11.11.2009 forwarded a certificate from the Chartered Accountants firm i.e. Saikat Datta & Asociates wherein it has been certified that the said assessee has not collected the 4% CVD from the buyer since it is not mentioned in the invoice of M/S Rajat Trading nor the buyer has collected the CVD from the subsequent buyer. The firm also certified that the said assessee has not fulfilled the condition of stamping in the invoices of not collecting the CVD from its buyers as mentioned in para 2(b) of Notification No.102/2007-Cus, dt. 14/-9.2007. It has also been mentioned that the said assessee assured that they will fulfil the condition as mentioned in para 2(b) of Notification No.102/2007-Cus, dated 14.09.2007 from the next invoices onwards. Earlier, in point (e) of his letter dated 05.10.2009 the said assessee has mentioned that the VAT/ Sales Tax authority do not allow any further declaration on the body of the tax invoice as the proforma of tax invoice has been prescribed by them under Rule 6(6)(i) of the VAT Rules.</u>

But, in terms of the requirement under para 2(b) of the said Notification, it is clearly stated that the importer, while issuing the invoice for sale of the goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible which is a mandatory provisions and it was not fulfilled by the said assessee. Hence, the certificate of the Chartered Accountant could not be acceptable in this regard. Further, the said assessee has not cited any valid reason why the VAT/Sales Tax authority are not allowing them to make the statutory declaration on the body of the tax invoice. Further, if so is the situation how has the said assessee has assured that they will fulfil the condition as mentioned in para 2(b) of Notification

No.102/2007-Cus., dated 14.09.2007 from the next invoices onwards. This point remained unanswered.

It is therefore established that the party has failed to strictly adhere to the mandatory conditions stipulated as pre-conditions for the grant of refund particularly Para 2(b) of the Notification No.102/2007-Cus, dated 14.09.2007 and the condition of unjust enrichment, para (vii) of the Circular No.16/2008-Cus, dated 13.10.2008. Hence the said assessee is not entitled for the refund of a total of Rs.2,01,233.00 (Rupees Two lacs one thousand two hundred and thirty threea0 [Rs.44,052.oo + Rs.79,242.00 + Rs.38,336.00 + Rs.39,603.00] only as claimed. Being a creature of the statute, I have got no other option but to strictly abide by the terms and provisions of the statute and hence I am of the view that the said assessee has not fulfilled the statutory provision of para 2(b) of the Notification No.102/2007-Cus, dated 14.09.2007 and the conditions of unjust enrichment Para (vii) of the Circular No.16/2008-Cus., dated 13.10.2008." **[Emphasis added]**

9. Having held thus, the petitioner's claim for refund was rejected by the Assistant Commissioner, Customs Division, Agartala. The said order though was subsequently amended by the corrigendum dated 22.01.2010, Annexure-3 to the counter-affidavit filed by the respondents, there was no substantive change.

10. Appearing for the petitioner, Mr. D.K. Biswas, learned counsel, has submitted that there is a provision for preferring appeal under Sections 128 and 129 of the Customs Act, 1962, but for non-availability of the Presiding Officer in the Appellate Authority/Appellate Tribunal, the petitioner filed this

writ petition and such circumstances has been elaborated in paragraph 8 of the writ petition as under :

> **"That the Appellate Forum at Guwahati does not provide any efficacious remedy because cases are filed only, but the date is not made available even in 2 to 3 years after filing the appeal. This happens mainly because the office of the Appellate Authority remains almost always vacant and emergency works are done by officer from different State temporarily working in the office at Guwahati. It is thus a futile exercise to get any relief from the Statutory Authority by preferring an appeal. This is a good ground which this Hon'ble Court would consider to entertain this Writ Petition even without the challenge of the vires of the notification."**

11. Mr. Biswas, learned counsel has urged that unless the writ petition was entertained the petitioner would have been without any remedy. However, after filing of the writ petition, the petitioner filed appeal against the orders passed by the Assistant Commissioner, Customs Division, Agartala, refusing to grant refund of 4% additional customs duty to the petitioner on various other pretexts. Mr. Biswas, learned counsel, has further submitted that the petitioner would not insist his challenge to clause (2) of the Notification No.102/2007-Customs, dated 14.09.2007, Annexure-1 to the writ petition, which has operationalised the refund of 4% additional customs duty. However, the petitioner still insists his challenge against the order dated 01.01.2010, by rejecting the claim of refund of the additional customs duty, as stated. Mr. Biswas, learned counsel

has submitted that the petitioner has submitted all required documents, but the respondents, by trivialising the procedure, has raised some highly technical objections as regards the verification and stamping for purpose of rejecting his legitimate claim. Mr. Biswas, learned counsel, has referred to the decision of the tribunal in this regard which were part of the miscellaneous application filed by the petitioner, being C.M.Appl.No.326/2011, arising from the appeal. For illustrating, he has relied on a decision of the Commissioner, Customs and Central Excise (Appeals) dated 27.07.2011 in an identical matter, where the appellate authority, after discussing all relevant circulars, has held that :

> **17. There is no dispute that the Appellant have submitted the required certificate from their Auditor/Chartered Accountant, as prescribed, however, despite these glaring facts and material on record, the Lower Authority has objected that the Chartered Accountant has not explained how[?] he has arrived at the conclusion that he has verified the books of Account and other records, furthermore, his direction to them to produce the Audited Balance Sheet (above) refers – this is patently egregious and improper as the said Circular never envisages such requirement. No material and proper basis is found for this. It would appear, in these circumstances, that he has twisted and manipulated the conditions prescribed therein in order to deny the benefit of exemption to the Appellant. No other substantial, reasonable, and proper basis and ground are brought on the record by him to justify and sustain his findings against the Appellant, on the issue of unjust enrichment. The Appellant in this regard has submitted that the certificate of the Chartered Accountant which itself is sufficient and proper material to cover the requirement of satisfaction**

of "unjust enrichment", and no further requirement of additional explanation is called for, to fulfil this requirement. Regarding the matter of submission of Audited Balance Sheet by them, I find that such requirement (query) has been met by the Appellant, as recorded later at page 5, para 3 (-not numbered, though) thereof that the Balance Sheet record would be made available, possible only subsequently – at the end of the financial year – and in any case, this requirement is also not stipulated in the said notification/circular.

Further, the Chartered Accountant, i.e. M/s Saikat Datta & Associates are the Auditor of the Importer-Appellant, reasonable for submitting the Audited Balance sheet/Annual accounts of the Importer under the Income Tax Act, 1961. They are not an individual (unconnected) Chartered Accountant as far as the Importer is concerned, and hence the Certificate issued by the said Chartered Accountant's firm is the certificate (required) as referred to in para 2(vii) of the Circular No.16/08-Cus, dated 13.10.08 (supra), for fulfilling the requirement of "unjust enrichment".

18. I also find that the refund of duty under the said notification is a beneficiary provision. It is well-settled law that any beneficiary provision should be interpreted liberally and non-observation of procedural requirements should not become hurdle or ground for denial of the substantial right. Referred- the Apex Court decision in the case of Sambhaji v. Gangabai [2009(240)ELT 161(S.C.)] and Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner [1991(55)ELT437(S.C.)].

19. The case law referred and relied upon by the Lower Authority is on the principle of "unjust enrichment"; in the first three cases, it was held *interalia* that refund is not grantable without considering unjust enrichment aspect, this has not been disputed by the Appellant; rather, they also have duly complied with such requirement and the balance (remaining) three cases could not be considered for the incomplete citation made.

[Emphasis added]

12. Mr. Biswas, learned counsel appearing for the petitioner has further submitted that while claiming the refund, the petitioner has submitted the Chartered Accountant's certificate to fulfil the requirement of unjust enrichment clause and it would be evident from the communication dated 11.11.2009, Annexure-4 to the counter-affidavit filed by the respondents. Despite that, the Assistant Commissioner, Customs Division, Agartala, has rejected the claim of the petitioner.

13. Mr. P. Datta, learned counsel appearing for the respondents, has submitted that when there exists substantive effective remedy of filing appeal under Section 128 or under Section 129 of the Customs Act 1962, this court would not be inclined to entertain this petition. Mr. Datta, learned counsel has submitted that it is evident from the order dated 27.07.2011, passed by the appellate authority (Annexure-A to the miscellaneous application) that the petitioner has been deriving the benefit of the scheme promulgated by the Govt. of India, vide their Notification dated 14.09.2007, Annexure-1 to the writ petition. As such, the petitioner cannot challenge the very foundation of such claim. Moreover, no reason or ground has been assigned in the writ petition to show that the said Notification dated 14.09.2007 is *ultra virus* or that that is grossly unjust, arbitrary, unfair and unreasonable, offending

good conscience qua Article 14 of the Constitution. Thereafter, Mr. Datta, learned counsel, has elaborated that the petitioner even though has filed his claim within the limitation, but he did not fulfil the requirement as laid down in the terms of the Circular No.6/2008-Cus., dated 28.04.2008 and Circular No.16/2008-Cus., dated 13.10.2008. Mr. Datta, learned counsel, has submitted that elaborate procedure has been provided by the Circular No.6/2008, dated 28.04.2008, which postulates that for purpose of claiming the refund of the additional excise duty at 4% and in order to ensure sanction of refund properly, the document evidencing payment of ST/VAT (in original) duly issued by or acknowledged by the concerned ST/VAT authorities shall be produced by the importer. A certificate from a Chartered Accountant or any other independent authority certifying payment of ST/VAT would not be acceptable in lieu of the original documents. However, a certificate from the statutory auditor / Chartered Accountant, who certifies the importer's annual financial accounts under the Companies Act or any statute, correlating the payment of ST/VAT on the imported goods (in respect of which refund is claimed) with the invoices of sale, would be required along with the original tax / duty payment documents as proof of payment of appropriate ST/VAT for the purpose of para 2(d) & (e) of the said notification. The petitioner, as would be apparent from the impugned order, did not deposit the original documents in proof of payment of ST/VAT.

14. It appears that, in Clause (5) of the Circular No.6/2008-Cus, dated 28.04.2008, it has been categorically provided that a certificate from a Chartered Accountant or any other independent authority certifying payment of ST/VAT would not be acceptable in lieu of the original documents. Therefore, the submission of the certificate issued by the Chartered Accountant by itself would not absolve an importer from submission of the original documents which are required for due consideration or entitlement as provided. Further, to strictly deter unjust enrichment by way of realising additional customs duty from the buyers and realising refund of the additional customs duty of 4% as in the same transaction the following provisions has been made at clause 6.1 and 6.2 of the Circular No.6/2008-Cus :

> **6.1. The 4% CVD exemption under the said notification is operated through a refund mechanism, wherein the importer would have to first pay the said 4% CVD at the time of importation and, thereafter, can claim refund of 4% CVD on production of documents showing that the appropriate ST/VAT has been paid. Hence, the purpose of granting this exemption is to ensure that the importer pays either 4% CVD or the appropriate ST/VAT and not both. It is not the intention of the Government to allow the importer to recover the 4% CVD from the buyer as well as to claim refund of this amount from Customs. Hence, the principle of unjust enrichment needs to be examined in each case before sanction of**

> **refund under this notification. However, considering the voluminous transactions and the documents involved in the cycle, from import to sale, it was felt that it would be expedient to allow the importer to submit a certificate from the statutory auditor / Chartered Accountant who certifies the annual accounts of the importer, that the burden of 4% CVD has not been passed on by the importer to the buyer and to fulfill the requirement of unjust enrichment.**
>
> **6.2. In view of the above, it is clarified that the doctrine of unjust enrichment will apply to 4% CVD refunds Scheme under the said exemption notification issued in terms of Section 25(1) of the Customs Act, 1962. However, importers may produce a certificate from the statutory auditor/Chartered Accountant who certifies the importer's annual financial accounts under the Companies Act or any statute, explaining how the burden of 4% CVD has not been passed on by the importer and to fulfill the requirement of unjust enrichment. In addition to the aforesaid the importer shall also make a self-declaration along with the refund claim to the effect that he has not passed on the incidence of 4% CVD to any other person. [Emphasis added]**

15. Since the Chartered Accountant has not given the due certificate, the petitioner's claim for refund of the additional excise duty came under the thicket of suspicion. The certificate issued by the Chartered Accountant on 29.09.2009, which reads as under has also been cautiously structured :

> **"<u>To whom It May Concern</u> :**
>
> **This is to certify that M/s Rajat Trading, N.S. Road, Agartala, Tripura(W) has imported 5000 bags of cement vide bill of entry No.1742/IMP/AGT/LC/2008-09, dated 05.01.2009, 10000 bags of cement vide bill of entry No.1838/IMP/AGT/LC/2008-09 dated**

24.01.2009, 5000 bags of cement vide bill of entry No.2033/IMP/AGT/LC/2008-09 dated 24.02.2009 and 5000 bags of cement vide bill of entry No.2066/IMP/AGT/LC/2008-09 dated 04.03.2009, details of which are enclosed with the certificate.

<u>This is to further certify that the concern has not collected the additional countervailing Duty (ACD) from its customers as apparent from the books and records of the concern</u>.

Place : Agartala
Date : 29/09/2009

For, SAIKAT DATTA & ASSOCIATES
Chartered Accountants
Sd/- illegible
(SAIKAT DATTA)
Proprietor"

The Chartered Accountant has clearly stated the concern, the petitioner herein, has not collected the additional countervailing duty (ACD) from its customers as is apparent from the books and records of the concern.

16. Mr. Datta, learned counsel appearing for the respondents, has contended that the said certificate issued by the Chartered Accountant on 29.09.2009 could not be accepted for non-availability of the records. As such, there is no illegality or irregularity in the impugned order. Even the documents appended with the writ petition do not establish the case of the petitioner that he had complied with all the requirements in terms of the Circular No.6/2008-Cus, dated 28.04.2008. Finally, Mr. Datta, learned counsel has submitted that the Assistant Commissioner, Customs Division, Agartala, has shown adequate

flexibility by affording sufficient opportunities to the petitioner to properly document his claim in terms of the Circular No.6/2008-Cus, dated 28.04.2008 and the Circular No.16/2008-Cus, dated 13.10.2008.

17. On scrutiny of the records, this court finds that the petitioner did not produce properly verified challans of Sales Tax/Value Added Tax in respect of the sale, did not file the verified challans of payment of the additional customs duty from the concerned unit and also did not file the challans verified by the concerned unit of the Customs Department. Moreover, those documents which were filed with the claim are the photo-copies. Hence, there is no infirmity in the impugned order. However, this court is satisfied that the petitioner filed the claim within time, but there had been non-compliance of the requirement in terms of the Circular No.6/2008-Cus, dated 28.04.2008 and the Circular No.16/2008-Cus, dated 13.10.2008, having reference to the Notification No.102/2007-Cus, dated 14.09.2007. But, such claim has been rejected. Even though rightly, but it would not be proper to deprive the petitioner of his legitimate claim as that might constitute unjust enrichment of the Govt. of India at the cost of the petitioner. The jurisprudential objection as to the maintainability of the writ petition as raised by Mr. Datta, learned counsel appearing for the respondents has been relegated having regard to the averments that at the relevant

point of time, the Tribunal had no regular Presiding Officer. But, it is made clear that this waiver cannot be treated as the precedent for future cases inasmuch as it is trite law that when there is substantive and efficacious remedy provided by the statute, the petition filed under the provisions of Articles 226/227 in ordinary course shall not be invoked by the High Court.

18. Having regard to that aspect of the matter and also to the deficiencies in documenting the claim petition, it is directed that if the petitioner submits the original documents, with appropriate certificate with required verification/stamping and with the appropriate certificate of the Chartered Accountant in observance of the said circulars within a period of 30(thirty) days from today, then the Assistant Commissioner, Customs Division, Agartala, shall re-consider the matter, else the impugned order dated 01.01.2010 shall be treated as final for all purposes.

19. With this observation and direction, this writ petition stands disposed of. There shall be no order as to costs.

JUDGE

ROY