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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CUSAA 3/2022

COMMISSIONER OF CUSTOMS, ACC IMPORT ...Appellant
Through: Mr. Harpreet Singh, Ms. Suhani Mathur, Mr. Jatin Kumar Gaur, Mr. Kirit Gupta, Ms. Pranjal Jain, Mr. Hemant Jain and Mr. Dharmender K, Advs.

versus

M/S U.T. ELECTRONICS PVT. LTD. .....Respondent
Through: Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria and Ms. Purvi Sinha, Advs.

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\+ CUSAA 4/2022

COMMISSIONER OF CUSTOMS, ACC IMPORT ...Appellant
Through: Mr. Harpreet Singh, Ms. Suhani Mathur, Mr. Jatin Kumar Gaur, Mr. Kirit Gupta, Ms. Pranjal Jain, Mr. Hemant Jain and Mr. Dharmender K, Advs.

versus

M/S U.T ELECTRONICS PVT. LTD. .....Respondent
Through: Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria and Ms. Purvi Sinha, Advs.

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\+ CUSAA 5/2022

COMMISSIONER OF CUSTOMS, ACC IMPORT ...Appellant
Through: Mr. Harpreet Singh, Ms. Suhani Mathur, Mr. Jatin Kumar Gaur, Mr. Kirit Gupta, Ms. Pranjal Jain, Mr. Hemant Jain and Mr.

Dharmender K, Advs.

versus

M/S U.T ELECTRONICS PVT. LTD. .....Respondent
Through: Mr. Yogendra Aldak, Mr. Agrim Arora, Mr. Sumit Khadaria and Ms. Purvi Sinha, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MS. JUSTICE TARA VITASTA GANJU

O R D E R

% **29.07.2024**

1. These appeals are directed against the final order dated 24 December 2019 passed by the **Customs Excise and Service Tax Appellate Tribunal**[1] and is confined to the issue of the claim of refund and the question of unjust enrichment.

2. It becomes apparent that the stand of the respondent-assessee was noticed before the CESTAT in the following terms:

> "**6.** It is submitted on behalf of the respondent-assessee that the assessee has produced the Chartered Accountant Certificate as well as the requisite balance-sheets based whereupon it was observed that the assessee had discharged the statutory obligation of rebutting the presumption of unjust enrichment and accordingly, the amount of refund was sanctioned. It is impressed upon that since the said Chartered Accountant Certificate had included the entire refund amount of tax as recoverable and has also so recorded in the balance sheet, the refund of the whole amount is admissible to the assessee. The rejection of partial refund amount as was done by the original adjudicating authority and as has been proposed vide the aforementioned review order is not just and legal Commissioner (Appeals) has rightly sanctioned the entire refund claim, relying upon the principles laid down in the SRF judgment by the Hon'ble Supreme Court. The present refund claim is post said judgment. The said principles have to be applied to the present refund claim, which permit the sanction of the whole amount of the refund. With these submissions, the order of Commissioner

[1] CESTAT

(Appeals) is impressed upon to have no infirmity. Same are prayed to be upheld and appeals are prayed to be dismissed."

3. The CESTAT has upon taking note of the objections which were taken with respect to the disclosures made in the concerned Balance Sheet as well as the **Chartered Accountant**[2] certificate which was submitted ultimately come to record the following conclusions:

> "**7.** While impressing upon the admissibility of CA Certificate, Id. Counsel has relied upon the case laws in the case of **Nokia India Sales Pvt. Ltd. v. CC, Hyderabad in Order NO. A/30757-30758/2018 dated 24.07.2018 and Eastern Shipping Agency v. CST, Ahmedabad - 2013 (32) STR 630 (Tri.-Ahmd.)** With respect to the accounting treatment given to the record submitted, Id. Counsel has relied upon two decisions in the cases of **Deputy Commissioner of Commercial Taxes v. Hindustan Lever Ltd.** - **(2016) 13 SCC 28** & **Savita Oil Technologies Ltd. vs. Commissioner of Central Excise, Belapur - 2016 TIOL 1444 CESTAT MUM.** It is finally impressed upon that in Nokia India Sales Pvt. Ltd. in Final **Order No. A/30757-30758/2018 dated 24.07.2018** the refund claim was sanctioned. The facts of present case are similar to the said case. The appeals are accordingly, prayed to be dismissed.
>
> **8.** After hearing the rival contentions, we observe and hold as follows:-
>
> 1. The only question that remains in these appeals is whether the assessee has passed on the tax burden to his buyers or not i.e. whether assessee got unjust enriched.
>
> 2. and whether the original adjudicating authority was right in holding that the refunded amount, part thereof, is liable to be deposited to the Consumer Welfare Fund.
>
> Apparently and admittedly all the relevant documents were made good the deficiency by the assessee-respondent as were sufficient to sanction the refund. Partial amount of claim was rejected only on the ground that Balance-sheet was not showing the accountable of the amount of impugned Bill of Entry. This issue stands already decided even prior SRF decision in the case of **M/s. Yu Televentures Pvt. Ltd. in Writ Petition No.2102/2017.** The relevant portion is reproduced below:-

[2] CA

"24. It has been explained by learned counsel for the petitioner that no refund claim had yet been made in respect of the aforementioned B/Es during the financial year which ended on 31st March, 2015. Since the refund applications were submitted only during FY 2015-16, the outstanding refund in respect of these four B/Es could not have been shown in the balance sheet for FY 2014- 15. Indeed, the mere fact that this amount was not shown as outstanding during the year 2014-15 would not mean that the petitioner is not entitled to claim refund. The petitioner cannot possibly be denied refund if it, in fact, did not pass on the burden of CVD to its customers.

25. What respondent No. 4 had to examine was whether the claim of the petitioner that it had not passed on the incidence of CVD in respect of the above B/Es for 27th March, 2015 to 31st March, 2015 to the customer was supported by proper documentation.

26. Here it is interesting to note that the petitioner submitted the same CA certificate and documents (including sales invoices) for the aforementioned period as well as for the period June and July, 201-5. Respondent No. 4 has accepted these very documents for the claim in respect of June and July, 2015. Pertinently, respondent No. 4 observes in respect of those invoices as under :

> *"I find that the sales invoices of June, 2015 and July, 2015 produced by the importer do not reflect the CVD amount separately which, prima facie, indicate that the burden of SAD has not been passed on by the importer to their customers directly. Further, I have already taken note of the fact that the importer has submitted a Chartered Accountant's Certificate issued by M/s. Nayyar Maniar & Associates* LLP, *M. No. 502101, to the effect that certifying that the burden of CVD under this refund claim has not been passed on to the buyers and the refund being claimed is shown in their books of account/balance sheet for the year ended 31 March, 2016 as amount recoverable from the Customs. Accordingly, I hold that the provisions of unjust enrichment clause under Section 28D read with Section 27 of the Customs Act, 1962 are not applicable to the facts of this case and hence not invocable."*

27. *By the same yardstick, there was no reason whatsoever for respondent No. 4 not to accept the very same documents in respect of the imports between 27th March, 2015 and 31st March, 2015. The certificate of the CA is categorical that the incidence of CVD, even in respect of these imports, had· not'*

been passed on to the customers. Consequently, there was no valid justification for respondent No. 4 to have denied the refund claim."

9. It is to be noted the decision of the **Yu Televentures Pvt. Ltd.,** (as cited herein above) was upheld by the Apex Court by dismissing the SLP filed by the Revenue by an Order dated 06.02.2017.

xxxx xxxx xxxx

11. Further it has also been settled that fault with the balance sheets and duty paid under protest are not sufficient to prove the unjust enrichment on part of the assessee. It has been settled in the case of **Tecil Chemicals & Hydro Power Ltd. vs. Commr. Of C. Ex., Cochin reported !n 2003 (15.1) E.L.T. 136 (Tri. - Del.)** wherein it is held:

*. "**17.** The appellants have also produced the copies of the balance-sheets for the disputed period. Learned Commissioner (Appeals) has found fault with the balancesheets on the ground that they had not shown the duty paid under protest as the amount recoverable from the Government, therein. But in our view, that could not be made basis for discarding-· the balance-sheets and no inference from that omission could be taken that the incidence of duty had been passed on by the appellants to the consumers. The correctness of the Chartered Accountants' Certificates and the comparative tables of cost and selling price, sale invoices, gate passes produced by the appellants for the period in question, had not been doubted by the Commissioner (Appeals) in the impugned order. We do not find any sufficient ground to discard the certificates and other evidence produced by the appellants for proving that the incidence of duty had not been passed on by them, to the consumers.*

***18.** It is well settled that the incidence of duty cannot be said to have been passed on by the consumers, if the sale price of the goods had remained the same before and after payment of duty by the assessee. In this context, reference may be made to, Commissioner of Central Excise, Kanpur v. Corona Cosmetics & Chemicals (P) Ltd.* - 2000 *(118) E.L. T. 356 (T) and Commissioner of Central Excise v. Minerva Mills* - 2002 *(141) E.L. T. 177, wherein it has been so ruled by the Tribunal. The Revenue had not produced any evidence to contradict the documentary evidence produced by the appellants referred to above. Therefore; the un-rebutted evidence of the appellants that their selling price of the final product was not influenced by payment of duty on the inputs* *during the period in question and that the price remained the same or even on certain occasions stood reduced, deserves to be accepted. From all this evidence brought on record, it stands amply proved that the incidence of duty had not been passed on by the appellants to the buyers/consumers during the period in question."*

Though learned DR has laid emphasis on Section 28C of the Customs Act, 1962 about presumption for incidence of duty to have been passed on customers but -

- Present is a case of composite price where duty is not shown separately
- Auditor's certificate is there
- No evidence of Department to contrary

Hence, we are of the opinion that said presumption stands rebutted.

12. We draw support from decision of Karnataka High Court in case of **Commissioner of Customs, Bangalroe vs. Apple India Pvt. Ltd. reported in 2014 (309) E.L.T. 29** wherein it is held:

Refund - Presumption that incidence of duty has been passed on to the buyer - Rebuttal of - HELD : Section 28D of Customs Act, 1962 states that there is a presumption that incidence of duty has been passed on to the customers and that every person who has paid duty on any goods under the 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 - Thus, it is a rebuttable presumption - On facts, assessee rebutted said presumption by producing the auditor report required to claim the refund of special additional duty, and this report unequivocally stated that the burden had not been passed on directly or indirectly and in coming to such conclusion, it had taken into account how the price of traded goods had been arrived at - Section 28D ibid."

4. More significantly, the CESTAT in paragraph 13 had observed as follows:

"**13.** We also observe that:
(i) <u>Revenue has not placed any specific evidence on record to rebut the findings of the Commissioner (Appeals) as regards the factual position that the burden of duty incidence was not passed on by the respondents to their customers</u>.
(ii) The various judgments have been relied upon by the respondent where the duty incidence has not been shown separately on the invoices and the agreed upon price has only been changed.

(iii) The respondents have also been able to show that the average ex-factory price for the period prior to the relevant period, during the relevant period and thereafter, remains almost constant
(iv) The assessees have paid the Excise duty on the intermediate product on insistence of -the Department, therefore they paid the duty 'Under Protest'.
(v) (a) The invoices evidencing the sale, which were on record, showed that the price· charged did not include therein the Central Excise duty component.
(v) (b) The assessee also produced certificate from the different buyers of its goods to the effect that the buyers had not recovered the duty for sale of assessee's finished goods. In addition thereto, the certificate issued by the Chartered Accountant who had audited the accounts including the accounts for the period from 1-8-1982 to 31-12-1986, it was established that the Central Excise duty from the buyers of the finished goods were no collected, there was no passing over of the duty to the consumers and there was no unjust enrichment."

5. In view of the aforesaid, we fail to discern any substantial question of law which may be said to arise.

6. The appeals fail and shall stand dismissed.

YASHWANT VARMA, J

TARA VITASTA GANJU, J

JULY 29, 2024/rsk