

2020-TIOL-386-CESTAT-DEL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI  
COURT NO. IV**

**Customs Stay Application No.50557 of 2019  
(On behalf of Department) in  
Customs Appeal No. 51622 of 2019 [DB]**

Arising out of Order-in- Appeal No.CC(A) Cus/D-I/ACC-Import/Refund/NCH/08/2019-20, Dated: 26.04.2019  
Passed by the Commissioner of Customs (Appeal), New Custom House, New Delhi

**WITH**

**Customs Stay Application No.50562 of 2019  
(On behalf of Department) in  
Customs Appeal No. 51665 of 2019 [DB]**

Arising out of Order-in- Appeal No.CC(A) Cus/D-I/ACC-Export/Refund/NCH/ 781/2018-19, Dated: 28.03.2019  
Passed by the Commissioner of Customs (Appeal), New Custom House, New Delhi

**AND**

**Customs Stay Application No.50563 of 2019  
(On behalf of Department)  
in Customs Appeal No. 51666 of 2019 [DB]**

Arising out of Order-in- Appeal No.CC(A) Cus/D-I/ACC-Export/Refund/NCH/ 779/2018-19, Dated: 28.03.2019  
Passed by the Commissioner of Customs (Appeal), New Custom House, New Delhi

**Date of Hearing: 30.08.2019**

**Date of Decision: 24.12.2019**

**COMMISSIONER OF CUSTOMS  
ACC IMPORT COMMISSIONERATE  
NEW CUSTOM HOUSE, NEW DELHI-110037**

**Vs**

**M/s U T ELECTRONICS PVT LTD  
SCO-363-364, SECTOR - 35-B, CHANDIGARH**

**Appellant Rep by:** Shri Rakesh Kumar, AR

**Respondent Rep by:** Shri Tarun Gulati, Sr. Adv. with Shashi Mathews, Adv.

**CORAM:** C L Mahar, Member (T)

Rachna Gupta, Member (J)

**Cus-** The assessee-company imported cellphones and paid duty in excess of what was payable, albeit with such payment being made under protest in compliance with condition in Notfn No 12/2012, which required levy of CVD @ 1% - At the time of clearance, the respondents paid CVD @ 12.5% - Hence refund was claimed in respect of differential amount of CVD - Of the total refund claimed, the adjudicating authority

directed that the refund amounts claimed in respect of the different periods, be deposited in the Consumer Welfare Fund - Such orders were quashed with the same directed to be paid to the assessee within 15 days of the order - The present appeal by the Revenue assails such orders of the Commr.(A).

**Held:** It is seen that the Revenue did not place any specific evidence on record to rebut the findings of the Commr.(A) regarding the factual position that burden of duty incidence was not passed on by the assessee to its customers - Moreover, the judgments relied on by the Revenue are those where the duty incidence was not shown separately on the invoices and the agreed upon price was charged only - Besides, the assessee also demonstrated that the average ex factory price for the period prior to the relevant period, in the relevant period and thereafter, remains almost constant - The assessee also paid the Excise duty on the intermediate product, albeit under protest - The invoices evidencing the sale showed that the price charged did not include the Excise duty component - Hence when the assessee's invoice reflected a composite price and duty was not indicated separately and the sale price of the goods before and after the revaluation, remained the same, it can be inferred that incidence of duty was not passed onto the consumers - Merely because the Excise duty is booked as expenditure in P&L a/c, it cannot be said that the incidence of duty is passed on - Onus otherwise rests upon the Department to prove that burden of duty was passed on - There is no such evidence produced by the Department in this regard - Hence the refund cannot be denied: CESTAT

**Revenue's appeals dismissed**

**Case laws cited:**

*S.R.F. Ltd. Vs. Commissioner, Customs, Chennai* - [2015-TIOL-74-SC-CUS...](#) Para 2

*Cosmos Films Ltd. vs. CCE & Customs, Aurangabad*- [2015-TIOL-2898-CESTAT-MUM...](#) Para 5

*CCE Mumbai Vs. Allied Photographic India Ltd* - [2004-TIOL-27-SC-CX...](#) Para 5

*Poddar Pigments Ltd. vs. CCE, Jaipur* - [2015-TIOL-2456-CESTAT-DEL...](#) Para 5

*Nokia India Sales Pvt. Ltd. v. CC, Hyderabad* - [2018-TIOL-2759-CESTAT-HYD...](#) Para 7

*Eastern Shipping Agency v. CST, Ahmedabad* - 2013 (32) STR 630 (Tri.-Ahmd.)... Para 7

*Deputy Commissioner of Commercial Taxes v. Hindustan Lever Ltd* - [2016-TIOL-94-SC-CT...](#) Para 7

*Savita Oil Technologies Ltd. vs. Commissioner of Central Excise, Belapur* - [2016-TIOL-1444 CESTAT-MUM...](#) Para 7

*Nokia India Sales Pvt. Ltd* - [2018-TIOL-2759-CESTAT-HYD...](#) Para 7

*Yu Televentures Pvt. Ltd* - [2017-TIOL-1468-HC-DEL-CUS...](#) Para 8

*Vishal Video and Appliances Ltd* - [2016-TIOL-2033-HC-DEL-CUS...](#) Para 10

*Tecil Chemicals & Hydro Power Ltd. vs. Commr. Of C. Ex., Cochin* 2003 (151) E.L.T. 136 (Tri. - Del.)... Para 11

*Commissioner of Customs, Bangalroe vs. Apple India Pvt. Ltd* - [2014-TIOL-1544-HC-KAR-CUS...](#) Para 12

*Mohan Sales (India), [2003 (158) E.L.T 667 (T)]...* Para 15

*Solar Pesticides* - [2002-TIOL-57-SC-CX-LB...](#) Para 16

*Agrotech Foods Ltd. vs. Commissioner of Customs, Bangalore* 2005 (192) E.L.T. 273 (Tri. - Bang.)... Para 17

*Mangal Textile Mills Pvt. Ltd.* - 2004 (171) E.L.T. 160 (Guj.)... Para 18

*H.L. Papers Ltd.* - [2010-TIOL-555-CESTAT-DEL...](#) Para 18

FINAL ORDER NOS. 51730-51732/2019

Per: Rachna Gupta:

The present order disposes of 3 appeals, the respondent and the issue involved being common. The details thereof are as follows:-

CA Certificate relevant date	O-I-O No. & date	O-I-O No. & date
01/04/2015 to 31/03/2016	2838 Dated 23.01.2017	No. CC(A) Cus/D-I/ACC-Import/ Refund/ NCH/08/2019-20 dated 26.04.2019
01/04/2015 to 31/03/2016	27/2017 Dated 23.08.2017	CC(A) Cus/D-I/ACC-Export/Refund/NCH/ 779/2018-19 dated 28.03.2019
01/04/2015 to 31/03/2016	27/2017 Dated 23.08.2017	CC(A) Cus/D-I/ACC-Export/Refund/NCH/ 781/2018-19 dated 28.03.2019

3. Respondents in their refund application had stated that they had imported mobile phones and made excess payment under protest as they complied the condition No.16 of Notification No.12/2012 in accordance whereof there should be levy of CVD at the rate of 1%. However, at the time of Customs clearance, the respondents paid CVD at the rate of 12.5%. Accordingly, the refund of respective differential CVD paid was prayed. Though all the demanded documents were provided by the assessee, and were subjected to the audit, but vide respective Order-in-Original out of total refund claim of Rs.5,22,16,320/- in Appeal No.51622/2019, Rs.5,45,64,965/- in appeal No.51666/2019 and Rs.5,45,64,965/- in Appeal No. C/51665 of 2019, a refund claim of Rs.24,88,913/-, Rs.3,29,15,387/- & Rs.2,16,49,578/- respectively, as was not been shown accountable in the balance-sheet for the respective year, was ordered to be deposited with Consumer Welfare Fund. The respective appeals against the said orders were allowed setting aside the order of the credit of sanctioned refund amount to Consumer Welfare Fund and directing the same be paid to the assessee within 15 days of the said order. It is thereafter that review order No.07/2019 dated 10.07.2019 was passed proposing appeals to have been filed before this Tribunal. Resultantly, the Department in the present appeals is assailing the order of Commissioner (Appeals) dated 26.04.2019 & 28.03.2019.

4. We have heard Shri Rakesh Kumar, Id. A.R. for the Department-Appellant and Shri Tarun Gulati, Id. Sr. Advocate with Id. Advocate Sasi Mathews for the respondents.

5. It is submitted on behalf of the Appellant/Department that the impugned refund claims were filed for excess duty paid by the assessee-respondents after the judgment of SRF Ltd. (supra) case by Hon'ble Apex Court on 26.03.2015. The adjudicating authority had sanctioned the refund but had credited the same to Consumer Welfare Fund on the ground that it did not pass the test of unjust enrichment in accordance of Section 28D of Customs Act, 1962. It is impressed upon that there is no infirmity in the said order as the refund claimants have not shown the said amounts of refunds in their audited books of accounts as receivable from the Government but have debited the same to profit and loss account which means that amount of refund claim has been realized from the buyers of the imported goods. The CA Certificate is alleged to not to be a concrete evidence, as it is not specifying that the burden of CVD prayed to be refunded was not passed-on to the buyers. Above all, there is no corroborative evidence to the said CA Certificate. Ld. D.R. has also impressed upon that as per accounting principle refund claim should have been shown as recoverable in the balance-sheet at the time of the end of respective financial years. But as already mentioned above, the assessee have not shown the same as recoverable but as the expenses charged to profit and loss account, which clarifies that the differential CVD has already been recovered by the assessee from the buyers of the goods in subsequent financial year. Ld. D.R. has placed reliance upon the decision of this Tribunal, Mumbai Bench in the case of **M/s. Cosmos Films Ltd. vs. CCE & Customs, Aurangabad reported as - 2015-TIOL-2898-CESTAT-MUM CCE Mumbai Vs. Allied Photographic India Ltd. reported as 2004 (166) ELT 3 (S.C.) = 2004-TIOL-27-SC-CX** and **M/s. Poddar Pigments Ltd. vs. CCE, Jaipur reported as - 2015-TIOL-2456-CESTAT-DEL** to impress upon that the

uniformity in price before and after assessment does not lead to inevitable conclusion that incidence of duty has not been passed on to the buyers as such uniformity may be due to various other factors. It was held in Poddar Pigments (supra) case that the burden of assessee cannot be deemed to have been discharged merely by saying that price of final products reduced after import of impugned goods because price of final products do not depend solely on the price of impugned goods. Finally, impressing upon that it is very much apparent from the record that companies profit has increased in gross as well as net profit despite non-increase of sales price and CVD increased rates as applicable which is sufficiently to indicate that they have passed on the incidence of duty to the buyers and as such there is no infirmity in the order of the original adjudicating authority while ordering the credit of partial refund amount into Consumer Welfare Fund. Finally submitting that stereo type Chartered Accountant Certificate cannot be the sufficient evidence for assessee to discharge its burden as was held by Hon'ble High Court of Punjab & Haryana in the case reported as **2006 (202) ELT 773 ( P & H)**.

With these submissions, Id. DR has prayed for the impugned appeals to be allowed.

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

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 = [2018-TIOL-2759-CESTAT-HYD](#) 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 = [2016-TIOL-94-SC-CT](#) & 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 = [2018-TIOL-2759-CESTAT-HYD](#)** 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 = [2017-TIOL-1468-HC-DEL-CUS](#)**. The relevant portion is reproduced below:-

**"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, 2015. 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.

10. We find that Hon'ble High Court of Delhi again had an occasion to consider identical issue as the one in these appeals i.e in the case of **Vishal Video and Appliances Ltd., in writ petition No. 7851/2016 = [2016-TIOL-2033-HC-DEL-CUS](#)**. The said writ petition was allowed in favour of the petitioner (assessee) therein by order dated 05.09.2016 (unreported). Their Lordships had an occasion to consider the ground of unjust enrichment. It was held as under:

*"4. This Court notices from the record that the concerned adjudication officer, who rejected the petitioner's claim for refund has adopted the same approach that she did which became the subject matter of scrutiny in several previous orders commencing from Micromax (supra). We notice that the Micromax (supra) was revisited in Yu Televentures v. Union of India [W.P. (C) No. 6750/2016, decided on 3-8-2016] = [2016-TIOL-1641-HC-DEL-CUS](#). In the present case as well, the order rejecting the refund was made during the same period and apparently by the same officer who rejected the refund claim in Yu Televentures (supra).*

5. It is contended lastly by the respondents that this Court should not grant relief in this case since there is no ascertainment as to whether the CVD was in fact passed on and collected from the end user. The petitioner, on the other hand, submits that all relevant documents, including the Chartered Accountant's certificate as required by the rules were furnished. The relevant part of the CA's certificate reads as follows:

*"D. That for the purposes of examining the clause of unjust enrichment to the importer in respect of subject refund claim we have verified the importer's Books of Accounts and other relevant documents and record of the goods. Based on such verification we have satisfied ourselves."*

6. This was not a ground for rejection. We find no force in the submission. It is accordingly rejected.

**7. Since the facts are identical, we are of the opinion that the operative portion of the order should be identical to the one in Yu Televentures (supra). It is hereby directed consequently that the petitioner's refund claim is, therefore, allowed. The respondents are directed to pay to the petitioner, the claimed amount together with interest due thereof upto the date of refund - which shall be done within three weeks from today."**

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 in 2003 (151) 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 balance-sheets 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 = [2014-TIOL-1544-HC-KAR-CUS](#)**

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*.**

13. We also observe that:

(i) 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.

(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 assesseees 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 not collected, there was no passing over of the duty to the consumers and there was no unjust enrichment.

14. We, accordingly, hold that:

When assesseees' invoice showed a composite price and duty was not indicated separately and the sale price of the goods before as well as after the reclassification, revaluation etc. remained the same, it can be concluded that the incidence of duty was not passed on to the consumer. Merely because the Excise duty is booked as expenditure in Profit & Loss account, it cannot be said the incidence of duty has been passed on.

15. In the case of ***Mohan Sales (India), [2003 (158) E.L.T 667 (T)]***

the Tribunal set aside the finding of unjust enrichment and also the direction of crediting the same to welfare fund on the ground that it is not possible to sell goods on losses, was set aside. It was held that presumption in law having passed the duty burden is a rebuttable presumption. It was also held that since invoice and certificate was not being disputed, the order of sanctioning refund but directing the same to be credited to Consumer Welfare Fund is not sustainable.

16. Decision of Bharat Electronics as relied upon by Id. D.R. is not applicable to the facts of the present case as the present is not the case of captive consumption. Moreover the decision has relied upon ***Solar Pesticides reported in 2000 (116) ELT 401 S.C. = 2002-TIOL-57-SC-CX-LB*** which is no more a good law in terms of decision of Hon'ble Apex Court in SRF case (supra).

17. We further rely upon the decision of:

***Agrotech Foods Ltd. vs. Commissioner of Customs, Bangalore reported in 2005 (192) E.L.T. 273 (Tri. - Bang.) held:-***

**"3. Furthermore, the plea that failure to indicate the amount of duty in the invoice in terms of Section 28C of Customs Act, by itself is not a ground for rejecting the refund to the importer on the ground of unjust enrichment is also a well taken ground and supported by the following two judgments.**

**(i) CC, Jamnagar v. H.R. & Sons & Anr. - 2001 (42) RLT 121 (CEGAT)**

**(ii) Panihati Rubber Limited v. CCE, Calcutta-II - 2001 (127) E.L.T. 742 (Tri-Cal.).**

Hon'ble Karnataka High Court in case of **Commissioner of Customs, Bangalore vs. Apple India Pvt. Ltd. reported in 2014 (309) E.L.T. 29** = [2014-TIOL-1544-HC-KAR-CUS](#) 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.**

18. Finally coming to the issue as to whether C.A. Certificate is not sufficient to rebut the aforesaid presumption, we rely upon the decision of **Eastern Shipping Agency vs. Commr. of Service Tax, Ahmedabad reported in 2013 (32) S.T.R. 630 (Tri. - Ahmd.)** which followed decision of Hon'ble High Court of Gujarat in the case of **Mangal Textile Mills Pvt. Ltd. - 2004 (171) E.L.T. 160 (Guj.)**, that since the Chartered Accountant's certificate is not countered by Revenue authorities by any other certificate same has to be considered. Also in the case of **H.L. Papers Ltd. - 2010 (18) S.T.R. 481 (Tri.-Del.) = 2010-TIOL-555-CESTAT-DEL**, it was held that the burden is on the Department to disprove the Chartered Accountant's certificate.

19. Further Tribunal Ahmedabad held in

**Commissioner of Central Excise, Surat-II vs. Binakia Synthetics Ltd. reported in 2013 (294) E.L.T. 156 (Tri. - Admd.)** that:

**Merely because the said certificate does not give the details of costing etc., will not turn it into a bad certificate.**

20. In view of above discussion, we hold that the mere fact that the amount of differential CVD is shown as recoverable in profit and loss account is, in itself, not sufficient to prove that burden thereof has been passed by the assessee to the buyers. Onus otherwise rests upon the Department to prove the same. There is no such evidence produced by the Department. On the contrary, the assessee has placed on record the C.A. Certificate falsifying the allegations of unjust enrichment. Same cannot be ignored, that too, in absence of any evidence to the contrary.

21. Resultantly, both the questions as framed above stands decided in favour of the assessee-respondents, thereby upholding the order of Commissioner (Appeals). Consequent thereto, the stay applications seeking stay of operation of Order-in-Appeal and these appeals as filed by the Department praying by setting aside the said order are hereby dismissed.

(Pronounced in the open Court on 24.12.2019)

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