(2024) 10 CESTAT CK 0018

Customs, Excise And Service Tax Appellate, New Delhi

Case No: Customs Appeal No.50113, 50202 of 2020

M/s. Nokia India Sales Pvt. Ltd	APPELLANT
Vs	
Commissioner of Customs	RESPONDENT

Date of Decision: Oct. 15, 2024

Acts Referred:

- Customs Act, 1962 - Section 27, 27(1), 27(1A), 27(2), 28, 28(C), 28(D), 128(1), 129A(4)
- Customs Tariff Act, 1975 - Section 3, 3(1)
- Central Excise Act, 1944 - Section 11B
- Finance Act, 1994 - Section 73A, 73B
- Service Tax Appellate Tribunal (Procedure) Rules, 1982 - Rule 3
- CENVAT Credit Rules 2004 - Rule 11, 13

Hon'ble Judges: Dilip Gupta, President (J); P. V. Subba Rao, Member (T)

Bench: Division Bench

Advocate: Kamal Sawhney, Deepak Thackur, Aakansha Wadhwani, Rishabh Mishra, Nagendra Yadav, Rakesh Kumar

Final Decision: Allowed

Judgement

Dilip Gupta, J

1. Customs Appeal No. 50113 of 2020 has been filed by M/s. Nokia India Sales Pvt. Ltd., the appellant to assail the order dated 05.09.2019 passed by

the Commissioner of Customs (Appeals), New Delhi, the Commissioner (Appeals). This order dismisses the appeal filed by the appellant to assail that

part of the order dated 23.01.2017 passed by the Deputy Commissioner that directs that the claim of Rs. 3,43,88,087/- sanctioned on the refund

application filed by the appellant would be credited to the Consumer Welfare Fund in terms of the provisions of section 27(2) of the Customs Act

1962, the Customs Act.

2. Customs Appeal No. 50202 of 2020 has been filed by the appellant to assail the order dated 26.09.2019 passed by the Commissioner of Customs

(Appeals), New Delhi, the Commissioner (Appeals). This order also dismisses the appeal filed by the appellant to assail that part of the order dated

23.01.2017 passed by the Deputy Commissioner that directs that the claim of Rs. 2,33,05,108/- sanctioned on the refund application filed by the

appellant would be credited to the Consumer Welfare Fund in terms of the provisions of section 27(2) of the Customs Act.

3. Cross-Objections had been filed by the department on 28.12.2022 in both the aforesaid appeals in terms of section 129A(4) of the Customs Act and

with the Cross-Objections applications for condoning the delay of 977 days in filing the Cross-Objections were also filed. The grounds contained in the

Cross-Objections mainly concentrate on the decision of the Supreme Court in Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive),

2004 (172) E.L.T. 145(S.C.) wherein the Supreme Court held that so long as the order of assessment stands and has not been reviewed under section

28 of the Customs Act, duty would be payable as per the order of assessment, and the decision of the Supreme Court in ITC Ltd. vs. Commissioner

of Central Excise, Kolkata-IV, 2019 (368) E.L.T. 216 (S.C.), wherein the Supreme Court held that the claim for refund cannot not be entertained

unless the order of assessment or self-assessment is modified in accordance with law. It is for this reason that it was contended in the Cross-

Objections that the refund that was granted to the appellant was improper and the order passed by the Deputy Commissioner sanctioning refund

should be set aside.

4. Learned counsel for the appellant had not only opposed the delay condonation applications filed with the Cross-Objections, but had also submitted

that the Cross-Objections should be rejected as they had not been filed in the manner prescribed under the Customs, Excise and Service Tax

Appellate Tribunal (Procedure) Rules, 1982, the 1982 Rules.

5. On these two issues, namely as to whether the delay in filing the Cross-Objections should be condoned or not, and whether the Cross-Objections

had been filed in accordance with the procedure prescribed, submissions had been advanced by Shri Nagendra Yadav learned authorised

representative for the department and Shri Kamal Sawhney learned counsel for the appellant and the order was reserved only on these two issues on

08.11.2023. The delay condonation applications filed by the department were rejected by a detailed order dated 08.11.2023, and consequently the

Cross-Objections stood rejected.

6. The appeal filed by the department before the Delhi High Court against the said order dated 08.11.2023 of the Tribunal was dismissed by the Delhi

High Court on 16.07.2024 and the relevant portions of the order are reproduced below:

â€œ4. As would be evident from the various findings and conclusions which have come to be rendered by the CESTAT, it was found that the

notice to the appellant carrying the memorandum of appeal was duly tendered on 03 March 2020 and would be deemed to have been

served upon them on 18 March 2020. The only explanation which was proffered by the appellant was that a copy of the appeal was not

available on the departmental file. It was this which constrained the CESTAT to observe that it was never the case of the appellant that a

copy of the appeal memo had not been received.

5. It is further borne out from the record that the authorized representative of the appellant duly appeared before the CESTAT on 01

November 2021, 24 November 2021, 10 December 2021, 09 February 2022, 27 April 2022, 21 July 2022 and again on 03 October 2022.

The cross-objections were themselves based on contentions which had been duly raised before the Deputy Commissioner itself. It is on an

overall conspectus of the aforesaid, that the CESTAT has come to the conclusion that the delay caused was not liable to be condoned.

6. We find that the aforesaid view as taken cannot be said to suffer from any perversity. Consequently, and since no substantial question of

law arises, the appeal fails and shall stand dismissed.â€

(emphasis supplied)

7. It is after the rejection of the Cross-Objections that the two appeals have now come up for hearing.

FACTS

8. The appellant imported mobile phones during the period November 2014 to February 2015 and paid additional duty of customs at the rate of 6%

upto February 2015. A notification dated 17.03.2012 was issued by the government providing that the additional duty of customs would be leviable only

at 1% under entry at serial 263A on import of mobile phones provided condition no. 16 was satisfied. Condition no. 16 provides that for an assessee to

claim the lesser 1% of additional duty of customs, it should not have taken credit under rule 3 or rule 13 of the CENVAT Credit Rules 2004, the

CENVAT Rules in respect of the inputs or capital goods used in the manufacturer of these goods.

9. The Supreme Court, in the context of the import of Nylon Filament Yarn of 210 deniers, examined a similar condition no. 20 in SRF Ltd. vs.

Commissioner of Customs, Chennai, 2015 (318) E.L.T. 607 (S.C.). The appellant therein had claimed nil rate of additional duty by relying upon a

notification dated 01.03.2002. The Deputy Commissioner held that SRF would not be entitled to exemption from payment of additional duty since it did

not fulfil condition no. 20 of the said notification, which is to the effect that the importer should not have availed credit under rule 3 or rule 11 of the

CENVAT Rules in respect of the capital goods used in the manufacture of these goods. The admitted position was that such CENVAT credit was

not availed by SRF. The Tribunal held that when the credit under CENVAT Rules was not admissible, the question of fulfilling the aforesaid condition

did not arise and, therefore, as condition no. 20 was not satisfied SRF could not claim nil rate of additional duty. This reasoning of the Tribunal was

found to be not correct by the Supreme Court for the reason that for the purpose of attracting additional duty of customs under section 3 of the Tariff

Act on the import of a manufactured or produced article, the actual manufacture or production of a like article in India was not necessary and that for

quantification of additional duty in such a case, it has to be imagined that the article imported was manufactured or produced in India and then to see

what amount of excise duty was leviable thereon. SRF was, therefore, held entitled to exemption from payment of additional duty.

10. The appellant, on the same reasoning, claimed that it had to pay the reduced additional duty of customs at the rate of 1% in terms of condition no.

16 of the notification dated 17.03.2012, which is identical to condition no. 20 of the notification dated 01.03.2002 that was examined by the Supreme

Court in SRF Ltd. It had, however, paid additional duty of customs at the rate of 6% upto February 2015. Customs Appeal No. 50113 of 2020 relates

to refund of Rs. 3,43,88,087/-. Customs Appeal No. 50202 of 2020 relates to refund of Rs. 2,59,20,950/- out of which refund of Rs. 26,15,842/- is

barred by time. Thus, in effect this appeal relates to refund of Rs. 2,33,05,108/-.

11. Two separate but similar orders, each dated 23.01.2017, were passed by the Deputy Commissioner on the refund applications filed by the

appellant. In view of the decision of the Supreme Court in SRF Ltd., the Deputy Commissioner held that the appellant was required to pay additional

duty of customs at the reduced rate of 1% in terms of condition no. 16 of the notification dated 17.03.2012. The Deputy Commissioner then examined

whether it was necessary for the appellant to get re-assessment of the Bills of Entry for claiming refund and for this purpose examined the decision of

the Delhi High Court in M/s. Micromax Informatics Ltd. vs. Union of India, 2016 (335) E.L.T. 446 (Del.) that had been placed by appellant to contend

that it was not necessary to seek re-assessment of the Bills of Entry. The Delhi High Court in Micromax Informatics had held that an authority would

not be justified in refusing to entertain an application for refund only because no appeal was filed against the assessment order, even if there was one.

The Deputy Commissioner, accordingly, held that there was no necessity of seeking modification in the Bills of Entry. The relevant portion of the

order passed by the Deputy Commissioner is reproduced below:

â€œIn any event, after 8th April, 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a

claim for refund made by such person under section 27(1) of the Act as it now stands, will have to be entertained and an order passed

thereon by the authority concerned even where an order of assessment may not have reviewed or modified in appeal. Hence, again,

following judicial discipline, the refund claim of the claimants, needs to been entertained on the basis of their self-assessed Bills of Entry,

though there is no modifying order for those Bills of Entryâ€

(emphasis supplied)

12. After having held so, the Deputy Commissioner framed two issues to be decided, namely whether the said refund claims were hit by limitation and

whether the appellant had proved that the incidence of additional duty of customs had not been passed on to the buyers. As regards limitation, it was

found by the Deputy Commissioner that the claim of Rs. 26,15,842/- was barred by time, but the rest of the claim was within time. As regards the

issue as to whether the incidence of duty had been passed on to the buyers or not, the Deputy Commissioner held that the certificates of the

Chartered Accountant could not solely be relied upon and as the appellant had failed to conclusively prove that the burden of incidence of duty had not

been passed on to the buyers, the amount sanctioned on the refund applications should be credited to the Consumer Welfare Fund in terms of the

provisions of section 27(2) to the Customs Act.

13. Feeling aggrieved by this part of the order passed by the Deputy Commissioner directing the sanctioned refund amount to be credited to the

Consumer Welfare Fund, the appellant filed two appeals before the Commissioner (Appeals). The appeals have been dismissed by the Commissioner

(Appeals) by two separate orders, both dated 05.09.2019, for the following reasons:

â€œ5.3 The relied upon cases/ decisions of various judicial forums have noted that the appellants had in fact submitted relevant documents

such as balance-sheet, invoices, ledgers etc along with the certificate of the Chartered Accountant. And it was on this premise it was held

that certificate given by a Chartered Accountant cannot be disbelieved and should be accepted as true and correct. Consequently, it was

held that in view of the said certificate the appellants had succeeded in proving that the burden of incidence of duty has not been passed on

to the buyers. However, in the present case the appellants was asked certain documents for rebuttal of any unjust enrichment by the original

adjudicating authority, still the appellantâ€™s C.A. Certificate findings were not supported with the documents. In such circumstances, I

find that all the above mentioned cases laws, relied upon by the claimant, are set upon a different sets of facts and hence cannot be applied

to the present case.

5.4 In view of above, I find that, the impugned Order is legally correct as the applicant has failed to conclusively prove that the burden of

incidence of duty has not been passed on to the buyers of the goods imported under the subject Bills of Entry. And accordingly, this refund

claim is hit by the doctrine of unjust enrichment.â€

(emphasis supplied)

14. It needs to be noted that the department did not file appeals before the Commissioner (Appeals) to assail that part of the order passed by the

Deputy Commissioner that sanctioned the refund.

15. The appellant has filed two appeals before the Tribunal to challenge the orders passed by the Commissioner (Appeals).

CONTENTIONS

16. Shri Kamal Sawhney, learned counsel for the appellant assisted by Shri Deepak Thakur and Shri Rishabh Mishra made the following submissions:

(i) The certificate of the chartered accountant submitted by the appellant to substantiate that the incidence of duty had not passed on to the buyers

was not accepted by the Commissioner (Appeals) for the reason that it was not supported by documents. This finding is perverse as the certificate

dated 29.12.2015 not only stated facts but was also accompanied by Annexure A which contained invoice details, Bills of Entry details, challan details,

valuation details, actual duty paid and the duty payable;

(ii) The Hyderabad Bench of the Tribunal in the matter of the appellant accepted identical certificate dated 29.12.2015 issued by the same chartered

accountant and this order of the Tribunal has attained finality as the department did not file any appeal. Identical certificate of the same chartered

accountant also came up for consideration before the Ahmedabad Bench of the Tribunal and on remand by the Tribunal, the Deputy Commissioner

passed two orders dated 03.11.2022 accepting the certificate issued by the chartered accountant. These two orders passed by the Deputy

Commissioner have also attained finality as no appeals have been filed by the department. In this view of the matter, the chartered accountant

certificate dated 29.12.2015 in the present matter should be accepted. In support of this contention, learned counsel placed reliance on the following

decisions:

(a) Marsons Fan Industries vs. Commissioner of C. Ex., Calcutta, 2008 (225) E.L.T. 334 (S.C.);

(b) C.C.E., Navi Mumbai vs. Amar Bitumen & Allied Products Pvt. Ltd., 2006 (202) E.L.T. 213 (S.C.)

(iii) In the face of the certificate issued by the chartered accountant it does not matter even if the amount has been shown as â€œexpenseâ€ in the

books of the account of the appellant; and

(iv) If the price remains the same, both before and after the increase in the duty rate, it means that the assesse has not passed on the burden of duty

to the buyers.

17. Shri Nagendra Yadav and Shri Rakesh Kumar, learned authorized representatives appearing for the department however, made the following

submissions:

(i) The refund claims filed by the appellant are not maintainable as they had been filed without getting the assessment orders modified and in support

of this contention, learned authorized representatives placed reliance upon the decision of the Supreme Court in ITC;

(ii) A pure question of law can be raised at any point of time and in support of this contention learned authorized representatives placed reliance on the

following decisions:

(a) M/s Shiv Naresh Sports Pvt. Ltd. vs. Commissioner, Service Tax, Commissionerate, Service Tax Delhi-III, 2022(6) TMI-CESTAT New Delhi;

(b) Asstt. Commr., Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Ltd., 2008(230) E.L.T. 385 (S.C.);

(c) Gannon Dunkerley & Co. Ltd. vs. Commr. Of Ex. & S.T. (ADJ), New Delhi, 2020 (43) G.S.T.L. 183 (Tri.-Del.);

(d) K. Lubna and Others vs. Beevi & others, (2020) 2 SCC 524;

(e) The National Textile Corporation Ltd. vs. Nareshkumar Badrikumar Jagad & others, 2011 (12) SCC 695; and

(f) Saurav Jain & anr. vs. M/s A.B.P. Design & anr., 2021 (9) TMI 1112- Supreme Court

(iii) Even if the Cross-Objections filed by the department to raise this issue had been rejected by the Tribunal, still it is open to the department, at the

time of hearing of these appeals, to raise this legal issue; and

(iv) A certificate given by the chartered accountant cannot be conclusive proof of the fact that the incidence of duty has not been passed on to the

buyers. In view of the provisions of sections 28(C) and 28(D) of the Customs Act, the appellant had to substantiate that the incidence of duty had not

been passed to the buyers.

18. As regards, the objection raised by the learned authorized representative appearing for the department that the refund applications were not

maintainable in view of the decision of the Supreme Court in ITC, learned counsel for the appellant submitted that the decision of the Supreme Court

in ITC would not be applicable in the present matter as not only had the Cross-Objections that had been filed by the department to raise this issue in

the appeals had been rejected, but also because of the fact that this issue cannot be raised by the department for the first time before this Tribunal,

more particularly when the finding of the Deputy Commissioner that the appellant was entitled to refund has attained finality. To support this

contention, learned counsel for the appellant placed reliance upon the following decisions:

(i) Commissioner of Customs, Mumbai vs. Toyo Engineering India Ltd, 2006 (201) E.L.T. 513 (S.C.);

(ii) Commissioner of Customs Central Excise & Service Tax vs. Indian Farmers Fertilizers Cooperative Ltd., 2014 SSC Online All 17614;

(iii) Neelima Srivastava vs. The State of Uttar Pradesh & Ors., Civil Appeal No. 4840 of 2021 decided on 17.08.2021

(iv) Global Constructions vs. Commissioner of Customs, Central Excise & Service Tax, Visakhapatnam, 2022 (9) TMI 744 â€" CESTAT Hyderabad;

(v) Suchi Fasteners Pvt. Ltd. vs. C.C.E. & S.T., Vadodara, 2021 (378) E.L.T. 329 (Tri. - Ahmd.);

(vi) Principal Commissioner, CGST vs. Emaar MGF Land Limited, 2023 (74) G.S.T.L. 212 (Del.);

(vii) Servo Packaging Ltd. vs. Customs, Excise and Service Tax Appellate Tribunal, 2016 (340) E.L.T. 6 (Mad.); and

(viii) Commissioner of Customs (I), N.S. vs. Udit Seth, 2019 (369) E.L.T. 1441

DISCUSSION

19. The objection raised by the learned authorized representatives appearing for the department that the refunds application are not maintainable in

view of the decision of the Supreme Court in ITC needs to be examined first, because if this issue is decided in favor of the department then it will not

be necessary to examine whether the incidence of duty was passed on by the appellant to the buyers.

20. The contention of the learned authorized representatives appearing for the department is that the issue as to whether the application filed for

refund would be maintainable even in the absence of the assessment order having been modified has been settled by the Supreme Court in ITC and,

therefore, despite the rejection of the Cross-Objections by the Tribunal, the department can still raise this legal issue while responding to the appeals

filed by the appellant against that part of the orders that direct for deposit of the sanctioned amount in the Consumer Welfare Fund.

21. Learned counsel for the appellant, however, submitted that it is not open to the department to raise this issue regarding the maintainability of the

refund applications in these appeals as the department had allowed the orders passed by the Deputy Commissioner sanctioning refund to attain finality.

22. The submissions advanced by the learned counsel for the appellant and the learned authorized representatives for the department on this issue

have been considered.

23. To examine this issue, it will be appropriate to first examine the proceedings relating to the refund applications filed by the appellant.

24. As noted above, the appellant had filed refund applications on 29.10.2015 for refund of the excess additional duty of customs that was paid by the

appellant. According to the appellant, it was required to pay additional duty of customs at the reduced rate of 1% in terms of condition No. 16 of the

notification dated 17.03.2012 instead of at the rate of 6%. An objection was raised by the department in the deficiency memo issued to the appellant

on the refund applications that since the Bills of Entry had not been re-assessed, it would not be possible to process the refund applications. This

aspect was first examined by the Deputy Commissioner in the order and in view of the decision of the Delhi High Court in Micromax Informatics,

which considered the decision of the Supreme Court in Priya Blue Industries, the Deputy Commissioner held that the refund applications would be

maintainable even in the absence of any challenge to the assessment orders by the appellant. The finding recorded by the Deputy Commissioner is as

follows:

â€œ31. ***** Hence, again, following judicial discipline, the refund claim of the claimants, needs to be entertained on the basis of their

self-assessed Bills of Entry, though there is no modifying order for those Bills of Entry.â€

25. Thereafter, the Deputy Commissioner found as the fact that the appellant was required to pay additional duty of customs only at the reduced rate

of 1%.

26. After having recorded the aforesaid two findings, the Deputy Commissioner proceeded to decide the following two issues:

(i) Whether the refund claims are hit by limitation and, therefore, liable for rejection; and

(ii) Whether it has been proved beyond doubt that the incidence of duty has not been passed on to the buyers.

27. Regarding the issue relating to limitation, the Deputy Commissioner found that only the claim to the extent of Rs. 26,15,842/- out of the claim of

Rs. 2,59,20,950/- was barred by limitation, and the remaining claims of Rs. 3,43,88,087/- and Rs. 2,59,20,950/- were found to be within limitation.

28. Regarding the issue as to whether the incidence of duty had been passed on to the buyers or not, the Deputy Commissioner examined the

certificate dated 29.12.2015 that had been issued by the chartered accountant and observed that they do not conclusively prove that the incidence of

duty had not been passed on to the buyers. The finding recorded by the Deputy Commissioner is as follows:

â€œ42. ***** The aforementioned statutory requirements regarding unjust enrichment did not appear to be adequately compensated by the

auditorâ€™s certificate dated 29.12.2015 issued by M/s. KRA & Co., Chartered Accountants, New Delhi and enclosed with the refund

application. The auditorâ€™s certificate, at para II(D), draws a subjective conclusion on the point on the assumption that the incidence of

duty burden has not been passed onto the final consumer as the price at which the imported goods were sold to buyers had not increased in

2014-15 due increase in rate of CVD in 2014-15 or before 2014-15. This assumption of the auditor cannot substitute cogent evidences to

substantiate the absorption of duty incidence by the importer himself. Non-escalation of value on account of upwards variation of duty

cannot be considered as an absolute evidence of absorption of duty burden without supporting tangible evidence. The auditor has not

advanced any reason to arrive at the absolute conclusion under para II D(b) of their certificate which is blanket certificate without

advancing verifiable evidence. The para IID is concluded by giving a highly subjective opinion on a general assumption that in their view

as a business practice any variation/increase in tax burden has been absorbed by the company and the same is evident from the cost sheet

examined. However, no cost sheet has been enclosed or rationale of costing has been spelt out to arrive at this conclusion. Hence, the

Chartered Accountantâ€™s certificate is a subjective document without evidential value and therefore did not compensate the evidential

requirement mandated under Section 27(1A), Section 28D. Therefore, the presumption under Section 28D is held against the importer who

it is deemed to have passed on full incidence of such duty to the buyer of such goods. The claimant thus appeared to have failed to prove

that the claim was not hit by the unjust enrichment clause. Hence, in the event of the refund claim being sanctioned, such amount being

sanctioned may be credited to the Consumer Welfare fund in such event, as provided in Section 27(2) of Customs Act, 1962.

*****

51. In the present case as well the applicant has not produced any other document except the said certificate issued by the Chartered

Accountant. In view of the above, I am not inclined to solely rely upon the said certificated issued by the Chartered Accountant and I come

to a reasoned conclusion that in the present case the applicant has failed to conclusively prove that the burden of incidence of duty has not

been passed on to the buyers of the goods imported under the subject Bills of Entry. And accordingly, this refund claim is hit by the doctrine

of unjust enrichment.â€

(emphasis supplied)

29. It would, therefore, be seen that after rejecting the certificate of the chartered accountant, on which reliance was placed by the appellant to

substantiate that the incidence of duty had not been passed on to the buyers, the Deputy Commissioner ordered for sanction of the refund claim, but

directed it to be credited to the Consumer Welfare Fund in terms of section 27(2) of the Customs Act.

30. Feeling aggrieved by that part of the order of the Deputy Commissioner which directed that the sanctioned amount of refund should be credited to

the Consumer Welfare Fund, the appellant filed two appeals before the Commissioner (Appeals).

31. The department, however, did not file any appeal before the Commissioner (Appeals), though under section 128(1) of the Customs Act, any

person aggrieved by any decision or order passed under the Customs Act by an officer of customs lower in rank than a Principal Commissioner or

Commissioner of Customs can appeal to the Commissioner (Appeals). The department should have considered itself to be a person aggrieved because

the order passed by the Deputy Commissioner sanctioned the refund claim as a result of which the department would have to pay that much amount.

It cannot be urged by the department that merely because the amount was directed to be credited to the Consumer Welfare Fund in terms of the

provisions of section 27(2) of the Customs Act, the department would not be a person aggrieved and it would be a person aggrieved only when the

amount is sanctioned in favour of an assessee. The order passed by the Deputy Commissioner sanctioning refund, therefore, attained finality so far as

the department is concerned.

32. The department did make an attempt to raise this issue in the Cross-Objections that were filed in these appeals, but the Cross-Objections were

rejected by the Tribunal and the appeal filed by the department before the Delhi High Court to assail this order of the Tribunal has been dismissed.

33. What transpires from the aforesaid discussion is that the only issue that arises for consideration in these two appeals is as to whether the amount

sanctioned on the refund applications filed by the appellant should be deposited in the account of the appellant or in the Consumer Welfare Fund under

section 27(2) of the Customs Act. It is not in dispute in the present appeals that the amount claimed under the two refund applications has to be

sanctioned. What alone has to be examined in the two appeals is whether the incidence of duty had passed on to the buyers or not.

34. It is in the light of the aforesaid facts that the submissions advanced by the learned authorized representative appearing for the department that the

amount could not have been sanctioned by the Deputy Commissioner as the refund applications were not maintainable because of the judgment of the

Supreme Court in ITC has to be examined.

35. The issue that has been raised by the department is no doubt a legal issue but what has to be seen is whether this legal issue can be raised by the

department in these two appeals filed by the appellant to challenge the issue of unjust enrichment only. The issue before the Tribunal today is not

whether the refund applications would be maintainable even in the absence of any challenge to the assessment order by the appellant because that

issue has attained finality. Such being the position, the department cannot be permitted to raise this issue in these two appeals. In fact, even if the

Cross-Objections were found to be in time, such an issue could not have been raised by the department in these two appeals because the orders

sanctioning the refund had attained finality.

36. In Toyo Engineering, the Supreme Court examined whether the view taken by the Tribunal that the department cannot be allowed to raise a

submission for the first time in a second appeal before the Tribunal. The Supreme Court held that the Tribunal was justified in not permitting the

department to raise the issue for the first time before the Tribunal.

37. A similar issue was examined by a Division Bench of the Allahabad High Court consisting of the Chief Justice (now the Chief Justice of India)

and one of us in Indian Farmers Fertilizers. Two questions of law were raised in the appeal and they are as follows:

â€œI. Whether the Honâ€™ble CESTAT has erred in allowing the refund, without considering provisions of limitation provided in Section

11B of the Central Excise Act, 1944?

II. Whether the Honâ€™ble CESTAT has erred in allowing the refund, without considering provisions of unjust enrichment provided in

Section 11B of the Central Excise Act, 1944?â€

38. In respect of the first issue as to whether the refund claim could have been allowed without considering the issue of limitation, the Allahabad High

Court followed the decision of the Supreme Court in

Toyo Engineering and held that though the department had filed an appeal against the order of the Assistant Commissioner sanctioning the refund, but

this ground was not taken by the department in the appeal. The appeal filed by the department was allowed by the Commissioner (Appeal). This order

was assailed by the assessee before the Tribunal but no Cross-Objection was filed by the department. The Allahabad High Court found that the

finding of the adjudicating authority to the effect that the claim was within limitation was not challenged by the department before the Commissioner

(Appeals) and so it would not be open to the department to assert before the High Court a point which was not raised in the grounds of appeal by the

department while assailing the order of the Assistant Commissioner sanctioning refund. The relevant portions of the judgment of the Allahabad High

Court are reproduced below:

â€œ5. As noted above, two questions of law have been raised on behalf of the revenue. The first question which falls for determination is

whether the Tribunal had erred, as the revenue would assert, in allowing the refund claim without considering the issue of limitation under

Section 11B of the Central Excise Act, 1944.

6. In dealing with this submission, it would be necessary to note at the outset that the Assistant Commissioner, Bareilly while sanctioning the

refund claim in his order dated 23 December 2011 specifically came to the conclusion that the claim had been filed within a period of one

year as prescribed by Section 11B of the Central Excise Act, 1944. The revenue challenged the order of the adjudicating authority before

the Commissioner (Appeals). The grounds of appeal have been reproduced in the order of the Commissioner (Appeals). Those grounds

would indicate that the revenue did not challenge the finding of the adjudicating authority to the effect that the application for refund had

been preferred within the period of one year prescribed by Section 11B. As a matter of fact, the grounds would indicate that the principle, if

not the only challenge on the part of the revenue was that the assessee, which was a recipient of the service and not the service provider,

was not entitled to file a refund claim under Section 11B. The case of the revenue was that it was the service provider, namely RGTIL which

alone was entitled to file a claim before the Commissionerate concerned and RGTIL had recovered the service tax amount from various

recipients.

7. This contention was accepted by the Commissioner (Appeals). The assessee filed an appeal before the CESTAT. No cross objections were

filed by the revenue. Hence, the record would indicate that the finding of the adjudicating authority to the effect that the claim was within

the limitation was not challenged by the revenue in the first appeal which was filed before the Commissioner (Appeals). That being the

position, it would not be open to the revenue to now assert to the contrary and to urge a point which was not raised in the grounds of appeal

filed by the revenue while assailing the order of the adjudicating authority sanctioning the refund.

8. In Commissioner of Customs, Mumbai vs. Toyo Engineering India Limited (2006 (201) E.L.T. 513 (S.C.)) the Supreme Court has held that

the revenue could not be allowed to raise submissions for the first time in a second appeal before the Tribunal.

9. The same principle has been followed by a Division Bench of this Court in Bajaj Hindusthan Ltd. vs. Union of India in holding that in an

appeal before this Court, a ground which was not raised before and decided by the Tribunal, would not be permitted to be urged.â€

(emphasis supplied)

39. This issue was also examined by the Supreme Court in Neelima Srivastava. Writ Petition No. 3316 of 1986 was filed before the High Court to

challenge the modification in the terms of the appointment and an interim order was passed by the High Court on 20.05.1986. The writ petitioner again

approached the High Court by filing Writ Petition No. 7890 of 2003 to challenge the order passed by the Joint Director of Education rejecting her

claim of regularization. The two Writ Petitions were disposed of by a common judgment dated 23.01.2006 with a finding that the petitioner possessed

all the requisite qualifications and as she had worked for 21 years, she had acquired a right to hold the post and it would not be appropriate to treat her

as an appointee in a stop-gap arrangement. Accordingly, a direction was given to the State to consider her for regularization under the relevant

Regularization Rules. This judgment of the High Court attained finality inter-se between the parties as admittedly the State did not challenge the order

before any higher forum. The aforesaid judgment, therefore, crystallized the right of the appellant for regularization. It was, however, denied and so

another Writ Petition No. 8597 of 2010 was filed. By an order dated 15.05.2014, this Writ Petition was allowed with a finding that since the High

Court in the earlier round of litigation had held that she was entitled to hold the post and the said judgment had attained finality, the refusal to apply the

Regularization Rules was unlawful. The aforesaid judgment of a learned judge of the High Court was challenged by the State in a Special Appeal

before a Division Bench of the High Court. The State relied upon a subsequent judgment of the Supreme Court in Secretary, State of Karnataka &

ors. vs. Umadevi & ors., (2006) 4 SCC 1 to contend that when the appointment of the appellant was dehors the Rules and, therefore, illegal she was

not entitled for regularization. The Special Appeal was allowed holding that since the initial appointment of the appellant was dehors the rules, it was

illegal and the appellant cannot be regularized in view of the decision of the Supreme Court in Umadevi. This order was assailed by Neelima

Srivastava before the Supreme Court. This contention of the State that was accepted by the Division Bench of the High Court was repelled by the

Supreme Court for the reason that the earlier order of the High Court dated 23.01.2006 had attained finality much before the Constitution Bench

decision of the Supreme Court in Umadevi. The Supreme Court further observed that merely because the principles followed by the High Court while

deciding the Writ Petition on 03.01.2006 had been over-ruled by the Constitution Bench judgment of the Supreme Court, it would not mean that the

final adjudication between the parties, which had attained finality, can be set at naught. In fact, the Supreme Court held that the judgment which had

attained finality has to be assailed and â€œgot rid of in a manner known to or recognized by lawâ€. The Supreme Court further held that mere over-

ruling of the principles by a subsequent judgment will not dilute the binding effect of the decision which had otherwise attained finality. The relevant

portions of the judgment of the Supreme Court in Neelima Srivastava are reproduced below:

â€œ28. Admittedly, when the judgment dated 23.01.2006 was passed by the High Court in the earlier two Writ Petitions filed by the

appellant, the dictum of Umadevi (3) was not even in existence as the said judgment was rendered subsequently on 10.04.2006.

*****

30. It becomes absolutely clear from the above clarification that earlier decisions running counter to the principles settled in the decision of

Umadevi (3) will not be treated as precedents. It cannot mean that the judgment of a competent Court delivered prior to the decision in

Umadevi (3) and which has attained finality and is binding inter se between the parties need not be implemented. Mere over-ruling of the

principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the

final adjudication between the parties and set it at naught. There is a distinction between over-ruling a principle and reversal of the

judgment. The judgment in question itself has to be assailed and got rid of in a manner known to or recognized by law. Mere over-ruling of

the principles by a subsequent judgment will not dilute the binding effect of the decision on inter-parties.

31. In an identical situation, this Court in Civil Appeal No. 4443 of 2021 with Civil Appeal Nos. 4444 & 4445 of 2021 decided on

26.07.2021 (Vice Chancellor Anand Agriculture University Vs. Kanubhai Nanubhai Vaghela and Anr.) has rejected the argument advanced

by the appellant in the said case that the judgment of this Court dated 18.01.2001 in Gujarat Agricultural University Vs. Rathod Labhu

Bechar & Ors. [(2001) 3 SCC 574] does not survive after the judgment of this Court in Umadevi(3). It was held in paragraph 11 as under:-

â€œ11. We have heard Mr. P.S. Patwalia, learned senior counsel for the university and Mr. Nachiketa Joshi, learned counsel for the

respondents. The main contention of the university is that after the judgment of this Court in Secretary, State of Karnataka and Ors. vs.

Umadevi and Ors. 2, the respondents are not entitled for regularization as there are no sanctioned posts available. Another submission

made on behalf of the appellant is that the judgment of this Court dated 18.01.2001 in Gujarat Agricultural University (supra) does not

survive after the judgment of this Court in Umadevi. ***** We are not impressed with the submissions made on behalf of the university that

the judgment of this Court in Umadeviâ€™s case overruled the judgment in Gujarat Agricultural University (supra). The judgment of this

Court in Gujarat Agricultural University (supra) inter partes has become final and is binding on the university. *****â€

*****

36. Thus, it is very well settled that it is not permissible for the parties to re-open the concluded judgments of the Court as the same may not

only tantamount to an abuse of the process of the Court but would have far reaching adverse effect on the administration of justice.

*****

39. Analyzing the entire facts of the case and upon consideration of the matter and settled legal position, we are of the considered view that

the impugned judgment passed by the Division Bench of High Court is not liable to be sustained and is hereby set aside. The appeal,

accordingly, stands allowed. The appellant is held entitled to be regularized with all consequential benefits which may be extended to her

within a period of three months from today.â€

(emphasis supplied)

40. It would also be useful to refer to the decision of a Division Bench of the Tribunal in Global Constructions. The Tribunal noticed that the impugned

order had partly sanctioned the refund but credited it to the Consumer Welfare Fund. The Tribunal held that though it is true that it was observed by

the Supreme Court in ITC that no refund can be entertained unless the order of assessment or self-assessment is modified but as the order sanctioning

refund had attained finality, this plea cannot be permitted to be raised by the department. The relevant portion of the order of the Tribunal is

reproduced below:

â€œ9. We have considered the submissions of the learned Authorized Representative and have carefully gone through the records of the

case. We find that the impugned order had partly sanctioned the refund and credited it to the consumer welfare fund and partly rejected on

the ground of time bar. It is true that the law laid down by the Honâ€™ble Supreme Court in the case of ITC Ltd, was that no refund can be

sanctioned at all unless the assessments (including self assessments) are first assailed before the Commissioner (Appeals) and modified.

However, the sanction of refund by the Commissioner (Appeals) has not been assailed by the Revenue either by an appeal or by a separate

memorandum of cross objections.â€

(emphasis supplied)

41. The Delhi High Court in Emaar MGF also held as follows:

â€œ14. The Learned Tribunal rightly found that the proposal and the show cause notice to recover a sum of Rs. 2,44,48,095/- under

Section 73A of the Act and the interest thereon under Section 73B of the Act, was not confirmed by the Learned Commissioner in his order-

in-original. Accordingly, the Learned Tribunal held that, in the absence of a cross-appeal by the Department, it would not be possible to

confirm any demand under Section 73A of the Act.â€

(emphasis supplied)

42. In Servo Packaging, the Madras High Court held:

â€œ19. Though show cause notices have been issued by the original authority, for the shortage of raw materials noticed, which includes,

allegation of clandestine removal of raw materials, the finding of the original authority against the revenue, on the latter, is clear. When the

department has not chosen to challenge the finding of the original authority, on the allegation of clandestine removal of raw materials nor

filed any cross-objection to the appeal filed by the assessee, we are of the view that the finding rendered, by the original authority, in favour

of the assessee, has reached finality.â€

(emphasis supplied)

43. In Udit Seth, the Tribunal held as follows:

â€œ5.5 In respect of para-III of the ground of appeal we find that even the adjudicating authority has in his order, not even proposed

addition of such charges. The issue raised in the appeal by the revenue has been raised for first time in appeal without the same being

subject matter of adjudication proceedings or in appellate proceedings before the Commissioner (Appeals). In case revenue was aggrieved

by adjudicating authority not proposing to add such charge to arrive at the assessable value, the correct course would have been to file

appeal or cross objections before the Commissioner (Appeal). Since revenue has proceeded not to file any appeal/ cross objections before the

Commissioner (Appeal) they could not have taken this ground for first time while filing the appeal before this Tribunal.â€

(emphasis supplied)

44. It clearly follows from the aforesaid decisions that if the department does not challenge a finding of the adjudicating authority by filing an appeal

before the Commissioner (Appeals), than that finding of the adjudicating authority attains finality and the department cannot be permitted to

subsequently raise this issue in a higher forum. This is what was observed by the Allahabad High Court in Indian Farmers Fertilizers. In Neelima

Srivastava it was also held by the Supreme Court that an order which has attained finality between the parties can only be assailed in a manner known

to law and mere over-ruling of the principles followed in the said order by a subsequent judgment cannot dilute the binding effect of the decision. In

Global Constructions, the Tribunal examined almost a similar issue. The adjudicating authority sanctioned the refund amount but credited it to the

Consumer Welfare Fund. The Tribunal held that though the Supreme Court had subsequently held in ITC that a refund can be claimed only if the

assessment order is modified but since the finding of the adjudicating authority sanctioning refund was not assailed by the department before the

Commissioner (Appeals), it would not be permissible for the department to raise this issue before the Tribunal.

45. Learned authorized representative appearing for the department has relied upon the decision of the Tribunal in Shiv Naresh Sports to contend that

even a respondent can raise a legal issue. It needs to be noted that the legal issue that is now sought to be raised by the department is that the refund

applications are not maintainable for the reason that assessment proceedings had not been challenged by the appellant by filing appeals. This issue, as

noticed above, had attained finality. Once the department allowed a particular issue to attain finality, it will not be permissible to permit the department

in appellate proceedings initiated by an assessee before the Tribunal to raise this issue, even if it be a legal issue. The issue that is sought to be raised

is not even the subject matter of these appeals as the sole issue that arises for consideration in these appeals is whether the incidence of duty was

passed on to the buyers. In all the decisions that have been referred to by the learned authorized representatives for the department only general

principles regarding raising of a legal issue have been examined. In none of these decisions it has been held that even if an issue that is sought to be

urged has attained finality, it can still be raised considering it to be a legal issue. The decisions relied upon by the learned authorized representatives

appearing for the department, therefore, do not come to the aid of the department.

46. It has, therefore, to be held that as the order dated 23.01.2017 passed by the Deputy Commissioner sanctioning refund had attained finality as no

appeal was filed by the department to assail this order, the department cannot be permitted to raise the issue regarding maintainability of the refund

applications.

MERITS

47. What remains to be decided is whether the incidence of duty had passed on to the buyers.

48. To substantiate that incidence of duty had not passed on to the buyers, the appellant had placed the certificate dated 29.12.2015 issued by a

chartered accountant in respect of the imports made at Delhi. The said certificate is reproduced below:

â€œAUDITOR CERTIFICATE

I. With regard to the imports made by M/s. Nokia India Sales Private Limited (â€˜the Companyâ€™) at Delhi, the Company has paid

Countervailing Duty of Customs (â€˜CVDâ€™) under Section 3(1) of the Customs Tariff Act, 1975 and NCCD (along with applicable cess

as applicable) of Rs. 36,289,329/- as has been evidenced by various tax payment challans (referred in the sheet enclosed herewith).

II. Pursuant to our review of books of accounts and other relevant records produced by the Company before us, we hereby certify:

A. That we, M/s. KRA & Co., Chartered Accountants, having its business place at H-1/208, Garg Tower, Netaji Subhash Palace, Pitampura,

New Delhi â€" 110034, have Sales Private Limited, a private limited company incorporated as per provision of Companies Act, 1956,

having its Office situated at 807, New Delhi House, Barakhamba Road, New Delhi â€" 110001 in relation to the refund claim of differential

customs duty. We have examined the accompanying â€˜Statement of Bills of Entry along with other relevant documentsâ€™ of the Company.

Our engagement was undertaken in accordance with the Generally Accepted Auditing Standards applicable in India and the Guidance note

on Audit Reports and Certificates for Special Purposes issued by the Institute of Chartered Accountants of India.

B. That pursuant to the judgment of the Honâ€™ble Supreme Court in the case of M/s. SRF Limited, the Company is entitled to claim

refund of differential customs duty amounting to Rs. 25,920,950/- paid and borne by it for October 2014 at Delhi by claiming benefit of the

exemption available under S. No. 263A of the notification no. 12/2012-CE dated 17 March 2012 (as amended from time to time).

C. That one of the condition to claim exemption under entry no. 263A of the exemption notification is that the Company should not have

availed any CENVAT credit on inputs and input services and basis our review of the books of accounts and other available records, stated

conditions stand fulfilled for the subject refund claim.

D. That for the purpose of examining the clause of unjust enrichment to the importer in respect of subject refund claim, we have verified the

importerâ€™s Books of Accounts and other relevant documents and records of the goods. Based on such verification, we have satisfied

ourselves:

a) that the price at which the imported goods were sold to buyers has not increased in 2014-15 due to increase in the rate of CVD in 2014-15

or before 2014-15.

b) that customs duty claimed as refund has not been recovered from the customers or any other person separately in any manner.

In our view as a business practice any variation/increase in tax burden has been absorbed by the Company and same is evident from the

cost sheets examined. Further, the claimant has not claimed the refund pertaining to the items where the duty burden was passed on to the

customer as an increase in price. Accordingly, we certify that the claimant has not passed on the incidence of the differential customs duty

to the buyer or any other person in relation to the items for which refund claim has been filed, and hence the requirement to rule out unjust

enrichment to the importer/claimant is fulfilled in respect of all goods imported and sold as covered by the subject claim.

E. The Company has filed only single claim against all bills of entries referred in Annexure A.

F. This certificate is solely for the purpose as set forth in the first paragraph of this certificate and is not to be used, referred to or

distributed for any other purpose without our prior written consent.

For KRA & Co.

FRN: 020266N

Chartered Accountants

Rajat Goyal

Partner

Membership No.: 503150

Place: Delhi

Date: 29/12/2015

Encl:

Details of Tax Payment Challans

Annexure Aâ€

(emphasis supplied)

49. A similar certificate with similar Annexure A was also filed by the appellant in respect of the imports made at Hyderabad. The adjudicating

authority, in respect of the refund applications filed by the appellant claiming refund of additional duty of customs, did not accept the certificates and

held that the appellant had not been able to prove that the incidence of duty had passed to the buyers. The appellant filed appeals before the

Commissioner (Appeals), which appeals were rejected. Against the order passed by the Commissioner (Appeals), the appellant filed Customs Appeal

No. 30153 - 30154 of 2018 before the Hyderabad Bench of the Tribunal. The Tribunal accepted the certificates filed by the chartered accountant and

allowed the appeal. The decision of the Hyderabad Bench of the Tribunal is reproduced below:

â€œ8. The only question that remains in both the appeals is whether the appellant is able to prove the hurdle of unjust enrichment has been

passed on or not. The facts of the case is reproduced herein above are not in dispute.

9. On perusal of the Chartered Accountant Certificate which is produced before the Lower Authorities and also produced before the

Tribunal, I find that the Chartered Accountant (Auditors) certificate clearly recorded that for the purpose of examining the case of unjust

enrichment, they audited importerâ€™s books of accounts and other documents and record of the goods, based upon such verification,

certified that incidence of duty is not passed on. The said Chartered Accountant is along with annexures showing as to how calculations are

arrived at. As against such clear evidence from the Chartered Accountant, we find that Revenue has not adduced contrary evidence to show

that appellant herein had passed on the incidence of duty. In the absence of any contrary evidence, we have to hold that the Chartered

Accountantâ€™s Certificate as produced by appellant needs to be accepted.â€

(emphasis supplied)

50. The aforesaid order of the Hyderabad Bench of the Tribunal has attained finality as no appeal has been filed by the department.

51. A similar certificate dated 29.12.2015 was filed by the appellant for imports made at Ahemdabad. This certificate was not accepted by the

adjudicating authority. The Ahemdabad Bench of the Tribunal in Customs Appeal Noâ€™s. 11639-11640 of 2017, 2019 (368) E.L.T. 975 (Tri. -

Ahmd.) remanded the matter to the adjudicating authority to pass a fresh order with respect to the certificate dated 29.12.2015 issued by the

chartered accountant.

52. On remand, the Deputy Commissioner, Ahmedabad accepted the chartered accountant certificate dated 29.12.2015 and observed as follows:

â€œ18. I further find that the Chartered Accountant (M/s. KRA & Co. New Delhi) of the claimant has already audited the records of the

said claimant and issued certificate as under:

*****

19. From the above Chartered Accountantâ€™s certificate, it is noticed that they have verified the Books of Accounts of the claimant and

certified that the price at which the imported goods were sold to buyers has not increased in 2014-15 due to increase in the rate of CVD in

2014-15 or before 2014-15. The customs duty as refund has not been recovered from the customers or any other person separately in any

manner. One the Chartered Accountantâ€™s certificate, I rely upon the following decisions:

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27. I find that the above mentioned citations are squarely applicable in the present case. In this case, the claimant had imported the mobile

phones and paid CVD duty @6%. However, in pursuant of the decision of the Honâ€™ble Supreme Court in the case of M/s. SRF Ltd. Vs.

Commissioner of Customs, Chennai, had filed the claim of refund of CVD duty paid in excess, as per Sr. No. 263A of Notification No.

12/2012-CE as amended. The Chartered Accountant (KRA & Co. New Delhi) of the said claimant has already certified vide his letter dated

29.12.2015 that â€œIn our view as a business practice any variation/increase in tax burden has been absorbed by the Company and same

is evident from the cost sheets examined. Further, the claimant has not claimed the refund pertaining to the items where the duty burden was

passed on to the customer as an increase in price. Accordingly, we certify that the claimant has not passed on the incidence of the

differential customs duty to the buyer or any other person in relation to the items for which refund claim has been filed, and hence the

requirement to rule out unjust enrichment to the importer/claimant is fulfilled in respect of all goods imported and sold as covered by the

subject claim.â€ Therefore, burden of custom duty has not been passed on the customers. Looking to the facts, and following the judicial

discipline, I conclude that the doctrine of unjust enrichment is not applicable in the present case. Therefore, the claimant is entitle for the

cash refund of Rs. 13,49,349/-.

28. In view of above discussion, the claimant is entitled for the refund of Rs. 13,49,349/- out of Rs. 13,49,349/- under Section 27 of the

Customs Act, 1962. The remaining refund amount of Rs. 2,72,957/-is not admissible being hit by limitation of time. Accordingly, I, pass the

following order.â€

(emphasis supplied)

53. This order of the Deputy Commissioner holding the claimant entitled to refund has also attained finality as no appeal has been filed by the

department.

54. It is seen that the same chartered accountant issued three identical certificates, each dated 29.12.2015, to the appellant in respect of the import of

the same goods at about the same time from Delhi, Ahemdabad and Hyderabad. The Hyderabad Bench of the Tribunal accepted this certificate and

held that the burden of duty had not passed on to the buyers. This order of the Hyderabad Bench has attained finality. An identical chartered

accountant certificate dated 29.12.2015 also came up for consideration before the Ahemdabad Bench of the Tribunal. The Tribunal remanded the

matter to the Deputy Commissioner to examine the issue afresh. The Deputy Commissioner, on remand, after carefully examining the said chartered

accountant certificate dated 29.12.2015, held that the incidence of duty had not passed on to the buyers. This order passed by the Deputy

Commissioner has also attained finality.

55. Once the department has allowed the order of the Hyderabad Bench of the Tribunal in respect of the imports at Hyderbad as also the order

passed by the Deputy Commissioner at Ahemdabad in respect of the imports made at Ahmedabad to attain finality, the department cannot be

permitted to contend in this appeal that an identical certificate issued by the same chartered accountant for the imports made at Delhi should not be

accepted.

56. In this connection, reference can be made to the decision of the Supreme Court in Marsons Fan Industries, wherein it has been held:

â€œ3. Mr. Joseph Vellapally, learned senior counsel appearing for the appellant has brought to our notice that in a case pertaining to

earlier period from February 1982 to December 1982 of the assessee, the Collector (very same officer) in Order (Original) No. 61 (30-D)

87-Collr. 57/89, dated 21st July 1989 took the view that rotors and stators were incomplete and were unfinished goods not known in the

market as stators and rotors. He also states that the subsequent order dated 21st July 1989 was brought to the notice of the Tribunal but the

Tribunal did not take note of it. In support of his assertion, learned senior counsel has filed an affidavit of the counsel who had appeared

for the assessee before the Tribunal. He further states that the Department has accepted the subsequent decision dated 21st July 1989 for

the period February 1982 to December 1982. He submits that in view of the fact that the Department has accepted the subsequent decision

dated 21st July 1989 in which it has been held that the rotors and stators in the form in which they are cleared from the appellantâ€™s

factory are not finished goods and, therefore, not exigible to the levy of excise duty, the present appeal be accepted and the impugned

order be set aside.

4. Learned senior counsel for the Department, after taking instructions, very fairly submits that the Department has accepted the decision

dated 21st July 1989 and the same has attained finality.

5. Keeping in view the fact that the Department has accepted the decision dated 21st July 1989 pertaining to the assessee itself on the

similar goods, we accept this appeal and set aside the order of the Tribunal and hold that the rotors and stators which were cleared by the

appellant were not finished goods and were, therefore, not exigible to the levy of excise duty for the relevant period.â€

(emphasis supplied)

57. Reference can also be made to the decision of the Supreme Court in Amar Bitumen, wherein it has been held:

â€œ4. The Tribunal relying upon an earlier decision of another Bench of the Tribunal in Commissioner of Central Excise, Calcutta-I v.

Bitumen Products (India) [1999 (107) E.L.T. 58 (T)], held that â€˜Bituminised Hessian based feltâ€™ is covered under Chapter Heading

59.09 as contended by the assessee and not under 68.07 as contended by the revenue.

5. Admittedly, no appeal was filed by the revenue against the earlier decision of the Tribunal in Bitumen Products (India) (supra) and the

same has become final.

6. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the

same has attained finality, then it is not open to the Revenue to accept judgment/order on the same question in the case of one assessee and

question its correctness in the case of some other assessees. The Revenue cannot pick and choose. [See : Union of India & Others v.

Kaumudini Narayan Dalal & Another [2001 (10) SCC 231]; Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd.

[2003 (158) E.L.T. 130 (S.C.)]; Birla Corporation Ltd. v. Commissioner of Central Excise [2005 (186) E.L.T. 266 (S.C.)]; Jayaswals Neco

Ltd. v. Commissioner of Central Excise, Nagpur [2006 (195) E.L.T. 142 (S.C.)], etc.]â€

(emphasis supplied)

58. It is, therefore, not possible to accept the contention raised by the learned authorized representatives appearing for the department that the

certificate of the chartered accountant produced by the appellant to substantiate the incidence of duty had not passed on to the buyers should not be

accepted because the appellant did not produce any other corroborative evidence as required under sections 28C and 28D of the Customs Act.

59. The orders dated 05.09.2019 and 26.09.2019 passed by the Commissioner (Appeals) confirming the order passed by the Deputy Commissioner for

deposit of the sanctioned amount in the Consumer Welfare Fund under section 27(2) of the Customs Act, therefore, deserve to be set aside and are

set aside. The appellant is held entitled to the payment of amount of Rs. 3,43,88,087/- and Rs. 2,33,05,108/-with consequential relief(s). The two

appeals are, accordingly, allowed.

(Order Pronounced on 15.10.2024)