

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No.64 of 2011

(Arising out of OIA-239-2010-CUS-COMMR-A—AHD dated 13.12.2010 passed by
Commissioner of CUSTOMS-AHMEDABAD

C.C. Ahmedabad

CUSTOM HOUSE,
NEAR ALL INDIA RADIO NAVRANGPURA,
AHMEDABAD, GUJARAT

.....Appellant

VERSUS

Shell Energy India Private Limited

101-103, ABHIJIT-II,
AHMEDABAD-GUJARAT

.....Respondent

WITH

- **CUSTOMS Appeal No. 87 of 2011 (Shell Energy India Pvt Ltd);**
- **CUSTOMS Appeal No. 88 of 2011 (Shell Energy India Pvt Ltd);**
- **CUSTOMS Appeal No. 181 of 2011 (Shell Energy India Pvt Ltd);**
- **CUSTOMS Appeal No. 189 of 2011 (Shell Energy India Pvt Ltd);**

(Arising out of OIA-239-2010-CUS-COMMR-A—AHD dated 13.12.2010 passed by
Commissioner of CUSTOMS-AHMEDABAD

(Arising out of OIA-238-2010-CUS-COMMR-A—AHD dated 10.12.2010 passed by
Commissioner of CUSTOMS-AHMEDABAD

(Arising out of OIA-77-2011-CUS-COMMR-A—AHD dated 07.03.2011 passed by
Commissioner of CUSTOMS-AHMEDABAD

(Arising out of OIA-101-2011-CUS-COMMR-A—AHD dated 25.04.2011 passed by
Commissioner of CUSTOMS-AHMEDABAD

APPEARANCE

Mr. T. Viswanathan, Jigar Shah, Manish Jain & Ms. Shruti Agarwal, Advocates
for the Appellant (Assessee)

Mr. Vinod Lukose, Superintendent (Authorized Representative) for the Revenue

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. 10370-10374 /2022

DATE OF HEARING: 21.12.2021

DATE OF DECISION: 13.04.2022

RAJU

These appeals have been filed by M/s Shell Energy India Private
Limited against denial of refund claim. Appeal has also been filed by
Revenue against part of the order.

2. The facts of the case are that the appellant were engaged in import of Liquified Natural Gas. The present dispute relates to 24 bills of entries. The appellant filed bills of entry for an estimate quantity of Liquified Natural Gas (LNG) and declared the value on the basis of provisional invoice issued by the foreign supplier. Part payment was also made to the foreign supplier on the basis of the provisional invoice. The value of import was declared on "Delivered Ex-Ship" basis. It was argued that due to following reasons, it is not possible to exactly measure the quantity of LNG in a ship:

- (i) Due to technical reasons, it is not possible to accurately calculate the quantity of LNG which had actually landed on the Indian shore without conducting technical estimation.
- (ii) Technical estimation is also required for the reason that vessel carrying LNG also consumes the same as fuel. Further such consumption depends on voyage time.
- (iii) Technical estimation is also required for the reason that LNG being gas is converted into liquid for ease of transportation and handling. During the voyage the same boils off as well. Further quantity of such boil off depends upon host of other variables e.g. weather condition, voyage time etc.

It was also argued that in most of the cases, the quantity actually delivered on the Indian shore is not exactly the same as the quantity mentioned in the provisional invoice and therefore at the time of filing bill of entry both quantity as well as value are based on estimates only.

2.1 The said bills of entries were assessed provisionally for home consumption on the above count as well as for the reason that original documents and test reports were awaited. The appellant paid customs duty on the basis of the provisional assessment made as above. On unloading of LNG independent surveyor carried out verification and inspection to ascertain the exact quantity delivered to the appellant. The surveyor gave a Certificate to the appellant. On the basis of surveyor's report, the supplier issued a credit note against the provisional invoice

and thereafter final payment on the actual quantity received was made by the appellant to the supplier. In the instant cases, the appellant filed refund claim for these 24 bills of entries as detailed in the orders in original numbers 7 to 24/AC/SRT/.REF/2009, dated 17.02.2009 and OIO Nos. 28 to 33/AC/SRT/REF/209, dated 08.05.2009.

2.2 The Assistant Commissioner of Customs (Surat) vide Orders-in-Original dated 17.02.2009 and 08.05.2009 sanctioned the refund claim covering all 24 bills of entries but the said amount were ordered to be credited to Consumer Welfare Fund on the ground on unjust enrichment. Aggrieved by the said order, the appellant filed appeals before the Commissioner (Appeals). The Commissioner (Appeals) vide Order-in-Appeal dated 14.12.2009 set aside both the orders and remanded the case back to the original adjudicating authority for passing fresh order on the basis of terms set out in the order. The Commissioner (Appeals) had order observed as follows in the said order:

*"From the foregoing discussions, **I find that the provisions of unjust enrichment are applicable to the present refund claims where provisional assessments involve the period on or after 13.07.2006.** While the adjudicating authority has fallen into an error in disposing of the refund claims against the appellant without admitting the evidences in the form of Balance sheets and CA Certificates, the appellant claimant was also found wanting so far as submission of the books of accounts explaining the effect of relevant entries made in the balance sheets called for by the adjudicating authority for examination of the claims are concerned. Under these circumstances, it is found desirable in the interest of justice that the impugned orders-in-original are set aside and the appellant given another chance to submit before the original authority further evidences including the copies of books of accounts which explain the effect of relevant entries in the respective audited balance sheets to rebut the presumption of unjust enrichment and the adjudicating authority another opportunity to examine the refund claims afresh in the light of all the evidences including the balance sheets, the CA's Certificate, appellate judgements noted above and pass a well reasoned order following the principles of natural justice."*

2.3 The appellant did not challenge the said order-in-appeal. In remand proceedings, the Assistant Commissioner examined only the issue of unjust enrichment. After going through the sales agreement between the appellant and Gujarat State Petroleum Corporation dated 21.04.2006, sales invoices, ledger accounts of the customer, published balance sheets, Chartered Accountant Certificate, the Assistant Commissioner came to the conclusion that the appellants have not been able to establish that the burden of duty has not been passed on.

3. Revenue appeal-The order in original further examined the four cases relating to period prior to 13.07.2006. In respect of these case the remand order of Commissioner (Appeals) has specifically observed that the original authority needs to examine the actual date of provisional assessments and only thereafter decide the matter in view of the decision of Hon'ble High Court of Gujarat in case of Hindalco Industries Ltd. **2008 (231) ELT 36 (Guj.)** and the decision of Larger Bench of Tribunal in the case of Hindustan Zinc Limited **2009 (235) ELT 629 (Tri. LB)**. The Assistant Commissioner observed that the said bills of entry were assessed provisionally prior to 13.07.2006 and finally after 13.07.2006. He observed that at the time of final assessment, the amended provision of Section 18 were in force and hence, the same will be applicable to the refund claims arising out of final assessment. He had observed that:

"Now I come to the point of applicability of the provisions of unjust enrichment in the 04 cases relating to the period prior to 13.07.2006 when the provisions of Section 18 of the Act were amended after examination of these claims in the light of Hon'ble Gujarat High Court judgement in CC vs Hindalco Industries Ltd. 2008 (231) ELT 36 (Guj.) as well as CESTAT Larger Bench, Ahmedabad judgement in CC, Kandla Vs. Hindustan Zinc Ltd. (2009 (235) ELT 629 (Tri.-LB)). I find that the impugned 04 bills of entry have been assessed provisionally prior to 13.07.06 and finally after 13.07.06. Thus, at the time of the final assessment, the amended provisions of Section 18 were in force and hence the same will be applicable to the refund claims arising out of the final assessment made on or after applicable to the refund claims arising out of the final assessment made on or after

13.07.06. Moreover, under the Customs Act, the refunds arising out of finalization or provisional assessment have been expressly subjected to the limitation prescribed under Section 27 of the Customs Act, since inception. Explanation I to Section 27 provided for the limitation to claim refund of duty provisionally assessed under section 18 of the Customs Act. By Act 21 of 1998 (with effect from 01.08.98), the Explanation I to Section 27 has been remembered as Explanation II. Thus, under the Customs Act, the refund of duty arising out on finalization of the provisional assessment has always been subject to the procedure prescribed under Section 27 of Customs Act. Therefore, whether prior on or after to amendment, the provisions of unjust enrichment are applicable to refunds arising on finalization of provisions assessment. In the case laws referred by the Commissioner (Appeals), it has been held that the principles of unjust enrichment found in Section 27 of the Act cannot be read into the provisions of Section 18 of the Act without considering and applying the amendment to Section 18 with effect from 13.07.06. however, the Hindalco Industries Ltd. 2008 (231) ELT 36 (Guj.) and filed SLP in the Hon'ble Supreme Court of India against the same, which is still pending for decision. Till the decision of Hon'ble Supreme Court, the matter cannot be said to have attained finality."

The Assistant Commissioner sanctioned total amount of refund claim but transferred the same again to the Consumer Welfare Fund. Aggrieved by the said order, the appellant filed appeal before Commissioner (Appeals).

3.1 The Commissioner (Appeals) pointed out that as far as four bills of entry which were assessed provisionally prior to 13.07.2006 are concerned, specific directions were given in the earlier Order-in-Appeal dated 28.04.2010 that the original adjudicating authority needs to follow the decision of Hon'ble High Court of Gujarat in the case of Hindalco Industries Ltd. **2008 (231) ELT 36 (Guj.)** as well as the decision of Larger Bench of Tribunal in the case of Hindustan Zinc Limited **2009 (235) ELT 629 (Tri. LB)**. The Commissioner (Appeals) observed that the basic question whether refund of customs duty arising out of finalization of provisional assessment in terms of provisions of Section 18 of the Customs Act, 1962 relatable to the period prior to 13.07.2006 (when the provision of Section 18 was amended) would attract the doctrine of unjust enrichment or not stands decided in the favour of the appellant. He further observed that it was clearly held that provisions of

unjust enrichment is not applicable to the refund claim arising out of finalization of provisional assessment prior to 13.07.2006. He further pointed out that the remand was only to ascertain the actual date of provisional assessment and to take decision accordingly. He observed that in respect of 4 bills of entries, the provisional assessment was done prior to 13.07.2006 and therefore, the Assistant Commissioner has failed to follow the remand directions. He observed that it was incumbent upon the Adjudicating Authority to pay refund arising out of 4 bills of entries which were assessed provisionally prior to 13.07.2006 without invoking the provisions of unjust enrichment. He took note of the fact that the decision of Hon'ble High Court of Gujarat in case of Hindalco Industries Ltd. (supra) was not followed on the ground that Revenue has filed an appeal before the Hon'ble Apex Court which is still pending. Commissioner (Appeals) held that once the decision of Hon'ble High Court is available and the same has not been set aside, the same should have been followed even if the said order has been challenged before the Hon'ble Apex Court. He, therefore, set aside the impugned order in respect of these 4 bills of entry and held that the provisions of unjust-enrichment is not applicable to the refund arising out of these 4 bills of entry.

3.2 Aggrieved by this part of the order, Revenue is in appeal. The Revenue has argued that the decision of Hon'ble High Court of Gujarat in the case of Hindalco Industries (supra) has been challenged in the Apex Court and the same is pending. The Revenue has relied on the decision of Hon'ble High Court of Bombay rendered in the case of M/s Bussa Overseas and Properties Ltd. wherein it was held that the refund arising from finalization from finalization of provisional assessment is governed by limitation prescribed under Section 27 of the Customs Act and the Customs authorities are under no obligation to refund the amount due under Section 18 (2) of the Customs Act, 1962 without application of

Section 27 of the Customs Act, 1962. In its appeal Revenue has argued that the provision of unjust-enrichment contained in Section 27 is applicable to refund arising under Section 18 of the Act. It has been argued that the decision of the Hon'ble High Court of Gujarat in the case of M/s. Hindalco Industries Ltd. is totally contrary to the decision of Hon'ble High Court of Bombay in the case of M/s Bussa Overseas and Properties Ltd., which was approved by the Hon'ble Apex Court vide order passed in Special Leave Appeal (Civil No. 21641 of 2003). It has been argued by the Revenue that the principles laid down by the Hon'ble High Court of Bombay in case of M/s Bussa Overseas and Properties Ltd. which has been approved by the Hon'ble Apex Court, the principle of unjust-enrichment would be applicable to the 4 bills of entry filed before dated 13.07.2006.

3.3 From the above it is seen that the Revenue is contesting the impugned order on the grounds that the decision of Hon'ble High Court of Gujarat in case of Hindalco Industries Ltd. (Supra) cannot be relied upon to grant refund without the test of unjust-enrichment in respect of the 4 bills of entry assessed provisionally prior to date 13.07.2006. The Revenue is seeking to rely on the decision of Hon'ble High Court of Bombay in the case of M/s Bussa Overseas and Properties Ltd. approved by the Hon'ble Apex Court vide order passed in Special leaved appeal (Civil No. 21641 of 2003). It is seen that the order of Commissioner (Appeals) has decided certain issues which have not been challenged by either of the sides. Both the sides have accepted the said order consequently limited the scope of arguments that they can make in subsequent proceedings.

3.4 It is also seen that the said order the Commissioner (Appeals) dated 14.12.2009 also settles the issue regarding the applicability of the decision of Hon'ble High Court of Gujarat in the case

of Hindalco Industries Ltd. (Supra). The said order specifically remands the matter to the original authority and directs that the same should be decided in terms of decision of the Hon'ble High Court of Gujarat in the case of Hindalco Industries Ltd. (Supra) and also the decision of the Larger Bench in the case of Hindustan Zinc Ltd.(supra). If the Revenue was aggrieved by the said decision on account of decision of Hon'ble High Court of Bombay in case of M/s Bussa Overseas and Properties Ltd. approved by the Hon'ble Apex Court then they should have challenged the order of the Commissioner (Appeals). Having accepted the order of the Commissioner (Appeals) it is not open to the Revenue to now raise the issue relating to non-applicability of the decision of Hon'ble High Court of Gujarat in the case of Hindalco Industries Ltd. (supra) and the decision of Larger Bench of Tribunal in the case of Hindustan Ltd (Supra). In the aforesaid background, we find that the sole ground raised by the Revenue in its appeal relying on the decision of Hon'ble High Court of Bombay in the case of M/s Bussa Overseas and Properties Ltd. approved by the Hon'ble Apex Court cannot be accepted, and therefore, the Revenue's appeal is dismissed.

4. Assessee Appeal-The Shell Energy India Pvt. Ltd. (SEIPL) appellants have filed the appeal in respect of the other 20 bills of entry on the grounds that

a) the refund has been claimed for duty paid on goods, that have not arrived in India. They have relied on the following decisions:-

- Godrej & Boyce Mfg. Co. Ltd. 2001 9134) ELT 429 (Tri. Mum.)
- KRBL Ltd. 2008 (226) ELT 236(Tri.-Mum.)
- Pentair Water India Pvt. Ltd.2006 (202) ELT 817 (Tri.-Mum.)
- Textool Co. Ltd. 1999 (111) ELT 826 (Tri. Mum.)
- BASF India Ltd. 2006 (204) ELT 474 (Tri.-Mum.)

b) The copies of the invoices submitted by the appellant clearly show that the excess duty paid by the appellant have not been passed on to the customers.

- c) The substantial condition for getting the refund has been fulfilled by the appellant. Merely making a 'provision' in the balance sheet does not imply that the burden of duty has been passed on to some other person.

4.1 It is seen that the said order of the Commissioner (Appeals) dated 14.12.2009 has taken note of the fact that all the goods were not received by the appellant and after examining the decisions relied by the appellant in this regard [reproduced in para 4 (a)] has come to the conclusions that the provisions of the unjust-enrichment would be applicable to the instant case. In these circumstances, it is not open to the appellant to agitate the issue regarding short receipt of goods once more relying on the same set of decisions. If they were aggrieved with the findings of the Commissioner (Appeals) in para 6.4 of the order dated 14.12.2009 then they should have challenged the same. Having failed to challenge the same, the appellant forgo their right to agitate the issues which were settled by the order of Commissioner (Appeals) dated 14.12.2009.

4.2 Now we come to the main issue decided by the impugned order which relates to the evidence produced by the appellant before the Commissioner (Appeals) in defense of its claim that they have not passed the burden of customs duty to anybody else.

4.3 The appellants have claimed that they have not passed the burden of Customs duty to anybody else on the strength of following assertions:

- (i) Invoices issued by them to their buyers do not contain any excess collection of customs duty.
- (ii) The balance sheets from the period 2006-07 onwards show the amount of refund as 'custom advance' under the head of 'Loans and Advances'/ 'Long term Loans and Advances'.

It is seen that the schedule relating to loans and advances/ long term loans and advances contain two specific entries in all the years from 2006-07 onwards. One entry relates to 'Custom advances' however, simultaneously the schedule contains a counter entry relating to provision for 'custom advances'. The said schedule on one hand adds the amount claimed to be refundable as 'custom advance' but simultaneously by making an entry Less: "provisions for custom advances" the amount of custom duty is deducted from the head of Loans and Advances. In effect the two entries nullify each other. Consequently, the cost is passed on to the profit and loss account as expenditure. It is seen that this kind of entry is made in all balance sheets from 2007 onwards.

BALANCE SHEET OF YEAR 2006-07

SCHEDULE 10

LOANS AND ADVACNES

(Unsecured, Considered good)

	As at 31.03.2007 (Rs.)	As at 31.03.2006 (Rs.)
Advances Recoverable in cash or in kind	17,845,546	131,346,092
Or for value to be received		
Advance Tax [Net of Provision Rs. 776,626 (Previous Year Rs. 801,926)]	9,668,817	1,271,446
Balance with Customs Authorities		
Custom Advance-Cargo	61,627,262	-
<u>Custom Advance-Others</u>	8,762,131	
	97,903,756	132,817,538
<u>Less: Provision for Custom Advance – Others</u>	<u>8,762,131</u>	<u>-</u>
	89,141,625	132,817,538

*includes amount due from a director Rs. 4,166,672 (Previous year Rs. Nil).
Maximum amount outstanding at any time during the year Rs. 5,000,000
(Previous Year Rs. NIL)

BALANCE SHEET OF YEAR 2007-08

SCHEDULE 10

LOANS AND ADVANCES

(Unsecured, Considered good)

	As at 31.03.2008 (Rs.)	As at 31.03.2007 (Rs.)
Advances Recoverable in cash or in kind	38,044,415	17,845,546
or for value to be received		
Advance Tax [Net of Provision Rs. 801.926 (Previous Year Rs.801.926)]	12,618,265	9,668 ,817
Balance with Customs Authorities		
Custom Advance-Cargo	-	61.627.262
<u>Custom Advance-Others</u>	<u>17,314,185</u>	<u>8,762,131</u>
	67,976,865	97,903,756
<u>Less Provision for Customs Advance-Others</u>	<u>17,314,185</u>	<u>8,762,131</u>
	<u>50,662,680</u>	<u>89,141,625</u>

• includes amount due from a director Rs. 2,500,001 (Previous Year Rs. 4,166,672).
Maximum amount outstanding at any time during the year Rs. 4,166,672
(Previous Year Rs. 5,000,000)

BALANCE SHEET OF YEAR 2008-09

SCHEDULE 10

LOANS AND ADVANCES (Unsecured, Considered good)	As at 31.03.2009 (Rs.)	As at 31.03.2008 (Rs.)
Advances Recoverable in cash or in kind or for value to be received	19,430,328	38,044,415
Advance Tax [Net of Provision Rs. 811,926 (Previous Year Rs.801.926)	19,172,096	12,618,265
Balance with Customs Authorities		
Custom Advance-Others	22,586,138	17,314,185
	<u>61,188,562</u>	<u>67,967,865</u>
Less Provision for Customs Advance-Others	22,586,138	17,314,185
	<u>38,602,424</u>	<u>50,662,680</u>
• includes amount due from a director Rs. 833,33 (Previous Year Rs. 2,500,004). Maximum amount outstanding at any time during the year Rs. 2,500,004 (Previous Year Rs. 4,166,672)		

BALANCE SHEET OF YEAR 2009-10

SCHEDULE 9

LOANS AND ADVANCES (Unsecured)	As at 31.03.2010 (Rs. In thousand)	As at 31.03.2009 (Rs. In thousand)
Advances Recoverable in cash or in kind or for value to be received [includes Rs. 30,295 thousand with customs (previous Year 22,586 thousand)]	42,388	42,066
Less Provision for Customs Advance	30,296	22,586
	<u>12,092</u>	<u>19,480</u>
• includes amount due from a director Rs. NIL (Previous Year Rs. 833 thousand). Maximum amount outstanding at any time during the year Rs. 833 thousand (Previous Year Rs. 2500 thousand)		
Advance Income Tax (Net of Provision Rs. 812 thousand)		
Previous Year Rs. 812 thousand	11,722	19,172
TOTAL	23,864	38,652

BALANCE SHEET OF YEAR 2010-11

SCHEDULE 9

LOANS AND ADVANCES (Unsecured)	As at 31.03.2011 (Rs. In thousand)	As at 31.03.2010 (Rs. In thousand)
Advances Recoverable in cash or in kind or for value to be received [includes Rs. 30,918,654 with customs (previous Year 30,295,348)]	58,076,570	42,387,533
Less Provision for Customs Advance	30,295,348	30,295,348
	<u>27,781,222</u>	<u>12,092,185</u>
• includes amount due from a director Rs. NIL (Previous Year Rs. Nil). Maximum amount outstanding at any time during the year Rs. Nil (Previous Year Rs. 8,33,336)		

Advance Income Tax (Net of Provision Rs. 811,926)		
Previous Year Rs. 811,926]	13,525,440	11,772.830
TOTAL	41,306,662	23,865,015

5. It is seen that the Commissioner (Appeals) has examined the above entries and observed as follows:

"8.1. With regard to refund claim amounting to Rs.1,72,51,454/- in respect of 20 Bills of entry, where provisional assessments involve the period on or after 13.7.2006. it was found that provision of unjust enrichment is applicable but the adjudicating authority has not accepted the evidence produced before him and impugned order was passed without examining the evidence, hence matter was remanded to adjudicating authority for fresh decision. The Commissioner of Customs (Appeals), in earlier OIA, while examining the evidence submitted by the appellant to rebut the presumption of unjust enrichment had held that:

6.6 Now, adverting to the evidences submitted by the appellant to dispel the presumption of unjust enrichment, I find that the amount of Rs.6,79,76,865/-shown as "Loans Advances" in Schedule-10 of the Balance Sheet for 2007-08 includes an entry for Rs1,73,14,185/ representing "Customs Advance – Others". Subsequently in the same schedule, the subject amount of Rs.1,73,14,185/- stands deducted against "Less: Provision for Customs Advance-Others" bringing the net amount of "Loans and Advances" down to Rs.5,06,62,680/-. The effects of these entries vis-à-vis the duty paid against the individual bill of entry are not decipherable unless it is explained with support of the books of accounts. Further, to illustrate with an example from appeal No.75/AHD/2009, the appellant has claimed differential duty refund of Rs.1,76,004/ against bill of entry No. F-733/07-08 dated 26.12.2007 (Vessel LNG Cross River) but the entry in Sr.No.22 of the statement attached to the Certificate dated 26.12.2008 by the Chartered Accountants M/s GK Chokshi & Co., shows the recoverable amount as "Nil" which thoroughly contradicts the claim filed by the appellant. In similar certificate dated 16.02.2009 issued covering the period of 2008-09 by the same Chartered Accountant, identical amount of Rs.1,76,004/-las been shown to have been subsequently added in January 2009 (2008-09). The Chartered Accountant's certificate does not explain as to how the amount of duty paid in 2007-08 was included in the books of accounts in the year (2008-09) and the effect of the said amount in the books for the year 2007-08 during which the expenditure was actually incurred for payment of duty. Since the certificates issued by the Chartered Accountant do not co-relate with the entries in the books of accounts and do not offer any explanation on the effect of the individual amounts in the books of accounts during the relevant financial year, no safe conclusions could be drawn from the documents illustratively exhibited by the appellant in the appeal memorandums on their eligibility for refunds in these cases.

The effect of including an amount of Rs. 1,73,14,185/-in "Customs Advance – Others" and subsequently deduction of the same amount as 'Less: Provision for Customs Advance- Others" in the Loan and advance of schedule of 10 of balance sheet was not understandable in absence of explanation as well as some deficiencies in the CA's certificate.

Therefore, in the remand OIA, the appellant was directed also to explain the effect of relevant entry made in the books of account and to produce evidences. In the present impugned order the adjudicating authority has examined the various evidences produced before him. The adjudicating authority has held that the effect of said entry in the accounts of the appellant as above mentioned in the earlier OIA, was no: properly explained, and hence, he upheld the earlier orders. Since the appellant was aggrieved that these entries were not properly examined by the adjudicating authority while passing the impugned order, during the personal hearing before me, the appellant was asked to explain the effect of said entry. In this regard the appellant vide their letter received on 18.8.2010 has explained the effect of both entries on the profit & loss of the company based on how the profit and loss account was prepared, which is as under:-

➤ The fundamental principle for preparing Profit and Loss account is that the expenses and income for the full trading period, but only for the trading period are to the to the profit and Loss account. This means that if an expense has been incurred but yet not paid for, a liability for the unpaid amount must be created before the accounts can be said to show a true picture. Same way income earned but not received in cash also be taken into account. However, all expenses and income must be adjusted so as to show a figure which relates the whole trading period but only to the trading for which accounts are being prepared.

➤ Applying what is stated herein above, in case there is doubt on realization of receivable recorded in the books of account, one has to make provision for the same in the year in which receivable are recorded. Now let us assume that a company has to receive a refund of Customs duty amounting to Rs.2/- from Customs department. However, the company is not sure as to whether Customs department may sanction the refund or reject it. Though company has doubt as to Customs department accepting its refund claim, it does not want to write off in the books of account of this year. However, next year if Customs department. reject the refund claim, then it will be written off next year by the company. In above situation, a question arises is that whether the loss is next's year loss or this year's loss? Obviously, this year's loss even if actual writing off is done next year. **Therefore, better and correct way of accounting is that one should provide for the loss of this year and accordingly reduce this year's profit toward it and treat the amount provided as provision in its books of accounts.** On Customs department rejecting refund claim, any amount that has to be written off next year shall be debited (reduced) out of the provision created in earlier year. Similarly, in the later year, if the Customs department accepts the refund claim and issue refund order, then the amount of refund granted shall be credited to profit and loss account that year and provision created shall be debited (reduced) to that extent and accordingly show profit of that year by higher amount to that extent. Based on the above explanation the appellant contended that question of applying of doctrine of unjust enrichment does not arise.

➤ On law Customs duty shown in accounts as expenditure does not mean that the burden has been passed on to the buyers/customers. The judgments in the case of Sunbean Auto Ltd. v/s CCE [2005(185) ELT185(Tri)], and CCE v/s. Cummins India Ltd. [2008 (221) ELT 525 (Tri.)] were relied upon.

From the above explanation it is clear that first the refund amount of Rs. 1,73,14,185/- is included in 'Customs Advance others' and shown as "Loans and advances" in Schedule 10 of the Balance Sheet for 2008-09 and at the same time said amount stands deducted from the total amount of said "Loan and advance" and included the amount deducted as "less-provision for Customs Advance -others". Thus, the "provisions" does not remain a notional "provision", but it is actual impact on amount of profit. Less profit implied more expenses (costs). Therefore, it is undisputedly clear that the refund amounts has been accounted as expenditure of the traded goods and admittedly charged as "expense" in the profit & loss account of the appellant in the financial year 2008-09. As per said accounting method adopted by the appellant, entry as "receivable" remains an eyes wash and the same is obliterated by back door debit entry called "Less: Provision for Customs Advance Others", which implied that excess duty paid by the appellant was not retained as "receivable from the Customs" in the books of account. It is settled law that if duty paid in excess is retained as "receivable" in the books of account and not charged as expense in profit and loss account of the claimant, bar of unjust enrichment will not operate. For example, is the case of Saralee Household & Body care (I) Pvt. Ltd. reported in [(2007 (210) ELT 42(tri-Chennai)] approved by the Madras High Court as reported in [ELT (216) ELT-685(Mad)]. From these facts and as per settled law, I can only conclude that the incidence of refund amount stands passed on to customers as cost of the "traded goods" in the relevant financial year and therefore refund is hit by doctrine of unjust enrichment.

8.2. *With regard to showing profit in the next year by higher amount to the extent the refund sanctioned amount, I find that the result of total exercise of accounting adopted by the appellant is that they had accounted the refund amount in the books of account on actual receipt basis rather than accrual basis, which implied that it would be accounted for after receipt of refund. It means that at the time of filing the refund claim as well as sanction of refund no documentary evidence was available to rebut the presumption of unjust enrichment. The refund sanctioning authority, before sanction of the claim, has to examine the evidence for the fulfilment of non-applicability of unjust enrichment. As already held that every case of refund has to pass the test of unjust enrichment before its sanction and it is rebutted by adducing the documentary evidence, therefore, the accounting method on actual receipt basis followed by the respondent would not help them for getting the refund and claims are hit doctrine of unjust enrichment. The Chartered Accountant in his certificates has certified that appellant has not recovered the refund amount from their customers. It was further certified that no portion of refund amount has been charged as expenditure in the books of account of the company. The explanation given by the CA that how the refund amount has not been recovered from customers is mainly based on the fact that refund amount has not been charged as expenditure in the books of account. However as already held in preceding para that refund amount has been charged as "expenditure". I, therefore, find that the CA's certificates have been issued without supporting documents/evidences relied upon, and it suffered from fatal defects. Thus, such certificates cannot be considered as sufficient evidence to rebut the presumption that incidence of duty has been passed on."*

6. We find that the appellant assessee has summarized their arguments in the written submissions filed after the hearing as follows:

1. The Appellants are extremely grateful to Your Honour for granting the Appellants patient and detailed hearing in these appeals. The issue involved in the appeals is whether the Appellants are entitled to refund the customs duty provisionally paid on short landed goods. During the course of hearing of the matters Your Honour has raised queries on application of unjust enrichment. The Appellants have clarified the same during the course of hearing, however, the Appellants place the below submissions for ease of reference of Your Honour.

2 The Appellants have shown the eligible amount of refund in their books of accounts as "Receivables" from the customs department. However, at the same time, the Appellants have created the provision also of the same amount in their books of accounts. The Appellants submit that despite of the fact that the Appellants have marked the amount of refund as "Provision" in their books of accounts, the principle of unjust enrichment is not applicable to the facts of the present case.

3. The Appellants have submitted the definitions of "Provision" as per dictionary of Finance and Banking, Dictionary of Accounting, Dictionary of Business and Management for reference. As per these definitions it is clear that a **"provision" is an amount set aside out of profits in the accounts of an organization for a known liability** (even though the specific amount might not be known) of for the diminution in value of asset. Common examples include provisions for bad debts, provisions for depreciation and also provision for accrued liabilities.

4. Another essential feature of the "provision" as per dictionary meanings in it is appropriation of profit as the amount of "provision" is set aside out of the profits. Therefore, in fact, it is not a charge to profit & loss account and no part of the amount of "provision" can be said to be charged to any expenses.

5. The another reason for creating the provision for the amount of refund is prudent accounting policies. The accounting framework in India mandates that the enterprise should disclose its true and fair status of the financial transactions. The Appellants have shown the eligible amount of refund as "receivable" in their books of accounts. **The reason for creating "provision" for the same amount of refund is by creating the "receivable" is that to the extent of creation of "receivable" in the books of account, the expenses towards the customs duty will be lesser.** This may result in disclosing higher amount of profit for a particular financial year.

6. By creating the same amount as "provision" there is appropriation from the amount of profit to arrive at the true amount of profit. In other words, **the act of creating "receivable" and resultantly showing lesser amount of expenditure towards customs duty to that extent is compensated by creating the provision of the same**

amount out of the profit. Therefore, in fact, creation of "provision" out of the profits is **balancing act** and in line with the accounting framework prevailing in India.

7. In the event the assessee is granted the refund subsequently, the said amount of "provision" will be simply written back by adjustment in the books account against the "receivable" amount. It is submitted that there would not be debit and corresponding credit anywhere. Further Creation of provision is to show realistic picture on financials of the company.

8. Therefore, the Appellants submit that creation of "provision" in the books of accounts does not mean passing of the burden to anyone. In fact, the "provision" is created as per accounting norms and it is part of appropriation of profits it is unreasonable to say that it is charge to profit and loss account. By any stretch of imagination, it cannot be said that the Appellants have passed on the duty burden to anyone by creating the "provision" in the books accounts.

9. Therefore, the Appellants submit that the Appellants have not passed on the duty burden to anyone by creating the "provision" in their books of accounts. Further, since the Appellants have shown the amount of refund as "receivable" in their books of accounts, the Appellants are eligible to refund of the excess amount of customs duty paid on short landed goods. 10. The Appellants pray that above submissions be considered while deciding the matter.

(emphasis supplied)

7. It is seen that when a person shows any amount as receivables it becomes an asset in the balance sheet. Consequently, the said amount is not passed as expenditure in the profit and loss account. Ledgers are just accounts, the net effect of these accounts is reflected in the final figures in the profit and loss accounts as profit or loss. When a disputed receivable is shown as an asset then the impact of said entry is not passed to P&L account as the expenditure, consequently, the profit in the 'profit and loss statement' is enhanced by that amount. Similarly, as per appellant's own explanation above: **"The reason for creating "provision" for the same amount of refund is by creating the "receivable" is that to the extent of creation of "receivable" in the books of account, the expenses towards the customs duty will be lesser"**. The appellant themselves have described it as 'balancing act'. By creating a receivable, the appellant has sought to exclude the said

amount from expenditure. However, by creating the entry of 'provision', the effect of the 'receivable' entry gets reversed or nullified.

8. In the instant case, the appellant has paid a certain amount of customs duty. Thereafter, the appellant has sought to create an asset in the shape of 'receivables' so as to not pass the effect of payment of duty to the profit and loss account. To nullify the effect of the entry 'receivables', it has created a parallel entry exactly opposite to the receivables in its ledger as 'provisions'. The net effect of creating 'receivables' and 'provisions' on profit and loss and balance sheet is that the customs duty paid is included in expenditure shown in profit and loss account. **The legders on the one hand recognizes the disputed amount of customs duty as receivables (an asset) and simultaneously, creates a provision (a liability) for the same amount.** These are obviously artificial accounting juggleries as the net combined effect of these two ledger entries in the profit and loss account is that the customs duty gets reflected in the profit and loss as expenditure.

9. The appellant has attempted to argue that the said provision was made to arrive at 'true amount of profit'. In the appellant's own words, the act of creating receivables and resultantly showing "lesser amount of expenditure towards the customs duty, to that extent, is compensating by creating provision of same amount of profit". It has admitted that the two entries nullify each other.

10. The reason why existence of the customs duty as receivables in the balance sheet is considered as evidence of not passing on the burden of customs duty to anybody else is because the said amount shown as receivable is not passed to profit and loss account as expenditure. As soon as a particular amount is charged to expenditure, it is deemed to

have been recovered in the shape of the price of the goods. In the instant case, by creating an entry for receivables and thereafter, creating an entry for provision in the ledgers, the appellant has nullified these entries. Consequently, the entire amount of duty paid is passed on as an expenditure to the profit and loss account. Thus the appellant has failed to discharge the burden of unjust enrichment. In these facts and circumstances, we find ourselves in total agreement with the order of the Commissioner (Appeals). Both revenue & assessee appeals are dismissed.

(Pronounced in the open court on 13.04.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha