

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI**

PRINCIPAL BENCH COURT NO. IV

Customs Appeal No. 53523/ 2018

(Arising out of Order-in-Appeal No. 206-207 (SM)/Cus/JPR/2018 dated 26.07.2018 passed by the Commissioner of Customs(Appeals), Central Excise and Central Goods & Service Tax, Jaipur)

M/s. Akshar Telecom P Ltd.

208, Gol Market
Jawahar Nagar, Jaipur

Appellant

VERSUS

Commissioner of Customs

Jaipur I

Respondent

WITH

Customs Appeal No. 53524 / 2018

(Arising out of Order-in-Appeal No. 206-207 (SM)/Cus/JPR/2018 dated 26.07.2018 passed by the Commissioner of Customs(Appeals), Central Excise and Central Goods & Service Tax, Jaipur)

Trust Marketing

CC-207-210, Gole Market
Jawahar Nagar, Jaipur

Appellant

VERSUS

Commissioner of Customs

Jaipur I

Respondent

APPEARANCE:

Shri B L Narasimhan, Advocate for the Appellant

Shri Rakesh Kumar, Authorized Representative for the Respondent

CORAM :

HON'BLE MR. C L MAHAR, MEMBER (TECHNICAL)

HON'BLE MS. RACHNA GUPTA, MEMBER(JUDICIAL)

FINAL ORDER NO. 51228 /2019

DATE OF HEARING : 23/05/2019

DATE OF DECISION : 16/9/2019

PER C L MAHAR :

Present appeals have been filed by the Appellants against a common Order-in-Appeal No. 206-207 (SM)/Cus/JPR/2018 dated 26.07.2018 in the case of M/s. Akshar Telecom Pvt. Ltd. and M/s. Trust Marketing against denial of their following refund claim amounts in cash which have been ordered to be credited to the Consumer Welfare Fund on the ground that the appellants were not able to discharge the burden of unjust enrichment:

- (i) M/s.Akshar Telecom Rs. 1,56,24,904/-;
- (ii) M/s. Trust Marketing Rs.24,69,98,215/- and
Rs. 23,62,85,014/-

2. Briefly stated facts are that the appellants are engaged in the import of mobile phones classifiable under CTH 85171290 (herein after referred to as the "impugned goods"). They had been paying CVD at the rate of 6% till 28.02.2015 and 12.5% after 01.03.2015 on imported impugned goods. The Countervailing Duty (CVD) was equivalent to Central Excise duty leviable on the domestically produced impugned goods. A Notification No. 12/2012 -CE dated 17.03.2012 (as amended) provided central excise duty rate of 1% if no Cenvat Credit was taken in respect of inputs or capital goods used in the manufacture of impugned goods. The reduced rate of duty was not being extended to the

importers by the department for the purpose of payment of CVD on the ground that the exemption under aforesaid notification No. 12/2012 CE dated 17.3.2012 was not available for imports as provisions of Cenvat Credit were not applicable to the imported goods as the Cenvat Credit was not admissible to them. The Hon'ble Apex court vide its judgement dated 26.03.2015 in the matter of **M/s SRF Ltd. vs Commissioner of Customs, Chennai** reported in 2015 (318) ELT 607 (SC) has held while interpreting a similar notification No. 06/2002-CE dated 01.03.2002 that the reduced rate of excise duty will be applicable to CVD even in respect of imported goods for the reason that no question of availing Cenvat Credit under the Cenvat Credit Rules, 2004 arise where inputs are procured from a country other than India. Thus, the condition must be considered to have been fulfilled. Consequent upon the judgement, the appellant filed above mentioned refund claims for the periods October, 2014 to 25 March, 2015 amounting to Rs.24,69,98,215/- and April, 2015 to 17 July, 2015 amounting to Rs.23,62,85,014/- vide their applications dated 29.09.2015 and for Rs.1,56,24,904/- in case of M/s. Akshar Telecom (appellant No. 1) vide applications dated 27.09.2015 filed on 29.09.2015. A show cause notice dated 26.12.2015 was issued to the appellants proposing to reject the refund claims on the following grounds:

- (i) that firstly, the refund claims were not filed with complete details and documents and hence the submissions of both the applications on 29.09.2015 cannot be considered as valid submission within the time period granted under section 27 of the Customs Act, 1962;
- (ii) that the appellant had cleared the said goods without claiming the exemption under notification No. 12/2012-CE and hence the benefit of such notification was not admissible;
- (iii) that the facts of SRF case were distinguishable as the appellant has not paid CVD under protest and hence the assessments were final;
- (iv) Finally, that the refund applications were barred by limitation and that no evidence were submitted to prove that the duty was not passed on to the customers.

3. The appellants replied to the Show cause notice vide their letter dated 13.01.2016 claiming that the refund was admissible as all documents required in terms of section 27 of the Customs Act, 1962 were submitted with the claim and the ratio of the **SRF Ltd.** judgement was fully applicable in their case. It has further been submitted by the appellants that they are legally entitled to file the refund claim without paying the duty under protest. The appellants have also contended that they had already filed the relevant documents such as CA

certificate, self-certified copy of the refund working, copies of the bills of entry, sales invoices and challans to substantiate that the duty had not been passed on to the buyers. The refund claims were rejected vide Order-in-Original No. 48/2015-16 dated 26.02.2016 on merits and limitation but the issue of unjust enrichment was not decided with the observation that since the claims were not admissible on merits and limitation there was no need to go into the aspect of unjust enrichment. The appellants filed an appeal against original adjudication order dated 26.02.2016 with the Commissioner (Appeals). During the hearing before the Commissioner (Appeals), the Superintendent Shri S S Yadav appeared for the department and pleaded that the appellants may be asked to produce the financial accounts, invoices in respect of sale and purchase of mobile phones to examine as to how the incidence of duty has not been passed on to the buyers. On the basis of examination of the documents produced by the appellants, the Deputy Commissioner, Air Cargo Complex, Jaipur vide his report dated 19.02.2018 submitted that it appeared that the duty incidence had not been passed on to the buyers. In his another report dated 23.03.2018, the same Deputy Commissioner reported that they are not in a position to ascertain whether customs CVD was included in their sales invoices or not. The appellants were granted personal hearing on 11.04.2018 by the Commissioner (Appeals) who apart from arguing the case of unjust

enrichment on the basis of documents produced by them and relevant case laws, further argued that as the adjudication order did not consider the issue of unjust enrichment, the same was beyond the scope of jurisdiction of the appellate authority. The Commissioner (Appeals) vide his Order-in-Appeal dated 26.07.2018 held as under:

(i) The refund application filed by the appellant was proper and within the limitation period. Rejection of refund claim on the grounds that incomplete application was submitted by appellant is not sustainable;

(ii) Department's denial of refund on the grounds that benefit of exemption notification No. 12/2012 is not available to appellants as intention of government while restricting the duty structure of mobile handsets in the year 2014 was to boost the domestic production and levy higher duty on imported mobile phones was held to be unsustainable.

(iii) The refund claim was maintainable and there is no requirement for separate re-assessment proceedings post 08.04.2011,

(v) The judgement of SRF Ltd. supra is squarely applicable in the present case.

The above findings of the Commissioner have not been challenged by the Department and have attained finality. He further held that the Commissioner (Appeals) have

power to examine the issue of unjust enrichment as his powers were co-extensive and co-terminus and he need not remand the case to adjudicating authority for examining the aspect of unjust enrichment. After examination of the evidence and the case law produced by the appellants he held that the appellants failed to prove that the incidence of amount of CVD paid by them was not passed on to the customers and hence they did not qualify the bar of unjust enrichment and directed the adjudicating authority to transfer the amounts of refund to the consumer welfare fund. The appellants are now in appeal before us against the impugned order-in-appeal dated 26.7.2018.

4. The learned Counsel for the appellants has vehemently pleaded that the claims were not hit by unjust enrichment as sufficient proof has been provided to the department at the time of reply to the show cause notice as well as during appeal proceedings before the Commissioner (Appeals) which establishes beyond doubt that incidence of tax has not been passed on to the customers. He argued that the appellants had already substantiated their claim that the duty was not passed on to the buyers inasmuch as a certificate (for individual refund claims) issued by Chartered Accountant who was their statutory auditor, were filed indicating that the incidence of duty had not been passed on to the buyers. He further argued that the amounts of refunds claimed were shown as receivables/ recoverable in balance

sheets and financial books of accounts of the appellants and that the sale prices were not linked to the rate of CVD which were evidenced by the fact that the sale prices of the impugned goods either remained at the same level when rate of CVD was enhanced from 6% to 12.5% with effect from 01.03.2015 or same has come down. He produced a compilation of various case laws to emphasize that the evidence produced were sufficient to hold that the incidence of duty was not passed on to the buyers.

5. The learned advocate has further argued that a refund of Rs.28,48,587/- has already been sanctioned to them by the Deputy Commissioner (in the case of M/s. Trust Marketing) in a similar case and on the same issue and the present case is *pari materia* to the refund sanctioned by the Deputy Commissioner vide his Order no. 322/2016 issued from F. No. VIII (E)/20/refund /ACC/156/2016 dated 18 April, 2017 wherein it has been held on the question of unjust enrichment that "I find that the appellants contention that burden cast upon them to prove that incidence of duty was not passed on to the customers was discharged by the fact that the amount of excess tax paid, have been shown as receivable (recoverable) in their financial statement of financial year 2015-2016, this fact indicates that excess duty paid was not added to the cost of final product. Accordingly, I hold that provisions of unjust enrichment clause under section 28 of Customs Act, 1962 was not

applicable to the facts of this case, hence, not invocable.” As per the learned advocate, the above mentioned Refund Order has been accepted by the Department and no appeal has been filed against the same. It has further been added that the Department cannot change its stand on an issue of legal nature where the facts are *peri materia* to the present case.

6. The learned advocate has further submitted that the Deputy Commissioner vide its report dated 19 February, 2018 issued from F.No. Commr (Appeals-1)/Cus/JD/54/IV/16-393 has opined that the appellants have not passed the burden of customs CVD on buyers / customers. It has further been elaborated that in the case of M/s. Akshar Telecom P Ltd. that Deputy Commissioner had changed its stand in report dated 23 March, 2018 and stated that “this office is not in a position to ascertain whether the Customs CVD was included in their sales invoices or not”, and, thus, the Deputy Commissioner tried to say that they are not able to ascertain categorically whether the burden of additional amount of CVD was passed on to the customers or not going back from their earlier report without citing any cogent reasons.

7. The learned Advocate has further submitted that to overcome the bar of unjust enrichment, the assessee can succeed the claim on the basis of following documents:

- (i) Chartered Accountant's certificate prepared on the basis of financial books of appellants;
- (ii) Amount of the CVD recoverable from the Department is shown as receivable / recoverable in the balance sheet for the appellant.
- (iii) Sales price is not linked to the rate of CVD.

8. To substantiate his claim that the burden of extra amount of CVD has not been passed on to the customers, the learned advocate has taken us through the evidence as required to prove that the bar of unjust enrichment on above mentioned criterion has been clarified by the appellant. The learned advocate has taken us through the Chartered Accountant's certificate issued by M/s. Kotwani & Co. dated 28.9.2015 wherein it is categorically mentioned that "as a business practice any variation / increase in tax burden has been taken as a hit against the profit margin of the company and the same is evident from the cost sheet examined. Accordingly, we certify that the claimant has not passed on the incidence of duty to the buyers or any other person and hence the requirement to rule out unjust enrichment to the importer / claimant is fulfilled in respect of all goods imported and sold."

9. It has further been pleaded that the Chartered Accountants' certificate certified that the price at which the imported goods sold by the appellants to the buyers was not increased on increase in the rate of CVD. The

learned advocate has pointed out that in the case of **Intex Technologies (India) Ltd. vs. Union of India** (Writ Petition (C) No. 10618 of 2016) has held that the refund claim is to be accepted and passed if the Chartered Accountant's certificate claiming that burden has not been passed on to the customers. The learned advocate has also stated that in the case of **Vishal Video & Appliances Pvt. Ltd. vs. Union of India** reported in 2016 (341) ELT 39 (Del), the Hon'ble Delhi High Court noted that the fact that appellant has produced Chartered Accountant's certificate evidencing the assessee's claim is not hit by unjust enrichment, the Hon'ble Court has allowed the refund claim on the basis of Chartered Accountant's certificate filed by the appellant.

10. Similarly the learned advocate has taken the shelter of judgement of Delhi High Court in the case of **Yu Televentures Pvt. Ltd. vs. Union of India** reported in [2017 (358) ELT 81 (Del)] holding that the Chartered Accountant's certificate is sufficient to establish that the incidence of CVD on imports was not passed on to the customers. The learned advocate has also taken shelter of following decisions to prove his assertion.

1. **Dabur India Ltd. vs. Commr. of C. Ex., Ghaziabad, 2008 (228) E.L.T. 131 (Tri. – Del.)**;
2. **Commissioner of Central Excise vs. Dabur India Ltd., [2014 (304) E.L.T. 321 (All.)**];

- 3. Commr. Of Customs, Air Cargo Unit, New Delhi vs. Maruti Udyog Ltd., [2003 (155) E.L.T. 523 (Tri. – Del.)];**
- 4. Bridgestone India Private Limited vs. Central Goods and Service Tax, Indore, [2018 INdlaw CESTAT 665];**
- 5. National Fertilizers vs. Commissioner of Central Excise, Indore, [2018 (10) G.S.T.L. 305 (Tri-Del)];**
- 6. Bajaj Auto Ltd. vs. Commissioner of Central Excise, Pune-I, [2017 (347) E.L.T. 519 (Tri-Mum)]; and**
- 7. Hero Honda Motors vs. Commissioner of Customs, New Delhi, [2000 (126) E.L.T. 1014 (Tri)].**

11. The learned advocate has also pointed out that the balance sheet for financial year 2015-2016 of M/s. Trust Marketing captions the amount of Rs.48,61,31,816/- under heading 'loans and advances' on assets side and at the same time Schedule 15 of the 'notes to the balance sheet' is specifically providing that refund amount is attributable to customs CVD recoverable (refundable). It is being pointed out that the mention has also been made under Schedule 17 of the balance sheet and CA certificate that "the assessee has shown the amount of Rs.48,61,31,816/- as advance payment in the assets side of the balance sheet under 'loans and advances'. The ledger account of the financial year 2015-2016 provides the bifurcations of the disputed amount as follows:

- | | |
|---------------------------------------|----------------------|
| a) CVD refundable for year 2014-2015: | Rs. 24,69,98,215/- |
| b) CVD Refundable for year 2015-16 | : Rs. 23,62,85,014/- |
| Total CVD refundable | : Rs.48,32,83,229/- |

12. In view of the above, the learned advocate has tried to establish that as the books of accounts of the appellant clearly show that since the amount has been shown as recoverable in the balance sheet, it proves that CVD has not been passed on to the customers during the period 2014-2016. The learned advocate has taken the support from following judicial pronouncements to establish that if the refund amount is shown as recoverable in the balance sheet, the doctrine of unjust enrichment is not applicable.

- a. Bajaj Auto Ltd. vs. CC [2017 (347) ELT 519(T)];**
- b. CC vs S Mathivathani Traders [2016(344)ELT 329 (T)];**
- c. Cargill Foods India Ltd. vs CCE [2010(262)ELT 691 Tri-Mum)];**
- d. CCE vs Shrinathji DYG [2010 (262) ELT 622 (Tri-Ahmd)];**
- e. Global Ventures vs. CCE, [2010 (261) ELT 1164 (Tri-Chen)]**
- f. CCE vs Paradeep Phosphates Ltd.[2009(238) ELT 690 (Tri-Kol)**

13. To further substantiate the claim that sale prices of mobile phones are not linked to the CVD, the learned advocate has tried to prove by showing the price pattern which was existing before the CVD was increased from 6% to 12% saying that selling price of the goods have not been changed after the rate of CVD was increased from 6% to 12% since 01st March, 2015. The following table have been referred by the learned advocate.

Model No.	Import Date	Customs duty rate	Date of Sale	Selling Price
S96 [Chhattisgarh	19.1.2015	7%	24.04.2015 30.04.2015	2,429 2,429

Distributor Segment Price (Discount@ 6.5%)]	25.04.2015	13.5%	27.04.2015	2,429
			06.05.2015	2,429
			23.05.2015	2,429
P2 [Rajasthan Retail Distribution segment (Discount@ 6.5%)]	01.10.2014	7%	06.10.2014	4,515
			06.10.2014	4,515
	08.04.2015	13.5%	09.04.2015	4,129
			09.04.2015	4,129
S5.5 [Chhattisgarh Retail Distribution Segment Price (Discount@6.5%)]	06.02.2015	7%	13.02.2015	17,296
			07.04.2015	17,296
	31.03.2015	13.5%	08.04.2015	17,296
			16.04.2015	17,296
			16.04.2015	17,296

14. The learned advocate for the appellant have also taken shelter of following case laws in support of his claim. Since price has either remained unchanged or have gone down after increase in the rate of CVD indicated, that burden of increased duty to which refund has been demanded by the appellant has not been passed on to the customers and therefore, the refund claim of the appellant is not hit by unjust enrichment:

- i. **Indian Metal & Ferro Alloys vs. Collector of C. Ex., Bhubaneswar**, [2000 (125) E.L.T. 943 (Tribunal)] maintained by **Hon'ble Supreme Court** in [2001 (127) E.L.T. A162 (SC)]
- ii. **Ashish Metal Rolling Mills vs. Commr. of Ex. Ahmedabad-I**, [2014 (305) E.L.T. 510 (Guj)]
- iii. **Commissioner of Central Excise, Coimbatore vs. EL. P. EM Industries**, [2017 (356) E.L.T. 565 (Mad)]
- iv. **Yu Televentures Pvt. Ltd. v. Union of India**, [(358) ELT 81 (Del)]
- v. **Vishal Video & Appliances P. Ltd. v. UOI** [2016 (341) ELT 39 Del)]

vi. **Commissioner of C.Ex. & Cus. V. Manisha
Pharmoplast Pvt. Ltd.,** [2008 (222) E.L.T. 511 (Guj)]

15. It has further been argued by the learned advocate that Department has not provided any evidence to prove that the duty has been passed on to the customers in the present case and the Commissioner (Appeals) has not considered the Chartered Accountant's certificate without giving any cogent reasons as why same is not being considered inspite of the fact that Chartered Accountant's certificate has been issued by reputed Chartered Accountant's firm after referring to the appellants financial books of accounts as well as sales invoices etc.

16. We have also heard learned Departmental Representative who has vehemently opposed the arguments putforth by the learned advocate on the ground that all these arguments have been examined at length by Commissioner (Appeals) before holding that refund claims are hit by unjust enrichment. He reiterated the findings of the Order in Appeal.

17. Having heard both the rival contentions and after perusal of record of appeal, we find that in the impugned order of Commissioner (Appeals), the refund claim of the appellant have been found acceptable on all other grounds except that the appellants have not been able to adduce evidences to establish that they have not passed

on the burden of increase in CVD duty to the customers, and, therefore, the Commissioner (Appeals) held that the refund filed by the appellant was correct and justified to the extent of merit and limitation but same did not qualify the aspect of unjust enrichment and therefore, the amount of refund after sanction has to be transferred to the consumer welfare fund.

18. We thus, find that only question which is to be answered by us is whether the appellant have crossed the bar of unjust enrichment or whether there is an element of unjust enrichment which necessitates deposit of refund amount to the consumer welfare fund or not. We find that principal of unjust enrichment refers to a equitable principal that no person should be allowed to get enriched on the expenses of others. The matter of unjust enrichment has been examined by Hon'ble Apex Court as well as this Tribunal in several cases. We find that in case of **Commissioner of Customs, Air Cargo Unit vs. Maruti Udyog Ltd.** reported under 2003 (155) ELT 523 (Tri-Del), it has been held that whether the incidence of duty has been passed on to the consumers or not is to be adjudged on the following three criterions:

- (i) That duty was disclosed as amount recoverable from the customs under "other current assets" in the balance sheet for a particular financial year;

- (ii) A certificate of Chartered Accountant is produced to the effect that incidence of duty was not passed on to the customers; and
- (iii) The invoices for the relevant period which show that there was no change in the price of goods.

19. We proceed to examine the claim of the appellant that they have not passed on the burden of CVD to the consumers on the above mentioned three criterion laid down by this Tribunal in the case of **Maruti Udyog Ltd.** (supra). It is a matter of record that appellants balance sheet for the financial year 2015-2016 captioned the amount of Rs.48,61,31,816/- under heading 'loans and advances' on assets side. Further, as mentioned by the learned advocate, the schedule 15 of the balance sheet of the appellant specifically provides that the refund amount is attributable to "customs CVD refundable". The schedule 17 of the balance sheet also mentions that Chartered Accountant has certified that the assessee has shown the amount of Rs.48,61,31,816/- as advance payment in the assets side of the balance sheet under "Loans and advances". Considering the fact that the

appellants have shown the amount of refund as recoverable in their balance sheet certainly proves that appellants have not passed on the burden of CVD duty to their customers. This Tribunal in its decision in **Dabur India vs. Commissioner of Customs, Ghaziabad** reported under 2008 (228) ELT 131 (Tri-Delhi) has held as follows:

"5. We find that in this case admitted fact is that the appellants paid differential duty after clearance of goods. Demand of differential duty was confirmed for the period 1-3-90 to 30-9-97 and the duty has been paid in the year 1998. It is settled law that all the refund claimed are subject to the principle of unjust enrichment and onus is on the assessee to show that the burden of duty has not been passed on to the customer. In the present case demand was confirmed in respect of product-Gulabari after classifying the same under heading different from heading claimed by the appellant. Demand was subsequently set aside by the Tribunal. In the balance-sheet for the financial year, 1997-98 this amount is shown as excise duty recoverable from the revenue department. The amount, in question, was also shown in subsequent balance sheet as recoverable excise duty. We find that the Tribunal in various decisions relied upon by the appellants has taken a view that in case balance sheet amount of refund was shown as recoverable, it has been taken as established that the appellants have not passed on extra duty burden but have borne the same themselves. In these circumstances, as the balance sheet which is as per record under the Companies Act showing the amount as recoverable from the revenue and in view of the earlier decisions on this issue impugned, order is set aside. Appeal is allowed."

20. Similarly in case of **Bajaj Auto, Pune I** reported under [2017 (347) ELT 519 (Tri-Mum)], it has been held that unjust enrichment bar not applicable if the amount shown in the balance sheet as receivable from the department under section 27 of the Customs Act, 1962.

The relevant extract of the judgement is reproduced as under:

"8. It can be seen from the adjudication order and the impugned order that appellant is eligible for the refund as claimed by them. The only question that falls for our consideration is whether appellant has crossed the hurdle of unjust enrichment or not. It is undisputed that appellant had shown the amount claimed as refund as receivables in Balance Sheet, with a narration that this amount is due from Revenue Authorities. It is a common knowledge that when the amount is shown as receivables, it is not expensed out in the Balance Sheet, hence will not form a part of the cost of the final product manufactured. Since there is no dispute that the amount of refund sought was shown as receivables, appellant has been able to prove that he has not recovered the same their customer, we hold that the impugned order is unsustainable and liable to be set aside. The impugned order is set aside and appeal is allowed with consequential relief."

21. The learned Commissioner (Appeals) has not accept the claim of the appellant showing the refund as "receivable/recoverable under the assets" column of the balance sheet for financial year 2015-2016, saying that the appellant has included the disputed amount of Rs. 66,67,22,665/- in the debit side of the trading account of the financial year 2014-2015, and the appellant deliberately credited a schedule in the balance of financial year 2015-2016 under heading 'ANNEXURE to the Notes on accounts' just to hood winch the Department.

22. We have analyzed the contentions in this regard and find that as per 'Standard Accounting Principals, (which learned Commissioner (Appeals) did not have a look at) the 'contingent assets' are to be reflected in the financial year in which such assets actual arise.

23. The relevant extract of the Financial "Accounting Standard (AS) 29" for 'provisions, contingent liabilities and contingent assets' is reproduced here below :-

Contingent Assets :-

"30. An enterprise should not recognize a contingent asset.

31. Contingent assets usually arise from unplanned or other unexpected events that give rise to the possibility of an inflow of economic benefits to the enterprise. An example is a claim that an enterprise is pursuing through legal processes, where the outcome is uncertain.

32. Contingent assets are not recognized in financial statements since this may result in the recognition of income that may never be realized. However, when the realization of income is virtually certain, then the related asset is not a contingent asset and its recognition is appropriate.

33. A contingent asset is not disclosed in the financial statements. It is usually disclosed in the report of the approving authority (Board of Directors in the case of a company, and, the corresponding approving authority in the case of any enterprise), where an inflow of economic benefits is probable.

34. Contingent assets are assessed continually and if it has become virtually certain that an inflow of economic benefits will arise, the asset and the related income are recognized in the financial statements of the period in which the change occurs".

24. Thus, we find that the appellants have shown the refund amount rightly in their financial statement of Financial year 2015-2016 as "recoverable/receivable" under Assets category of their balance sheet because the contingent assets on this account have arisen only in financial year 2015-2016. We find that the Commissioner (Appeals) has not considered the prescribed principles of accounting while rejecting this fact. We thus feel that the appellant has correctly reflected the refund amount in their book of accounts and financial statements for financial year 2015-2016 as an assets under "receivable/recoverable" category.

25. Coming to the criteria (ii) that for claiming the refund claim, Chartered Accountant certificate required to be produced by the appellants to establish that burden of duty has not been passed on to the customers and thus, bar of unjust enrichment has been met by the appellant. We find that the appellants have submitted Chartered Accountant certificates from a reputed chartered accountant firm M/s. Kotwani and Company which are dated 28.9.2015 and same has been submitted for both the appellants and specifically covers the specific refund claims. The relevant extract of the Chartered Accountant certificate is reproduced below:

"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 importer'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 the buyers has not increased due to increase in the rate of CVD in 2014-2015.
- b) That customs duty has not been recovered from the customers separately in any manner.

In our view as a business practice any variation / increase in tax burden has been taken as a hit against the profit margin of the Company and same is evident from the cost sheets examined. Accordingly, we certify that the claimant has not passed on the incidence of the differential customs duty to the buyer or any other person 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.”

26. A perusal of the above mentioned Chartered Accountant certificates dated 28.9.2015 makes it very clear and leaves no doubt in the mind of anyone that certificate has been issued after verifying the appellant importers financial books of accounts as well as other relevant documents and records. Indeed it specifically mentions that the appellant have not increased the price of their product after increase of rate of CVD duty. It is specifically mentioned that there is no unjust enrichment on account of change in the rate of duty of the CVD in the present case and the burden of increased rate of CVD has not been passed on to the Customers as price of the impugned goods have remained same. We feel that a Chartered Accountant is a qualified person who can certify whether the burden of increased rate of duty on

any product has been passed on to the buyers of such goods or not. As it has categorically been certified by the Chartered Accountant firm in the present case that the burden of increased CVD duty has not been passed on to the customers and there is no scope for unjust enrichment as price have also got no change after the increase of rate of CVD. We feel that there is no other evidence to contradict the findings of Chartered Accountant and, therefore, we are inclined to accept the certificate given by the Chartered Accountant.

27. We find that Hon'ble High Court of Delhi in the case of **Yu Televentures Pvt. Ltd vs. Union of India** reported under [2017 (358) ELT 81 (Del)] has held that once the Chartered Accountant's certificate certifies that the incidence of CVD duty on import was not passed on to the customers, it is sufficient to rebut the presumption of unjust enrichment. The relevant extract of the Hon'ble High Court's decision is reproduced hereinbelow:-

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

"I find that the sales invoices of June, 2015 and July, 2015 produced by the importer do not reflect the CVD amount separately which, *prima facie*, indicate that the burden of SAD has not been passed on by the importer to their customers directly. Further, I have already taken note of the fact that the importer has submitted a Chartered Accountant's Certificate issued by M/s. Nayyar Maniar & Associates LLP, M. No. 502101, to the effect that certifying that the burden of CVD under this refund claim has not been passed on to the buyers and the refund being claimed is shown in their books of account/balance sheet for the year ended

31 March, 2016 as amount recoverable from the Customs. Accordingly, I hold that the provisions of unjust enrichment clause under Section 28D read with Section 27 of the Customs Act, 1962 are not applicable to the facts of this case and hence not invocable."

27. By the same yardstick, there was no reason whatsoever for respondent No. 4 not to accept the very same documents in respect of the imports between 27th March, 2015 and 31st March, 2015. The certificate of the CA is categorical that the incidence of CVD, even in respect of these imports, had not been passed on to the customers. Consequently, there was no valid justification for respondent No. 4 to have denied the refund claim."

28. It is also a matter of record that the Deputy Commissioner of Customs, Air Cargo Complex, Jaipur was also asked to examine and verify the record of the appellant to determine whether the appellants have passed on the burden of CVD duty to the Customers or not and give a report in this regard. The Deputy Commissioner vide his report issued from F. No. 1/Cus/JD/54/IV/16/393/506 dated 19.02.2018 has submitted the report to the Commissioner (Appeals) after verification of documents/ records such as, purchase invoices, import documents, as well as sales invoices, etc. and has reported that they are satisfied with the records submitted by the appellant and reported as follows:

- (a) That the price at which the imported goods were sold to the buyers has not been increased due to increase in the rate of CVD;
- (b) That Customs duty has not been recovered from the customers separately in any manner.

- (c) That claimant has not passed on the customs differential duty to the buyers or to any other person, hence, it rules out unjust enrichment to the importer claimant with regard to all goods imported and sold by them and as covered in the subject 'refund claim'.

29. Thus, the department itself has reached to the conclusion that the appellants have not passed on the burden of CVD to the buyers or customers. It is a matter of fact, whether the incidence of duty has been passed on to the buyers or not can only be established by verification and examination of sales invoices, and other financial records of the appellants. As both Chartered Accountant's certificate as well as the Deputy Commissioner's concerned who has physically verified the financial records including sales invoices, import prices etc. and has certified that the burden of CVD has not been passed on to the buyers of goods and also certified that there is no unjust enrichment for appellant. Since both the Deputy Commissioner's report as well as Chartered Accountant's certificate categorically certify after examining and analyzing

financial records, import prices and sale invoices that there is no element of unjust enrichment and the Department has not adduced any evidence to contradict such findings of the Deputy Commissioner and the Chartered Accountant, we are inclined to accept these fact finding reports as correct.

30. In this regard the Hon'ble High Court of Delhi in its judgment in case of **M/s Hero Motorcorp Ltd. versus Commissioner of Customs (Import and General)** reported in **2014 (302) E.L.T. 501 (Del.)** has held under para 17 of the judgment that "when the assessee is able to show that the burden of duty has not been passed on he asserts and submits affidavits and certificate of Chartered Accountant alongwith copy of the balance sheet, indicates and shows sale invoices for pre and post period and when there is no other negative factor or evidence to the contrary to disbelieve, the contention should be accepted".

31. In view of above, we feel that the Chartered Accountants certificates are acceptable and since no evidence has been adduced by the Department to

contradict the same, we are inclined to accept the same as indication the facts that burden of enhanced duty has not been passed down to the buyers.

32. Coming to the aspect whether the sales invoices of the product concerned for the relevant period showed that there was no change in the price of the goods. In this regard, we find that it has been claimed by the appellant that prices of various models of mobile phones imported by them have either remained the same or have gone down during the relevant period for which the refund claim have been filed. The assertion of the appellant has also been endorsed by the Chartered Accountant certificate as well as the report dated 19.2.2018 submitted by the Deputy Commissioner of Customs.

33. The record of the appeal have a table of sale prices of various models of mobile phones which gives comparative price for the period when the rate of duty was 7% when it was increased to 13.5% and as to how the prices have behaved during the relevant period.

In case of appellant – M/s Trust Marketing.

Model No.	Import date	Custom duty rate	Details of Cost			Details of Sale	
			Import Price	Import duty	Total Cost	Date of sale	Selling price
L700 (Rajasthan retail segment price)	21-01-2015	7%	1,302	102	1,404	04-05-2015	8
						20-05-2015	1,758
	12-10-2015	13.50%	1,302	184	1,486	13-10-2015	1,759
						17-10-2015	1,759
L700 (Rajasthan distributor segment price Discount @ 6.5%)	21-01-2015	7%	1,302	102	1,404	17-04-2015	1,651
						30-05-2015	1,651
	12-10-2015	13.50%	1,302	184	1,486	17-10-2015	1,651
						27-10-2015	1,651
M2 (Rajasthan distributor price segment Discount @ 5%)	21-01-2015	7%	6,525	491	7,017	21-01-2015	8,344
						21-01-2015	8,344
	14-07-2015	13.50%	5,750	820	6,571	14-07-2015	7,627
						14-07-2015	7,627
M2 (Rajasthan distributor price segment Discount @ 6.5%)	21-01-2015	7%	6,525	491	7,017	21-01-2015	8,226
						21-01-2015	8,226
	14-07-2015	13.50%	5,750	820	6,571	07-07-2015	7,520
						14-07-2015	7,520
						26-08-2015	7,520
M2 (Rajasthan retail price segment)	21-01-2015	7%	6,525	491	7,017	21-01-2015	8,761
						15-07-2015	8,008
	14-07-2015	13.50%	5,750	820	6,571	05-08-2015	8,008
						24-08-2015	8,008
P2S (Rajasthan distributor price segment Discount @ 5%)	15-11-2014	7%	4,091	296	4,387	17-11-2014	5,033
						02-04-2015	4,893
						28-05-2015	4,893
	12-10-2015	13.50%	3,513	483	3,996	20-10-2015	3,814
						02-11-2015	3,814

Table – B.

Model	Month of import	Rate of Customs duty	RSP declared at the time of import (in Rs)	Cost Rs.(basic cost + customs duty)	Selling Month	Sale price
L700 (Retail segment)	Jan.15	7%	2249	1404(1302+102)	May 15	1758
L700 (Retail segment)	Oct.15	13.5%	2099	1486(1302+184)	Oct 15	1759/1758
L700(Distributor segment)	Jan.15	7%	2249	1404(1302+102)	April & May 15	1651
L700(Distributor segment)	Oct.15	13.5%	2099	1486(1302+184)	Oct 15	1651
M2 (Distributor segment)	Jan.15	7%	10799	7017(6525+491)	Jan 15	8344
M2 (Distributor segment)	July.15	13.5%	9349	6571(5750+820)	July 15	7627
M2 (Distributor segment)	Jan.15	7%	10799	7017(6525+491)	Jan 15	8226
M2 (Distributor segment)	July.15	13.5%	9349/10799	6571(5750+820)	July & Aug.15	7520
M2 (Retail segment)	Jan.15	7%	9349	7017(6525+491)	Jan 15	8761
M2 (Retail segment)	July.15	13.5%	9349	6571(5750+820)	July & Aug.15	8008
P2S(Distributor)	Nov.14	7%	6499	4387(4091+296)	Nov.14	5033
P2S(Distributor)	Nov.14	7%	6499	4387(4091+296)	April & May 15	4893
P2S(Distributor)	July.15	13.5%	5499	3996(3513+483)	Oct. & Nov.15	3814

In case of appellant M/s Akshar Telecom Pvt. Ltd.

Table – A.

Model No.	Import date	Custom duty rate	Details of Cost			Details of Sale	
			Import Price	Import duty	Total Cost	Date of sale	Selling price
S96[Chattisgarh Distributor Segment Price (Discount @ 6.5%)]	19-01-2015	7%	2,027	159	2,186	24-04-2015	2,429
						30-04-2015	2,429
						27-04-2015	2,429
	25-04-2015	13.50%	2,075	285	2,360	06-05-2015	2,429
						23-05-2015	2,429
P2[Rajasthan Retail distribution segment(Discount @6.5%)]	01-10-2014	7%	3,748	268	4,017	06-10-2014	4,515
						06-10-2014	4,515
	08-04-2015	13.50%	3,539	518	4,057	09-04-2015	4,129
						09-04-2015	4,129
P2[Rajasthan retail distributor price (Discount @ 5%)]	01-10-2014	7%	3,748	268	4,017	06-10-2014	4,580
						30-09-2014	4,580
	08-04-2015	13.50%	3,539	518	4,057	11-04-2015	4,188
						13-04-2015	4,188

E7 MINI[Rajasthan retail distribution segment (Discount @ 5%)]	07-03- 2015	7%	8,792	905	9,697	16-03-2015	13,040
						17-03-2015	13,040
	17-04- 2015	13.50%	8,813	1,404	10,21 7	22-05-2015	13,040
						22-05-2015	13,040
S5.5[Chhatisgarh retail distribution segment (Discount @ 6.5%)]	06-02- 2015	7%	12,490	1,092	13,58 2	13-02-2015	17,296
						07-04-2015	17,296
	31-03- 2015	13.50%	12,600	1,930	14,53 0	08/04/2015	17,296
						16-04-2015	17,296
						16-04-2015	17,296
V4S[Rajasthan retail distribution segment (Discount @ 6.5%)]	01-10- 2014	7%	6,827	491	7,318	01-10-2014	8,226
	07-07- 2015	13.50%	5,940	790	6,730	08/07/2015	7,389
V4S(Rajasthan retail segment)	01-10- 2014	7%	6,827	491	7,318	02-10-2014	8,761
						12/08/2015	7,869
	07-07- 2015	13.50%	5,940	790	6,730	07/09/2015	6,481

Table – B.

Model	Month of import	Rate of Customs duty	Retail Sale price declared at the time of import	Cost in Rs.(basic cost + customs duty)	Selling Month	Sale price
S96 (Distributor segment)	Jan.15	7%	3499	2186(2027+159)	April 15	2429
S96 (Distributor segment)	April.15	13.5%	3249	2360(2075+285)	May 15	2429
P2(Retail segment)	Oct.14	7%	6999	4017(3748+268)	Oct.14	4515
P2(Retail segment)	April15	13.5%	6030	4057(3539+518)	Oct 15	4129
P2(Retail segment)	Oct.14	7%	6999	4017(3748+268)	Sept14, Oct.14	4580

P2(Retail segment)	April15	13.5%	6030	4057(3539+518)	Apr 15	4188
E7 Mini (Retail segment)	Mar.15	7%	19899	9697(8792+905)	Mar 15	13040
E7 Mini (Retail segment)	April 15	13.5%	15999	10217(8813+1404)	May15	13040
S5.5(Retail segment)	Feb. 15	7%	23999	13582(12490+1092)	Feb 15, Apr 15	17296
S5.5(Retail segment)	March.15	13.5%	21999	14530(12600+1930)	April 15	17296
V4S(Retail)	Oct.14	7%	10799	7318(6827+491)	Oct.14	8226
V4S(Retail)	July 15	13.5%	8999	6730(5940+790)	July 15	7381
V4S(Retail)	Oct 14	7%	10827	7318(6827+491)	Oct.14	8761
V4S(Retail)	July 15	13.5%	8999	6730(5940+790)	Aug 15	7869
V4S(Retail)	July 15	13.5%	8999	6730(5940+790)	Sept 15	6481

34. A glance at these tables and scrutiny of same provides that the prices for various models of mobile phone indicate that inspite of the fact that the rate of CVD have gone up, the retail sales price both for dealers as well as for ultimate customers have generally gone down or have remained same. We feel that the table as given above leave no doubt in the mind that increased rate of CVD have been borne by the importer himself and the burden of increased rate of CVD has not been passed on to the customers.

35. A careful scrutiny of above mentioned tables comparing the prices of various models of imported mobiles of appellant very categorically indicate that price at which the appellants have sold their product to its dealers and price to the ultimate customer in form of Retail Sale Price (RSP) has generally come down or have remained constant which prima-facie establishes that burden of enhanced CVD rate from 7% to 13.5% has not been passed on the buyer.

36. It is an established principle that Retail Sale Price comprises of all the cost components of a product, such

as cost of production, + cost of distribution, + all the taxes and reasonable margin of profit. In a given situation if the R.S.P. of a product is Rs. 1000/- and if rate of tax on the same product goes up from 10% to 20% and the product manufacturer still sells the product at previous RSP of Rs. 1000/-, we understand that the burden of enhanced rate of tax has been absorbed by the manufacturer and the burden of increase in the tax component of product has not been passed down to the customer, we find a similar situation in this case.

37. In view of the above, we are of opinion that the comparative analysis of prices, in a situation of change in the tax rates, is absolutely important to decide whether the additional tax burden in situation of increase in tax rates is being shifted to the buyer or not. This also has to be the important parameter to determine whether in a given situation whether there is a presence of unjust enrichment or not. We find that in the case at hand, the prices (both dealer price and RSP) indicate that the burden of enhanced rate of CVD has not been shifted to

the buyers and, therefore, there cannot be any element of unjust enrichment.

38. While holding the above view, we also take shelter of judgement of Hon'ble Supreme Court in the case of **Commissioner of Customs New Delhi vs. Organon (India) Ltd.** reported under [2008 (231) ELT 201 (SC)], wherein the Hon'ble Apex Court has held that if there is no change in the price post levy of duty and the Auditors' certifies that the incidence of duty has not been passed to the customers, in that case, it can safely be presumed that since the duty burden has not been passed on to the customers and therefore, the question of unjust enrichment does not arise. The relevant extract of the above mentioned decision of the Hon'ble Supreme Court is reproduced hereinbelow:

" 3. Assessee thereafter filed an application claiming refund of the customs duty paid by it. The authority-in-original rejected the claim on the ground that the assessee had passed on the burden of the customs duty to its customers and refund of the customs duty would amount to unjust enrichment as provided under Sections 27, 28(C) and (D) of the Act. Assessee challenged the order-in-original before the Commissioner of Customs (Appeals). Commissioner of Customs (Appeals) upheld the order-in-original. Assessee thereafter filed appeal before the Tribunal. Initially, there was a difference of opinion between the Member (Technical) and

Member (Judicial) regarding the refund of the customs duty. It was held by the Member (Technical) that the incident of duty has not been passed on to the customers and therefore the assessee is eligible to claim the refund of custom duty whereas Member (Judicial) held it otherwise. The matter was referred to a third Member who agreed with the Member (Technical) holding that the incident of duty had not been passed on to the customers and therefore the assessee is eligible to refund of the customs duty. It is an admitted position that the burden to prove that the customs duty was not passed on to the customers is on the assessee. The Member (Technical) and the third Member on the basis of the following facts :

(i) in the invoices, it was clearly mentioned that the sale price did not include the customs duty.

(ii) that there was no change in price post-levying of the duty. Assessee had filed its price list and the customs duty was imposed thereafter. The goods were sold to the customers at the same price which was stated in the price list.

(iii) That there was an auditor's certificate certifying that assessee had not passed on the customs duty to the customers.

came to the conclusion that the assessee had not passed on the burden of the customs duty to its customers. This finding is a finding of fact based on evidence which does not call for any interference."

39. Similarly, this Tribunal in the case of **Indian Metals & Ferro Alloys vs. CCE, Bhubaneswar** reported under **[2001 (125)ELT 943 (Tri)]** has held that invoices are normally the best evidence to show whether or not the burden of duty has been passed on by the manufacturers to his customers and if the invoices does not show any

element of duty being recovered from the customers, in that case, it can safely be concluded that there is no element of unjust enrichment. The relevant extract of the decision in the case of **M/s. Indian Metals and Ferro Alloys** (supra) is reproduced hereinbelow:

“4.2 As regards the question of *“unjust enrichment”* the findings of the authorities below in our view, are not tenable. Invoices are the normally the best evidence whether the burden of duty has been passed on or not by a manufacture to his customers. If the invoices do not show any element of duty having been recovered from the customers, it has to be assumed in the absence of any evidence to the contrary produced by the department or admission by the party, that no burden of duty has been passed on to the customers. In the present case, we note that it is the Appellants themselves who have come forward and admitted that they have realised a certain amount from some of the customers, no evidence has been produced by the department that the Appellants have realised over and above that admitted amount. Therefore the admission of the Appellants for realisation of a certain amount cannot be held against them for the entire amount, in the absence of any evidence to the contrary by the department. The inference we agree with the learned Consultant of the authorities below is based on surmises and conjecture. This is apparent from the use of the expression “could have been realised.....”

5. In view of the foregoing discussion, we allow the Appeal with consequential relief to the Appellants and any refund due to them should be given forth with, matter being of very old - 1977 to 1982. Amount which has been realised by the Appellants from their customers should be deposited with the Consumer Welfare Fund as per the provision of law.”

40. The decision of this Tribunal in the above mentioned case has been affirmed by Hon'ble Supreme Court reported under 2001 (127) ELT A 162 (SC). In another case in **Birla Corporation Ltd. vs. CCE Lucknow** reported under **2017 (358) ELT 443 (Tri-Allahabad)**, it has been held that *"it is an admitted fact that the appellants have received the same price/ MRP for clearances of goods on 6 December, 7 December, 8 December and so on. Accordingly, I hold that there can be no presumption that the appellant have passed on the excess duty deposited erroneously on 7 December, to the buyers of the goods. Accordingly, I hold that doctrine of unjust enrichment has been satisfied by the appellant assessee and I hold them entitled to refund in question."*

41. This tribunal has also had similar view in case of **Tecil Chemicals & Hydro Power Ltd. versus Commissioner of Central Excise, Cochin** reported in **2003 (151) E.L.T. 136 (Tri. – Del.)**. The relevant extract of same is reproduced here below:-

"18. It is well settled that the incidence of duty cannot be said to have been passed on by the consumers, if the sale price of the goods had remained the same before and after payment of duty by the assessee. In this context, reference may be made to, *Commissioner of Central Excise, Kanpur v. Corona Cosmetics & Chemicals (P) Ltd.* -

[2000 \(118\) E.L.T. 356](#) (T) and *Commissioner of Central Excise v. Minerva Mills* - [2002 \(141\) E.L.T. 177](#), wherein it has been so ruled by the Tribunal. The Revenue had not produced any evidence to contradict the documentary evidence produced by the appellants referred to above. Therefore, the un rebutted evidence of the appellants that their selling price of the final product was not influenced by payment of duty on the inputs during the period in question and that the price remained the same or even on certain occasions stood reduced, deserves to be accepted. From all this evidence brought on record, it stands amply proved that the incidence of duty had not been passed on by the appellants to the buyers/consumers during the period in question”.

42. We find that learned Commissioner (Appeals) has wrongly applied the judgement of Hon’ble Supreme Court in the case of **Commissioner versus M/s Allied Photographics India Ltd.** reported under **[2004 (166) ELT 3 (SC)]** for supporting his findings while, the Supreme Court in case of **Commissioner of Customs, New Delhi vs. Organan (India) Ltd.**(supra) has held that finding on the element of unjust enrichment is a matter of fact and need to be decided on the basis of factors such as comparative prices pre-duty and post duty prices; Auditors certificate that burden of tax is not being passed down to the customers, etc.

43. Since Hon’ble Supreme Court observations in case of **Allied Photographics India Ltd.** on the aspect of price, were for a specific situation and cannot generally

be applied in every situation as has been distinguished in case of **Hero Motocorp Ltd. versus Commissioner of Customs (Import and General)** reported in **2014 (302) E.L.T. 501 (Delhi)**. The relevant extract of same is reproduced here below :-

"14. The learned counsel for the respondent while referring to the decision of *Allied Photographics India Ltd.* (supra), has submitted that same or uniformity of price before and after the assessment does not show that the incidence of duty was not passed on to the buyer as uniformity may be due to the various factors. We would like to reproduce Paragraphs 17 and 18 of the decision in the case of *Allied Photographics India Ltd.* (supra), which read :-

"17. On the above facts, the short point which arises for determination is - whether incidence of duty was passed on by NIIL to its distributor M/s. AGIL and whether M/s. AGIL in turn passed on the burden to its dealers. On the first point, NIIL conceded in the earlier proceedings before the High Court that it had passed on the duty burden to its distributor M/s. AGIL. Therefore, the only question which we are required to decide is - whether M/s. AGIL in turn had passed on the duty burden to its dealers as alleged. In the present case, it was argued on behalf of the Department before the authorities below that 20% of the total price paid by M/s. AGIL represented the duty recovered by NIIL as a part of the sale price. It is important to note that M/s. AGIL was the sole distributor of NIIL. Therefore, it is highly improbable for a distributor to incur cost of purchase which included 20% element of duty in addition to the purchase price without passing on the burden to its dealers. From the record it appears that during the disputed period 1974 to 1984, M/s. AGIL was in trading which further supports the above improbability. In the present case, there is no material placed on record by M/s. AGIL as to how it had accounted for the cost of purchase in its books and the accounting treatment it gave to the said item at the time of payment of the purchase price. No record as to costing of that item has been produced. This material was relevant as in the present case NIIL conceded that it had passed on the burden of duty to its distributor M/s. AGIL (buyer) and it was the buyer who claimed refund. It has been urged on behalf of the respondent and which argument has been accepted by the authorities below that 20% of the total price paid by M/s. AGIL to NIIL represented total excess excise duty levied and not the excess duty collected by NIIL in the form of sale price from its distributor M/s. NIIL. It was argued that excess duty collected by NIIL represented only 1.62% of the total price. It was argued that resale price charged by M/s. AGIL to its dealers

had no relevance to excess excise duty paid by M/s. AGIL to NIIL at the time of purchase as the sale price charged by M/s. AGIL to its dealers was based on the prevailing market price. We do not find any merit in this argument. In the present case, the refund claim is made by a buyer and not by the manufacturer. The buyer says that he has not passed on the burden to its dealers. The buyer has bought the goods from the manufacturer paying the purchase price which included cost of purchase plus taxes and duties on the date of purchase. In such cases, cost of purchase to the buyer is a relevant factor. None of the authorities below have looked into this aspect. Even the Appellate Tribunal has not gone into this relevant factor. It has merely quoted the passages from the order of the lower authority, whose order was impugned before it. Costing of the goods in the hands of the distributor, the cost element and the treatment given to purchases by the buyer in his own account were relevant circumstances which the authorities below failed to examine. It was submitted that cost of purchase was not a relevant factor. It was submitted on behalf of the respondent that the resale price charged by the buyer was not a relevant factor. It was submitted that since the sale price of the goods before and after the assessment remained the same, the burden of excess duty was absorbed by the respondent. It was submitted that in any event the sale price of the goods increased much less than the amount of duty (differential) involved in this case and, therefore, incidence of duty was not passed on to the consumers. In this connection, reliance was placed on several judgments of the Tribunal. We have gone through these judgments. They are not applicable to the facts of this case. In the present case, we are concerned with the distributor buying the products from the manufacturer and reselling them to its dealers. Hence, the cost of purchase is a relevant factor. The facts of the cases before the Tribunal deal with sale by manufacturer to the consumer. They deal with the assessee's invoice bearing a composite price. They are the cases which dealt with the claim of refund by the manufacturer. They did not deal with claim of refund by the buyer. Hence, they have no bearing on the facts of the present case.

18. Before concluding, we may state that uniformity in price before and after the assessment does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer as such uniformity may be due to various factors. Hence, even on merits, the respondent has failed to make out a case for refund. Since relevant factors stated above have not been examined by the authorities below, we do not find merit in the contention of the respondent that this Court should not interfere under Article 136 of the Constitution in view of the concurrent finding of fact."

(Emphasis supplied)

15. The Supreme Court noticed that the assessee at the earlier proceedings had conceded before the High Court that it had passed

on the duty burden to its distributor and the only question was whether the distributor had passed on the duty burden to the dealers. It was therefore observed that it was highly improbable that the distributor had borne the duty burden or element of 20% which was already included in the purchase price of the distributor. The period in question was a decade long between 1974 to 1984. It was therefore, highly improbable that the distributor would have paid and borne the entire duty burden for the said period. It was further observed that no material was placed on record which supported the said improbability of the duty burden not being passed on to third parties. The distributors had failed to produce their account books. The assessee had also taken a plea that the actual excess duty represented only a fractional amount of the total price. But this contention was rejected analyzing the facts and for several reasons. It was in this context, the Supreme Court observed that the uniformity in price before and after the assessment cannot lead to 'inevitable conclusion' that the duty burden has not been passed on. Therefore, the fact that there was no increase in price is a relevant factor but not an inevitable conclusive factor. Several other facets and material relevant should be given due consideration.

16. In the facts of the present case, it is not disputed or denied that there was no change in the price whatsoever and the refund of CVD was claimed within a short time and the amount involved is very small compared to the overall transactions or turnover of the appellant. The appellant had filed affidavits and the certificate of the Chartered Accountant certifying the factual position and asserting on oath with documents that duty burden was not passed. We do not agree with the counsel for the respondent that the certificate should be disbelieved. When a professional like a chartered accountant gives a certificate, he owes and takes responsibility of what he certifies as personally ascertained and known to him. Even when an individual or officer of a company certifies a particular fact, the same should be normally believed unless there are grounds and reasons to reject or disbelieve the said assertion. The assertion should be objectively examined. Details and particulars if required should and can be ascertained and verified. Authorities may be justified and ask for documentation and details. In the present case the appellant has furnished relevant documents and materials which demonstrate and prove their claim that they had not passed on the incidence of CVD on the buyers. Reliance is not based upon the certificate alone. We would like to reproduce the observations of the Supreme Court in *Solar Pesticides Pvt. Ltd.*

"21. Learned Counsel for the respondent had also contended that in cases of captive consumption of imported goods, it would be impossible for the assessee to establish whether the duty component has been passed on to the buyers of the finished products or has been borne by the importer himself. Difficulty in proving that the incidence of the duty borne by the importer has not been passed on to the purchaser of the finished product can be no ground for interpreting Section 27 differently. It is not possible that in no case will an importer not be able to prove that the incidence of the duty imposed on the imported raw material has not been passed on to any other person. In fact in Civil Appeal No. 4381 of 1999 filed by

the Commissioner of Customs against M/s. Surya Roshini Limited, the importer had produced certificate from the Chartered Accountants giving details of costing of the final product and the Commissioner (Appeals) found as a fact that the component of excess customs duty paid on the imported raw material had not gone into the costing of the finished product. Without going into the correctness of this finding we wish to emphasize that even in cases of captive consumption, it should be possible for the importer to show and prove before the authorities concerned that the incidence of duty on the raw material, in respect of which refund is claimed, has not been passed on by the importer to anybody else."

17. While examining the question whether or not burden of duty has been discharged by the assessee, one has to be practical and adopt a realistic approach and not be oblivious as to nature and character of proof which will be available. When the assessee is able to show that the burden of duty has not been passed on, he asserts and submits affidavits and certificate of a chartered accountant along with copy of the balance sheet, indicates and shows sales invoices for pre and post-period and when there is no other negative factor or evidence to the contrary to disbelieve, the contention should be accepted. To deny what was paid and has to be refunded by law to the said person is not fair, just and equitable".

44. In view of above and considering the facts of the matter, we find that the element of unjust enrichment are not present in the matter at hand.

45. The provision of Section 28C and 28D of Customs Act are presumptive provisions and once the importer assessee submits his claim that he has submitted the required sales invoices etc. it is on the part of the Department to establish that assessee has not passed the burden of enhanced duty on the customers. In this case we find that all the invoices, purchase and sales invoices have

been submitted to the Department and Deputy Commissioner in his report dated 19 February 2018 has reported that burden of enhanced duty has been borne by the appellant and there is no element of unjust enrichment. Thus we find that the appellant has fulfilled this responsibility as cast by Section 28C and 28D of Customs Act, 1962 and Department has failed to establish any element of unjust enrichment. The decision of this Tribunal in case of **Picasso Exports versus Commissioner of Customs (ACC), Chennai** reported in **2004 (173) E.L.T. 214 (Tri. – Mumbai)** is relevant in this case. The relevant extract of same is reproduced here below :-

"4. After hearing both sides and considering the matter it is found:

(a) Commissioner (Appeals) is in error in ignoring the submission as regards the non-mention of the duty element separate by on invoice of sale to be in the area of procedure, especially when the appellants can otherwise prove that the duty burden has not passed on to the consumer causing the huge loss suffered in view of the documents submitted to the Deputy Commissioner whose authenticity is not doubted. Thus the Commissioner (Appeals) should not have upheld the bar of unjust enrichment in the present case.

(b) The Commissioner (Appeals) can't question the authenticity of sale invoiced by asking the appellants to substantiate the price quotation for the period prior to and after the sale.

(c) It was for the Department to have brought on record evidence to prove the case of unjust enrichment burden passed on. The sale price and costing of the goods as

submitted by the appellant that has not been questioned by both the authorities below. Therefore non-filing of IT returns and of Balancesheet to the Commissioner (Appeals) are issued not germane and are irrelevant for considering the question of unjust enrichment the sale of imported goods been made by the importer. The cost of goods is a pure question of fact and profit and loss are to be determined consequently to the cost of the goods of import duties, especially on enhanced value would be a important component of costs.

(d) Since the presumption raised by Sec. 28D of the Customs Act, 1962 is a rebuttable presumption of law and not conclusive merely because the documents of sale are not as per the provision of Section 28 DR it can't be presumed that whatever the appellants has recovered from his customer was first duty of customs and there-after his own costs.

(e) Vide Final Order No. A/1198/2003-NB (SM), dated 3-10-2003 in the case of *Mohan Sales (India)*, [2003 (158) E.L.T 667 (T)] the Tribunal set aside the finding of unjust enrichment and orders of credit to welfare fund in a case where Revenues conclusion that it is not possible to sell goods on losses was set aside after accepting the contention that presumption in law of having passed the duty burden is a rebuttable presumption and since invoice and certificate was not being disputed. The refunds were ordered as order directing the same to be credited to Consumer Welfare Fund have not sustained. Following this decision and finding the facts to be similar this appeal is also to be allowed since nothing contrary to this decision of Tribunal has been shown.

46. We also take note of the fact that Assistant Commissioner of Customs (Refund), New Delhi vide his Order No. 322/2016 issued from F.No. VIII(E)20/Refund/ACE/156/2016 dated 18.04.2017 has sanctioned the refund of Rs. 28,48,587/- to the appellant namely, M/s. Trust Marketing on the basis of the facts, which are pari materia and the refund has also arisen after the judgement of Hon'ble Supreme Court in the case of M/s. **SRF Limited**. The learned Assistant

Commissioner who has sanctioned the refund amount to the appellant has held that " I find that the application containing that burden cast upon them to prove that incidence of duty not passed on to the customers was successfully discharged by the fact that the amount of excess duty paid has been shown as receivable (recoverable) in their financial statement for financial year 2015-2016 that excess duty was not added to the cost of final product. Accordingly, I hold that provisions of unjust enrichment clause under section 28 of the Customs Act are not applicable to the facts of this case, hence not invokable". We have been told that the above mentioned refund orders of Assistant Commissioner (Refund) has been accepted by the Department and no appeal has been filed against the same. This very fact prove that the Department is also convinced that there is no unjust enrichment in the applicants case. The Hon'ble Delhi High Court in its decision in the case of **YU Televentures Pvt. Ltd.** (supra) has held that when the Department has accepted the certificates issued from same Chartered Accountant, to allow another refund of

the claimant, there was no valid reason to deny the claim of same assessee in another case. The relevant extract of the above decision is reproduced below:

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

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

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

"I find that the sales invoices of June, 2015 and July, 2015 produced by the importer do not reflect the CVD amount separately which, *prima facie*, indicate that the burden of SAD has not been passed on by the importer to their customers directly. Further, I have already taken note of the fact that the importer has submitted a Chartered Accountant's Certificate issued by M/s. Nayyar Maniar & Associates LLP, M. No. 502101, to the effect of certifying that the burden of CVD under this refund claim

has not been passed on to the buyers and the refund being claimed is shown in their books of account/balance sheet for the year ended 31 March, 2016 as amount recoverable from the Customs. Accordingly, I hold that the provisions of unjust enrichment clause under Section 28D read with Section 27 of the Customs Act, 1962 are not applicable to the facts of this case and hence not invocable."

27. By the same yardstick, there was no reason whatsoever for respondent No. 4 not to accept the very same documents in respect of the imports between 27th March, 2015 and 31st March, 2015. The certificate of the CA is categorical that the incidence of CVD, even in respect of these imports, had not been passed on to the customers. Consequently, there was no valid justification for respondent No. 4 to have denied the refund claim."

47. We find that refund on the similar issue has already been sanctioned to the appellant primarily based on the Chartered Accountant certificate and the price structure etc. Thus, we find no reason for Department to not to accept their refund claim in the present matter.

48. We find that this Tribunal, in exactly similar circumstances where the refund has been filed after pronouncement of judgment in case of **SRF Ltd.** has allowed the appeal of importer of the mobile phones in case of **M/s Nokia India Sales Ltd. versus Commissioner of Customs, Hyderabad** in final order No. A/30757-30758 of 2018 dated 24 July 2018. The

relevant extract of the decision are reproduced here below :-

"13. Further, I find that in the case of Intex Technologies (India) Ltd., in writ petition No. 10618/2016, Hon'ble High Court of Delhi by order dated 08.11.2016 (unreported), was again considering identical issue and one of the point which came before their Lordships is regarding refund claim in light of the decision of the Apex Court. Their Lordships in paragraph No. 6 of the order held as under:

"6. In the light of the law laid down by the Supreme Court in SRF Ltd., (supra) the Court is of the opinion that the claim in these proceedings has to succeed. A direction is issued to the respondents to process the petitioner's refund claim and pass appropriate orders having regard to the fact the petitioner had filed supporting certificates in the form of a Chartered Accountant's clarification/certificate etc. claiming that the benefit sought was not passed on to the customers. The respondents are further directed to pay the appropriate refund amount together with interest applicable till date of actual payment within three weeks from today."

The said order of the Hon'ble High Court was carried in SLP before the Apex Court, the Apex Court dismissed the SLP by order dated 07.07.2017.

14. Revenue Authorities were still not happy with the situation and in another consignment imported by Yu Televentures Pvt. Ltd., opined the same thing and rejected the refund applications filed by the petitioners. Petitioners in M/s Yu Televentures Pvt. Ltd., in writ petition No. 2102/2017 again moved to Hon'ble High Court of Delhi and their Lordships by an Order dated 26.07.2017 recorded detailed finding on the issue after considering various decisions/orders of the Hon'ble High Court of Delhi and held as under:

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

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

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

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

27. *By the same yardstick, there was no reason whatsoever for respondent No. 4 not to accept the very same documents in respect of the imports between 27th March, 2015 and 31st March, 2015. The certificate of the CA is categorical that the incidence of CVD, even in respect of these imports, had not been passed on to the customers. Consequently, there was no valid justification for respondent No. 4 to have denied the refund claim."*

15. It is noticed that identical/similar issue came up before the Hon'ble High Court of Karnataka in writ petition No. 45551-45554/2016, which was disposed of the writ petition directing Revenue Authorities to sanction the refund, by holding that refund is eligible for granted to them.

16. Hon'ble High Court of Madras in the case of Micromax Informatics in writ petition No. 3486/2016 by order dated 18.04.2017 on identical set of facts held that refund is admissible.

17. On the face of authoritative judicial pronouncement on self same issue, I find that the Lower Authorities have erred in coming to a conclusion that the appellant herein has not passed the hurdle of unjust enrichment.

18. Respectfully following the authoritative judicial pronouncement on the same issue, I find that the impugned order to that extent contested in these appeals are unsustainable and liable to be set aside and I do so".

49. In view of entire discussions, we hold that the appellants have been able to establish beyond doubt that burden of enhanced CVD has not been passed down to the buyers and therefore, the element of unjust enrichment is not present in this case, thus, the subject refunds are admissible to the appellants. Accordingly, we hold that the impugned order in appeal under challenge is devoid of any merit and deserves to be set aside, hence we set aside the same. The appeals are accordingly, allowed with consequential benefit, if any.

(Pronounced in the open Court on 16/9/2019)

(Rachna Gupta)
Member(Judicial)

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(C. L. Mahar)
Member(Technical)