
(2024) 10 CESTAT CK 1194

In the Customs, Excise And Service Tax Appellate, New Delhi

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

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

Date of Decision : 15-10-2024

Acts Referred:

Customs Act, 1962 — Section 27, 27(1), 27(1A), 27(2), 28, 28(C), 28(D), 128(1), 129A(4)
Customs Tariff Act, 1975 — Section 3, 3(1)
Central Excise Act, 1944 — Section 11B
Finance Act, 1994 — Section 73A,

Citation : (2024) 10 CESTAT CK 1194

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

Bench : Division Bench

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

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. Customs Appeal No. 50113 of 2020 has been filed by M/s. Nokia India Sales Pvt. Ltd., the appellant to assail the order dated 05.09.2019 passed by the Commissioner of Customs (Appeals), New Delhi, the Commissioner (Appeals). This order dismisses the appeal filed by the appellant to assail that part of the order dated 23.01.2017 passed by the Deputy Commissioner that directs that the claim of Rs. 3,43,88,087/- sanctioned on the refund application filed by the appellant would be credited to the Consumer Welfare Fund in terms of the provisions of section 27(2) of the Customs Act 1962, the Customs Act.

2. Customs Appeal No. 50202 of 2020 has been filed by the appellant to assail the order dated 26.09.2019 passed by the Commissioner of Customs (Appeals), New Delhi, the Commissioner (Appeals). This order also dismisses the appeal filed by the appellant to assail that part of the order dated 23.01.2017 passed by the Deputy Commissioner that directs that the claim of Rs. 2,33,05,108/- sanctioned on the refund application filed by the appellant would be credited to

the Consumer Welfare Fund in terms of the provisions of section 27(2) of the Customs Act.

3. Cross-Objections had been filed by the department on 28.12.2022 in both the aforesaid appeals in terms of section 129A(4) of the Customs Act and with the Cross-Objections applications for condoning the delay of 977 days in filing the Cross-Objections were also filed. The grounds contained in the Cross-Objections mainly concentrate on the decision of the Supreme Court in *Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive)*, 2004 (172) E.L.T. 145(S.C.) wherein the Supreme Court held that so long as the order of assessment stands and has not been reviewed under section 28 of the Customs Act, duty would be payable as per the order of assessment, and the decision of the Supreme Court in *ITC Ltd. vs. Commissioner of Central Excise, Kolkata-IV*, 2019 (368) E.L.T. 216 (S.C.), wherein the Supreme Court held that the claim for refund cannot not be entertained unless the order of assessment or self-assessment is modified in accordance with law. It is for this reason that it was contended in the Cross-Objections that the refund that was granted to the appellant was improper and the order passed by the Deputy Commissioner sanctioning refund should be set aside.

4. Learned counsel for the appellant had not only opposed the delay condonation applications filed with the Cross-Objections, but had also submitted that the Cross-Objections should be rejected as they had not been filed in the manner prescribed under the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982, the 1982 Rules.

5. On these two issues, namely as to whether the delay in filing the Cross-Objections should be condoned or not, and whether the Cross-Objections had been filed in accordance with the procedure prescribed, submissions had been advanced by Shri Nagendra Yadav learned authorised representative for the department and Shri Kamal Sawhney learned counsel for the appellant and the order was reserved only on these two issues on 08.11.2023. The delay condonation applications filed by the department were rejected by a detailed order dated 08.11.2023, and consequently the Cross-Objections stood rejected.

6. The appeal filed by the department before the Delhi High Court against the said order dated 08.11.2023 of the Tribunal was dismissed by the Delhi High Court on 16.07.2024 and the relevant portions of the order are reproduced below:

"4. As would be evident from the various findings and conclusions which have come to be rendered by the CESTAT, it was found that the notice to the appellant carrying the memorandum of appeal was duly tendered on 03 March 2020 and would be deemed to have been served upon them on 18 March 2020. The only explanation which was proffered by the appellant was that a copy of the appeal was not available on the departmental file. It was this which constrained the CESTAT to observe that it was never the case of the appellant that a copy of the

appeal memo had not been received.

5. It is further borne out from the record that the authorized representative of the appellant duly appeared before the CESTAT on 01 November 2021, 24 November 2021, 10 December 2021, 09 February 2022, 27 April 2022, 21 July 2022 and again on 03 October 2022. The cross-objections were themselves based on contentions which had been duly raised before the Deputy Commissioner itself. It is on an overall conspectus of the aforesaid, that the CESTAT has come to the conclusion that the delay caused was not liable to be condoned.

6. We find that the aforesaid view as taken cannot be said to suffer from any perversity. Consequently, and since no substantial question of law arises, the appeal fails and shall stand dismissed.”

(emphasis supplied)

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

FACTS

8. The appellant imported mobile phones during the period November 2014 to February 2015 and paid additional duty of customs at the rate of 6% upto February 2015. A notification dated 17.03.2012 was issued by the government providing that the additional duty of customs would be leviable only at 1% under entry at serial 263A on import of mobile phones provided condition no. 16 was satisfied. Condition no. 16 provides that for an assessee to claim the lesser 1% of additional duty of customs, it should not have taken credit under rule 3 or rule 13 of the CENVAT Credit Rules 2004, the CENVAT Rules in respect of the inputs or capital goods used in the manufacturer of these goods.

9. The Supreme Court, in the context of the import of Nylon Filament Yarn of 210 deniers, examined a similar condition no. 20 in SRF Ltd. vs. Commissioner of Customs, Chennai, 2015 (318) E.L.T. 607 (S.C.). The appellant therein had claimed nil rate of additional duty by relying upon a notification dated 01.03.2002. The Deputy Commissioner held that SRF would not be entitled to exemption from payment of additional duty since it did not fulfil condition no. 20 of the said notification, which is to the effect that the importer should not have availed credit under rule 3 or rule 11 of the CENVAT Rules in respect of the capital goods used in the manufacture of these goods. The admitted position was that such CENVAT credit was not availed by SRF. The Tribunal held that when the credit under CENVAT Rules was not admissible, the question of fulfilling the aforesaid condition did not arise and, therefore, as condition no. 20 was not satisfied SRF could not claim nil rate of additional duty. This reasoning of the Tribunal was found to be not correct by the Supreme Court for the reason that for the purpose of attracting additional duty of customs under section 3 of the Tariff Act on the import of a manufactured or produced article, the actual

manufacture or production of a like article in India was not necessary and that for quantification of additional duty in such a case, it has to be imagined that the article imported was manufactured or produced in India and then to see what amount of excise duty was leviable thereon. SRF was, therefore, held entitled to exemption from payment of additional duty.

10. The appellant, on the same reasoning, claimed that it had to pay the reduced additional duty of customs at the rate of 1% in terms of condition no. 16 of the notification dated 17.03.2012, which is identical to condition no. 20 of the notification dated 01.03.2002 that was examined by the Supreme Court in SRF Ltd. It had, however, paid additional duty of customs at the rate of 6% upto February 2015. Customs Appeal No. 50113 of 2020 relates to refund of Rs. 3,43,88,087/-. Customs Appeal No. 50202 of 2020 relates to refund of Rs. 2,59,20,950/- out of which refund of Rs. 26,15,842/- is barred by time. Thus, in effect this appeal relates to refund of Rs. 2,33,05,108/-.

11. Two separate but similar orders, each dated 23.01.2017, were passed by the Deputy Commissioner on the refund applications filed by the appellant. In view of the decision of the Supreme Court in SRF Ltd., the Deputy Commissioner held that the appellant was required to pay additional duty of customs at the reduced rate of 1% in terms of condition no. 16 of the notification dated 17.03.2012. The Deputy Commissioner then examined whether it was necessary for the appellant to get re-assessment of the Bills of Entry for claiming refund and for this purpose examined the decision of the Delhi High Court in M/s. Micromax Informatics Ltd. vs. Union of India, 2016 (335) E.L.T. 446 (Del.) that had been placed by appellant to contend that it was not necessary to seek re-assessment of the Bills of Entry. The Delhi High Court in Micromax Informatics had held that an authority would not be justified in refusing to entertain an application for refund only because no appeal was filed against the assessment order, even if there was one. The Deputy Commissioner, accordingly, held that there was no necessity of seeking modification in the Bills of Entry. The relevant portion of the order passed by the Deputy Commissioner is reproduced below:

"In any event, after 8th April, 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a claim for refund made by such person under section 27(1) of the Act as it now stands, will have to be entertained and an order passed thereon by the authority concerned even where an order of assessment may not have reviewed or modified in appeal. Hence, again, following judicial discipline, the refund claim of the claimants, needs to be entertained on the basis of their self-assessed Bills of Entry, though there is no modifying order for those Bills of Entry"

(emphasis supplied)

12. After having held so, the Deputy Commissioner framed two issues to be decided, namely whether the said refund claims were hit by limitation and whether the appellant had proved that the incidence of additional duty of

customs had not been passed on to the buyers. As regards limitation, it was found by the Deputy Commissioner that the claim of Rs. 26,15,842/- was barred by time, but the rest of the claim was within time. As regards the issue as to whether the incidence of duty had been passed on to the buyers or not, the Deputy Commissioner held that the certificates of the Chartered Accountant could not solely be relied upon and as the appellant had failed to conclusively prove that the burden of incidence of duty had not been passed on to the buyers, the amount sanctioned on the refund applications should be credited to the Consumer Welfare Fund in terms of the provisions of section 27(2) to the Customs Act.

13. Feeling aggrieved by this part of the order passed by the Deputy Commissioner directing the sanctioned refund amount to be credited to the Consumer Welfare Fund, the appellant filed two appeals before the Commissioner (Appeals). The appeals have been dismissed by the Commissioner (Appeals) by two separate orders, both dated 05.09.2019, for the following reasons:

"5.3 The relied upon cases/ decisions of various judicial forums have noted that the appellants had in fact submitted relevant documents such as balance-sheet, invoices, ledgers etc along with the certificate of the Chartered Accountant. And it was on this premise it was held that certificate given by a Chartered Accountant cannot be disbelieved and should be accepted as true and correct. Consequently, it was held that in view of the said certificate the appellants had succeeded in proving that the burden of incidence of duty has not been passed on to the buyers. However, in the present case the appellants was asked certain documents for rebuttal of any unjust enrichment by the original adjudicating authority, still the appellant's C.A. Certificate findings were not supported with the documents. In such circumstances, I find that all the above mentioned cases laws, relied upon by the claimant, are set upon a different sets of facts and hence cannot be applied to the present case.

5.4 In view of above, I find that, the impugned Order is legally correct as the applicant has failed to conclusively prove that the burden of incidence of duty has not been passed on to the buyers of the goods imported under the subject Bills of Entry. And accordingly, this refund claim is hit by the doctrine of unjust enrichment."

(emphasis supplied)

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

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

CONTENTIONS

16. Shri Kamal Sawhney, learned counsel for the appellant assisted by Shri

Deepak Thakur and Shri Rishabh Mishra made the following submissions:

(i) The certificate of the chartered accountant submitted by the appellant to substantiate that the incidence of duty had not passed on to the buyers was not accepted by the Commissioner (Appeals) for the reason that it was not supported by documents. This finding is perverse as the certificate dated 29.12.2015 not only stated facts but was also accompanied by Annexure A which contained invoice details, Bills of Entry details, challan details, valuation details, actual duty paid and the duty payable;

(ii) The Hyderabad Bench of the Tribunal in the matter of the appellant accepted identical certificate dated 29.12.2015 issued by the same chartered accountant and this order of the Tribunal has attained finality as the department did not file any appeal. Identical certificate of the same chartered accountant also came up for consideration before the Ahmedabad Bench of the Tribunal and on remand by the Tribunal, the Deputy Commissioner passed two orders dated 03.11.2022 accepting the certificate issued by the chartered accountant. These two orders passed by the Deputy Commissioner have also attained finality as no appeals have been filed by the department. In this view of the matter, the chartered accountant certificate dated 29.12.2015 in the present matter should be accepted. In support of this contention, learned counsel placed reliance on the following decisions:

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

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

(iii) In the face of the certificate issued by the chartered accountant it does not matter even if the amount has been shown as "expense" in the books of the account of the appellant; and

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

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

(i) The refund claims filed by the appellant are not maintainable as they had been filed without getting the assessment orders modified and in support of this contention, learned authorized representatives placed reliance upon the decision of the Supreme Court in ITC;

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

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

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

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

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

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

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

(iii) Even if the Cross-Objections filed by the department to raise this issue had been rejected by the Tribunal, still it is open to the department, at the time of hearing of these appeals, to raise this legal issue; and

(iv) A certificate given by the chartered accountant cannot be conclusive proof of the fact that the incidence of duty has not been passed on to the buyers. In view of the provisions of sections 28(C) and 28(D) of the Customs Act, the appellant had to substantiate that the incidence of duty had not been passed to the buyers.

18. As regards, the objection raised by the learned authorized representative appearing for the department that the refund applications were not maintainable in view of the decision of the Supreme Court in ITC, learned counsel for the appellant submitted that the decision of the Supreme Court in ITC would not be applicable in the present matter as not only had the Cross-Objections that had been filed by the department to raise this issue in the appeals had been rejected, but also because of the fact that this issue cannot be raised by the department for the first time before this Tribunal, more particularly when the finding of the Deputy Commissioner that the appellant was entitled to refund has attained finality. To support this contention, learned counsel for the appellant placed reliance upon the following decisions:

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

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

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

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

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

(Tri. - Ahmd.);

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

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

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

DISCUSSION

19. The objection raised by the learned authorized representatives appearing for the department that the refunds application are not maintainable in view of the decision of the Supreme Court in ITC needs to be examined first, because if this issue is decided in favor of the department then it will not be necessary to examine whether the incidence of duty was passed on by the appellant to the buyers.

20. The contention of the learned authorized representatives appearing for the department is that the issue as to whether the application filed for refund would be maintainable even in the absence of the assessment order having been modified has been settled by the Supreme Court in ITC and, therefore, despite the rejection of the Cross-Objections by the Tribunal, the department can still raise this legal issue while responding to the appeals filed by the appellant against that part of the orders that direct for deposit of the sanctioned amount in the Consumer Welfare Fund.

21. Learned counsel for the appellant, however, submitted that it is not open to the department to raise this issue regarding the maintainability of the refund applications in these appeals as the department had allowed the orders passed by the Deputy Commissioner sanctioning refund to attain finality.

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

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

24. As noted above, the appellant had filed refund applications on 29.10.2015 for refund of the excess additional duty of customs that was paid by the appellant. According to the appellant, it was required to pay additional duty of customs at the reduced rate of 1% in terms of condition No. 16 of the notification dated 17.03.2012 instead of at the rate of 6%. An objection was raised by the department in the deficiency memo issued to the appellant on the refund applications that since the Bills of Entry had not been re-assessed, it would not be possible to process the refund applications. This aspect was first examined by the Deputy Commissioner in the order and in view of the decision of the Delhi High Court in Micromax Informatics, which considered the decision of the

Supreme Court in Priya Blue Industries, the Deputy Commissioner held that the refund applications would be maintainable even in the absence of any challenge to the assessment orders by the appellant. The finding recorded by the Deputy Commissioner is as follows:

"31. ***** Hence, again, following judicial discipline, the refund claim of the claimants, needs to be entertained on the basis of their self-assessed Bills of Entry, though there is no modifying order for those Bills of Entry."

25. Thereafter, the Deputy Commissioner found as the fact that the appellant was required to pay additional duty of customs only at the reduced rate of 1%.

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

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

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

27. Regarding the issue relating to limitation, the Deputy Commissioner found that only the claim to the extent of Rs. 26,15,842/- out of the claim of Rs. 2,59,20,950/- was barred by limitation, and the remaining claims of Rs. 3,43,88,087/- and Rs. 2,59,20,950/- were found to be within limitation.

28. Regarding the issue as to whether the incidence of duty had been passed on to the buyers or not, the Deputy Commissioner examined the certificate dated 29.12.2015 that had been issued by the chartered accountant and observed that they do not conclusively prove that the incidence of duty had not been passed on to the buyers. The finding recorded by the Deputy Commissioner is as follows:

"42. ***** The aforementioned statutory requirements regarding unjust enrichment did not appear to be adequately compensated by the auditor's certificate dated 29.12.2015 issued by M/s. KRA & Co., Chartered Accountants, New Delhi and enclosed with the refund application. The auditor's certificate, at para II(D), draws a subjective conclusion on the point on the assumption that the incidence of duty burden has not been passed onto the final consumer as the price at which the imported goods were sold to buyers had not increased in 2014-15 due increase in rate of CVD in 2014-15 or before 2014-15. This assumption of the auditor cannot substitute cogent evidences to substantiate the absorption of duty incidence by the importer himself. Non-escalation of value on account of upwards variation of duty cannot be considered as an absolute evidence of absorption of duty burden without supporting tangible evidence. The auditor has not advanced any reason to arrive at the absolute conclusion under para II D(b) of their certificate which is blanket certificate without advancing verifiable evidence. The para IID is concluded by giving a highly subjective opinion on a general assumption that in their view as a business practice any variation/increase in tax burden has been absorbed by the company and the

same is evident from the cost sheet examined. However, no cost sheet has been enclosed or rationale of costing has been spelt out to arrive at this conclusion. Hence, the Chartered Accountant's certificate is a subjective document without evidential value and therefore did not compensate the evidential requirement mandated under Section 27(1A), Section 28D. Therefore, the presumption under Section 28D is held against the importer who it is deemed to have passed on full incidence of such duty to the buyer of such goods. The claimant thus appeared to have failed to prove that the claim was not hit by the unjust enrichment clause. Hence, in the event of the refund claim being sanctioned, such amount being sanctioned may be credited to the Consumer Welfare fund in such event, as provided in Section 27(2) of Customs Act, 1962.

51. In the present case as well the applicant has not produced any other document except the said certificate issued by the Chartered Accountant. In view of the above, I am not inclined to solely rely upon the said certificated issued by the Chartered Accountant and I come to a reasoned conclusion that in the present case the applicant has failed to conclusively prove that the burden of incidence of duty has not been passed on to the buyers of the goods imported under the subject Bills of Entry. And accordingly, this refund claim is hit by the doctrine of unjust enrichment."

(emphasis supplied)

29. It would, therefore, be seen that after rejecting the certificate of the chartered accountant, on which reliance was placed by the appellant to substantiate that the incidence of duty had not been passed on to the buyers, the Deputy Commissioner ordered for sanction of the refund claim, but directed it to be credited to the Consumer Welfare Fund in terms of section 27(2) of the Customs Act.

30. Feeling aggrieved by that part of the order of the Deputy Commissioner which directed that the sanctioned amount of refund should be credited to the Consumer Welfare Fund, the appellant filed two appeals before the Commissioner (Appeals).

31. The department, however, did not file any appeal before the Commissioner (Appeals), though under section 128(1) of the Customs Act, any person aggrieved by any decision or order passed under the Customs Act by an officer of customs lower in rank than a Principal Commissioner or Commissioner of Customs can appeal to the Commissioner (Appeals). The department should have considered itself to be a person aggrieved because the order passed by the Deputy Commissioner sanctioned the refund claim as a result of which the department would have to pay that much amount. It cannot be urged by the department that merely because the amount was directed to be credited to the Consumer Welfare Fund in terms of the provisions of section 27(2) of the Customs Act, the department would not be a person aggrieved and it would be a

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

32. The department did make an attempt to raise this issue in the Cross-Objections that were filed in these appeals, but the Cross-Objections were rejected by the Tribunal and the appeal filed by the department before the Delhi High Court to assail this order of the Tribunal has been dismissed.

33. What transpires from the aforesaid discussion is that the only issue that arises for consideration in these two appeals is as to whether the amount sanctioned on the refund applications filed by the appellant should be deposited in the account of the appellant or in the Consumer Welfare Fund under section 27(2) of the Customs Act. It is not in dispute in the present appeals that the amount claimed under the two refund applications has to be sanctioned. What alone has to be examined in the two appeals is whether the incidence of duty had passed on to the buyers or not.

34. It is in the light of the aforesaid facts that the submissions advanced by the learned authorized representative appearing for the department that the amount could not have been sanctioned by the Deputy Commissioner as the refund applications were not maintainable because of the judgment of the Supreme Court in ITC has to be examined.

35. The issue that has been raised by the department is no doubt a legal issue but what has to be seen is whether this legal issue can be raised by the department in these two appeals filed by the appellant to challenge the issue of unjust enrichment only. The issue before the Tribunal today is not whether the refund applications would be maintainable even in the absence of any challenge to the assessment order by the appellant because that issue has attained finality. Such being the position, the department cannot be permitted to raise this issue in these two appeals. In fact, even if the Cross-Objections were found to be in time, such an issue could not have been raised by the department in these two appeals because the orders sanctioning the refund had attained finality.

36. In Toyo Engineering, the Supreme Court examined whether the view taken by the Tribunal that the department cannot be allowed to raise a submission for the first time in a second appeal before the Tribunal. The Supreme Court held that the Tribunal was justified in not permitting the department to raise the issue for the first time before the Tribunal.

37. A similar issue was examined by a Division Bench of the Allahabad High Court consisting of the Chief Justice (now the Chief Justice of India) and one of us in Indian Farmers Fertilizers. Two questions of law were raised in the appeal and they are as follows:

"I. Whether the Hon'ble CESTAT has erred in allowing the refund, without considering provisions of limitation provided in Section 11B of the Central Excise

Act, 1944?

II. Whether the Hon'ble CESTAT has erred in allowing the refund, without considering provisions of unjust enrichment provided in Section 11B of the Central Excise Act, 1944?"

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

Toyo Engineering and held that though the department had filed an appeal against the order of the Assistant Commissioner sanctioning the refund, but this ground was not taken by the department in the appeal. The appeal filed by the department was allowed by the Commissioner (Appeal). This order was assailed by the assessee before the Tribunal but no Cross-Objection was filed by the department. The Allahabad High Court found that the finding of the adjudicating authority to the effect that the claim was within limitation was not challenged by the department before the Commissioner (Appeals) and so it would not be open to the department to assert before the High Court a point which was not raised in the grounds of appeal by the department while assailing the order of the Assistant Commissioner sanctioning refund. The relevant portions of the judgment of the Allahabad High Court are reproduced below:

"5. As noted above, two questions of law have been raised on behalf of the revenue. The first question which falls for determination is whether the Tribunal had erred, as the revenue would assert, in allowing the refund claim without considering the issue of limitation under Section 11B of the Central Excise Act, 1944.

6. In dealing with this submission, it would be necessary to note at the outset that the Assistant Commissioner, Bareilly while sanctioning the refund claim in his order dated 23 December 2011 specifically came to the conclusion that the claim had been filed within a period of one year as prescribed by Section 11B of the Central Excise Act, 1944. The revenue challenged the order of the adjudicating authority before the Commissioner (Appeals). The grounds of appeal have been reproduced in the order of the Commissioner (Appeals). Those grounds would indicate that the revenue did not challenge the finding of the adjudicating authority to the effect that the application for refund had been preferred within the period of one year prescribed by Section 11B. As a matter of fact, the grounds would indicate that the principle, if not the only challenge on the part of the revenue was that the assessee, which was a recipient of the service and not the service provider, was not entitled to file a refund claim under Section 11B. The case of the revenue was that it was the service provider, namely RGTIL which alone was entitled to file a claim before the Commissionerate concerned and RGTIL had recovered the service tax amount from various recipients.

7. This contention was accepted by the Commissioner (Appeals). The assessee

filed an appeal before the CESTAT. No cross objections were filed by the revenue. Hence, the record would indicate that the finding of the adjudicating authority to the effect that the claim was within the limitation was not challenged by the revenue in the first appeal which was filed before the Commissioner (Appeals). That being the position, it would not be open to the revenue to now assert to the contrary and to urge a point which was not raised in the grounds of appeal filed by the revenue while assailing the order of the adjudicating authority sanctioning the refund.

8. In *Commissioner of Customs, Mumbai vs. Toyo Engineering India Limited* (2006 (201) E.L.T. 513 (S.C.)) the Supreme Court has held that the revenue could not be allowed to raise submissions for the first time in a second appeal before the Tribunal.

9. The same principle has been followed by a Division Bench of this Court in *Bajaj Hindusthan Ltd. vs. Union of India* in holding that in an appeal before this Court, a ground which was not raised before and decided by the Tribunal, would not be permitted to be urged.”

(emphasis supplied)

39. This issue was also examined by the Supreme Court in *Neelima Srivastava*. Writ Petition No. 3316 of 1986 was filed before the High Court to challenge the modification in the terms of the appointment and an interim order was passed by the High Court on 20.05.1986. The writ petitioner again approached the High Court by filing Writ Petition No. 7890 of 2003 to challenge the order passed by the Joint Director of Education rejecting her claim of regularization. The two Writ Petitions were disposed of by a common judgment dated 23.01.2006 with a finding that the petitioner possessed all the requisite qualifications and as she had worked for 21 years, she had acquired a right to hold the post and it would not be appropriate to treat her as an appointee in a stop-gap arrangement. Accordingly, a direction was given to the State to consider her for regularization under the relevant Regularization Rules. This judgment of the High Court attained finality inter-se between the parties as admittedly the State did not challenge the order before any higher forum. The aforesaid judgment, therefore, crystallized the right of the appellant for regularization. It was, however, denied and so another Writ Petition No. 8597 of 2010 was filed. By an order dated 15.05.2014, this Writ Petition was allowed with a finding that since the High Court in the earlier round of litigation had held that she was entitled to hold the post and the said judgment had attained finality, the refusal to apply the Regularization Rules was unlawful. The aforesaid judgment of a learned judge of the High Court was challenged by the State in a Special Appeal before a Division Bench of the High Court. The State relied upon a subsequent judgment of the Supreme Court in *Secretary, State of Karnataka & ors. vs. Umadevi & ors.*, (2006) 4 SCC 1 to contend that when the appointment of the appellant was *dehors* the Rules and, therefore, illegal she was not entitled for regularization. The Special Appeal was allowed holding that since the initial appointment of the

appellant was dehors the rules, it was illegal and the appellant cannot be regularized in view of the decision of the Supreme Court in Umadevi. This order was assailed by Neelima Srivastava before the Supreme Court. This contention of the State that was accepted by the Division Bench of the High Court was repelled by the Supreme Court for the reason that the earlier order of the High Court dated 23.01.2006 had attained finality much before the Constitution Bench decision of the Supreme Court in Umadevi. The Supreme Court further observed that merely because the principles followed by the High Court while deciding the Writ Petition on 03.01.2006 had been over-ruled by the Constitution Bench judgment of the Supreme Court, it would not mean that the final adjudication between the parties, which had attained finality, can be set at naught. In fact, the Supreme Court held that the judgment which had attained finality has to be assailed and "got rid of in a manner known to or recognized by law". The Supreme Court further held that mere over-ruling of the principles by a subsequent judgment will not dilute the binding effect of the decision which had otherwise attained finality. The relevant portions of the judgment of the Supreme Court in Neelima Srivastava are reproduced below:

"28. Admittedly, when the judgment dated 23.01.2006 was passed by the High Court in the earlier two Writ Petitions filed by the appellant, the dictum of Umadevi (3) was not even in existence as the said judgment was rendered subsequently on 10.04.2006.

30. It becomes absolutely clear from the above clarification that earlier decisions running counter to the principles settled in the decision of Umadevi (3) will not be treated as precedents. It cannot mean that the judgment of a competent Court delivered prior to the decision in Umadevi (3) and which has attained finality and is binding inter se between the parties need not be implemented. Mere over-ruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between over-ruling a principle and reversal of the judgment. The judgment in question itself has to be assailed and got rid of in a manner known to or recognized by law. Mere over-ruling of the principles by a subsequent judgment will not dilute the binding effect of the decision on inter-parties.

31. In an identical situation, this Court in Civil Appeal No. 4443 of 2021 with Civil Appeal Nos. 4444 & 4445 of 2021 decided on 26.07.2021 (Vice Chancellor Anand Agriculture University Vs. Kanubhai Nanubhai Vaghela and Anr.) has rejected the argument advanced by the appellant in the said case that the judgment of this Court dated 18.01.2001 in Gujarat Agricultural University Vs. Rathod Labhu Bechar & Ors. [(2001) 3 SCC 574] does not survive after the judgment of this Court in Umadevi(3). It was held in paragraph 11 as under:-

"11. We have heard Mr. P.S. Patwalia, learned senior counsel for the university

and Mr. Nachiketa Joshi, learned counsel for the respondents. The main contention of the university is that after the judgment of this Court in Secretary, State of Karnataka and Ors. vs. Umadevi and Ors. 2, the respondents are not entitled for regularization as there are no sanctioned posts available. Another submission made on behalf of the appellant is that the judgment of this Court dated 18.01.2001 in Gujarat Agricultural University (supra) does not survive after the judgment of this Court in Umadevi. ***** We are not impressed with the submissions made on behalf of the university that the judgment of this Court in Umadevi's case overruled the judgment in Gujarat Agricultural University (supra). The judgment of this Court in Gujarat Agricultural University (supra) inter partes has become final and is binding on the university. *****"

36. Thus, it is very well settled that it is not permissible for the parties to re-open the concluded judgments of the Court as the same may not only tantamount to an abuse of the process of the Court but would have far reaching adverse effect on the administration of justice.

39. Analyzing the entire facts of the case and upon consideration of the matter and settled legal position, we are of the considered view that the impugned judgment passed by the Division Bench of High Court is not liable to be sustained and is hereby set aside. The appeal, accordingly, stands allowed. The appellant is held entitled to be regularized with all consequential benefits which may be extended to her within a period of three months from today."

(emphasis supplied)

40. It would also be useful to refer to the decision of a Division Bench of the Tribunal in Global Constructions. The Tribunal noticed that the impugned order had partly sanctioned the refund but credited it to the Consumer Welfare Fund. The Tribunal held that though it is true that it was observed by the Supreme Court in ITC that no refund can be entertained unless the order of assessment or self-assessment is modified but as the order sanctioning refund had attained finality, this plea cannot be permitted to be raised by the department. The relevant portion of the order of the Tribunal is reproduced below:

"9. We have considered the submissions of the learned Authorized Representative and have carefully gone through the records of the case. We find that the impugned order had partly sanctioned the refund and credited it to the consumer welfare fund and partly rejected on the ground of time bar. It is true that the law laid down by the Hon'ble Supreme Court in the case of ITC Ltd, was that no refund can be sanctioned at all unless the assessments (including self assessments) are first assailed before the Commissioner (Appeals) and modified. However, the sanction of refund by the Commissioner (Appeals) has not been assailed by the Revenue either by an appeal or by a separate memorandum of

cross objections.”

(emphasis supplied)

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

“14. The Learned Tribunal rightly found that the proposal and the show cause notice to recover a sum of Rs. 2,44,48,095/- under Section 73A of the Act and the interest thereon under Section 73B of the Act, was not confirmed by the Learned Commissioner in his order-in-original. Accordingly, the Learned Tribunal held that, in the absence of a cross-appeal by the Department, it would not be possible to confirm any demand under Section 73A of the Act.”

(emphasis supplied)

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

“19. Though show cause notices have been issued by the original authority, for the shortage of raw materials noticed, which includes, allegation of clandestine removal of raw materials, the finding of the original authority against the revenue, on the latter, is clear. When the department has not chosen to challenge the finding of the original authority, on the allegation of clandestine removal of raw materials nor filed any cross-objection to the appeal filed by the assessee, we are of the view that the finding rendered, by the original authority, in favour of the assessee, has reached finality.”

(emphasis supplied)

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

“5.5 In respect of para-III of the ground of appeal we find that even the adjudicating authority has in his order, not even proposed addition of such charges. The issue raised in the appeal by the revenue has been raised for first time in appeal without the same being subject matter of adjudication proceedings or in appellate proceedings before the Commissioner (Appeals). In case revenue was aggrieved by adjudicating authority not proposing to add such charge to arrive at the assessable value, the correct course would have been to file appeal or cross objections before the Commissioner (Appeal). Since revenue has proceeded not to file any appeal/ cross objections before the Commissioner (Appeal) they could not have taken this ground for first time while filing the appeal before this Tribunal.”

(emphasis supplied)

44. It clearly follows from the aforesaid decisions that if the department does not challenge a finding of the adjudicating authority by filing an appeal before the Commissioner (Appeals), than that finding of the adjudicating authority attains finality and the department cannot be permitted to subsequently raise this issue in a higher forum. This is what was observed by the Allahabad High Court in Indian Farmers Fertilizers. In Neelima Srivastava it was also held by the Supreme

Court that an order which has attained finality between the parties can only be assailed in a manner known to law and mere over-ruling of the principles followed in the said order by a subsequent judgment cannot dilute the binding effect of the decision. In Global Constructions, the Tribunal examined almost a similar issue. The adjudicating authority sanctioned the refund amount but credited it to the Consumer Welfare Fund. The Tribunal held that though the Supreme Court had subsequently held in ITC that a refund can be claimed only if the assessment order is modified but since the finding of the adjudicating authority sanctioning refund was not assailed by the department before the Commissioner (Appeals), it would not be permissible for the department to raise this issue before the Tribunal.

45. Learned authorized representative appearing for the department has relied upon the decision of the Tribunal in Shiv Naresh Sports to contend that even a respondent can raise a legal issue. It needs to be noted that the legal issue that is now sought to be raised by the department is that the refund applications are not maintainable for the reason that assessment proceedings had not been challenged by the appellant by filing appeals. This issue, as noticed above, had attained finality. Once the department allowed a particular issue to attain finality, it will not be permissible to permit the department in appellate proceedings initiated by an assessee before the Tribunal to raise this issue, even if it be a legal issue. The issue that is sought to be raised is not even the subject matter of these appeals as the sole issue that arises for consideration in these appeals is whether the incidence of duty was passed on to the buyers. In all the decisions that have been referred to by the learned authorized representatives for the department only general principles regarding raising of a legal issue have been examined. In none of these decisions it has been held that even if an issue that is sought to be urged has attained finality, it can still be raised considering it to be a legal issue. The decisions relied upon by the learned authorized representatives appearing for the department, therefore, do not come to the aid of the department.

46. It has, therefore, to be held that as the order dated 23.01.2017 passed by the Deputy Commissioner sanctioning refund had attained finality as no appeal was filed by the department to assail this order, the department cannot be permitted to raise the issue regarding maintainability of the refund applications.

MERITS

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

48. To substantiate that incidence of duty had not passed on to the buyers, the appellant had placed the certificate dated 29.12.2015 issued by a chartered accountant in respect of the imports made at Delhi. The said certificate is reproduced below:

"AUDITOR CERTIFICATE

I. With regard to the imports made by M/s. Nokia India Sales Private Limited ('the Company') at Delhi, the Company has paid Countervailing Duty of Customs ('CVD') under Section 3(1) of the Customs Tariff Act, 1975 and NCCD (along with applicable cess as applicable) of Rs. 36,289,329/- as has been evidenced by various tax payment challans (referred in the sheet enclosed herewith).

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

A. That we, M/s. KRA & Co., Chartered Accountants, having its business place at H-1/208, Garg Tower, Netaji Subhash Palace, Pitampura, New Delhi – 110034, have Sales Private Limited, a private limited company incorporated as per provision of Companies Act, 1956, having its Office situated at 807, New Delhi House, Barakhamba Road, New Delhi – 110001 in relation to the refund claim of differential customs duty. We have examined the accompanying 'Statement of Bills of Entry along with other relevant documents' of the Company. Our engagement was undertaken in accordance with the Generally Accepted Auditing Standards applicable in India and the Guidance note on Audit Reports and Certificates for Special Purposes issued by the Institute of Chartered Accountants of India.

B. That pursuant to the judgment of the Hon'ble Supreme Court in the case of M/s. SRF Limited, the Company is entitled to claim refund of differential customs duty amounting to Rs. 25,920,950/- paid and borne by it for October 2014 at Delhi by claiming benefit of the exemption available under S. No. 263A of the notification no. 12/2012-CE dated 17 March 2012 (as amended from time to time).

C. That one of the condition to claim exemption under entry no. 263A of the exemption notification is that the Company should not have availed any CENVAT credit on inputs and input services and basis our review of the books of accounts and other available records, stated conditions stand fulfilled for the subject refund claim.

D. That for the purpose of examining the clause of unjust enrichment to the importer in respect of subject refund claim, we have verified the 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 buyers has not increased in 2014-15 due to increase in the rate of CVD in 2014-15 or before 2014-15.

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

In our view as a business practice any variation/increase in tax burden has been absorbed by the Company and same is evident from the cost sheets examined. Further, the claimant has not claimed the refund pertaining to the items where

the duty burden was passed on to the customer as an increase in price. Accordingly, we certify that the claimant has not passed on the incidence of the differential customs duty to the buyer or any other person in relation to the items for which refund claim has been filed, and hence the requirement to rule out unjust enrichment to the importer/claimant is fulfilled in respect of all goods imported and sold as covered by the subject claim.

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

F. This certificate is solely for the purpose as set forth in the first paragraph of this certificate and is not to be used, referred to or distributed for any other purpose without our prior written consent.

For KRA & Co.

FRN: 020266N

Chartered Accountants

Rajat Goyal

Partner

Membership No.: 503150

Place: Delhi

Date: 29/12/2015

Encl:

Details of Tax Payment Challans

Annexure A"

(emphasis supplied)

49. A similar certificate with similar Annexure A was also filed by the appellant in respect of the imports made at Hyderabad. The adjudicating authority, in respect of the refund applications filed by the appellant claiming refund of additional duty of customs, did not accept the certificates and held that the appellant had not been able to prove that the incidence of duty had passed to the buyers. The appellant filed appeals before the Commissioner (Appeals), which appeals were rejected. Against the order passed by the Commissioner (Appeals), the appellant filed Customs Appeal No. 30153 - 30154 of 2018 before the Hyderabad Bench of the Tribunal. The Tribunal accepted the certificates filed by the chartered accountant and allowed the appeal. The decision of the Hyderabad Bench of the Tribunal is reproduced below:

"8. The only question that remains in both the appeals is whether the appellant is able to prove the hurdle of unjust enrichment has been passed on or not. The

facts of the case is reproduced herein above are not in dispute.

9. On perusal of the Chartered Accountant Certificate which is produced before the Lower Authorities and also produced before the Tribunal, I find that the Chartered Accountant (Auditors) certificate clearly recorded that for the purpose of examining the case of unjust enrichment, they audited importer's books of accounts and other documents and record of the goods, based upon such verification, certified that incidence of duty is not passed on. The said Chartered Accountant is along with annexures showing as to how calculations are arrived at. As against such clear evidence from the Chartered Accountant, we find that Revenue has not adduced contrary evidence to show that appellant herein had passed on the incidence of duty. In the absence of any contrary evidence, we have to hold that the Chartered Accountant's Certificate as produced by appellant needs to be accepted."

(emphasis supplied)

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

51. A similar certificate dated 29.12.2015 was filed by the appellant for imports made at Ahmedabad. This certificate was not accepted by the adjudicating authority. The Ahmedabad Bench of the Tribunal in Customs Appeal No's. 11639-11640 of 2017, 2019 (368) E.L.T. 975 (Tri. - Ahmd.) remanded the matter to the adjudicating authority to pass a fresh order with respect to the certificate dated 29.12.2015 issued by the chartered accountant.

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

"18. I further find that the Chartered Accountant (M/s. KRA & Co. New Delhi) of the claimant has already audited the records of the said claimant and issued certificate as under:

19. From the above Chartered Accountant's certificate, it is noticed that they have verified the Books of Accounts of the claimant and certified that the price at which the imported goods were sold to buyers has not increased in 2014-15 due to increase in the rate of CVD in 2014-15 or before 2014-15. The customs duty as refund has not been recovered from the customers or any other person separately in any manner. One the Chartered Accountant's certificate, I rely upon the following decisions:

27. I find that the above mentioned citations are squarely applicable in the present case. In this case, the claimant had imported the mobile phones and paid CVD duty @6%. However, in pursuant of the decision of the Hon'ble Supreme Court in the case of M/s. SRF Ltd. Vs. Commissioner of Customs,

Chennai, had filed the claim of refund of CVD duty paid in excess, as per Sr. No. 263A of Notification No. 12/2012-CE as amended. The Chartered Accountant (KRA & Co. New Delhi) of the said claimant has already certified vide his letter dated 29.12.2015 that "In our view as a business practice any variation/increase in tax burden has been absorbed by the Company and same is evident from the cost sheets examined. Further, the claimant has not claimed the refund pertaining to the items where the duty burden was passed on to the customer as an increase in price. Accordingly, we certify that the claimant has not passed on the incidence of the differential customs duty to the buyer or any other person in relation to the items for which refund claim has been filed, and hence the requirement to rule out unjust enrichment to the importer/claimant is fulfilled in respect of all goods imported and sold as covered by the subject claim." Therefore, burden of custom duty has not been passed on the customers. Looking to the facts, and following the judicial discipline, I conclude that the doctrine of unjust enrichment is not applicable in the present case. Therefore, the claimant is entitle for the cash refund of Rs. 13,49,349/-.

28. In view of above discussion, the claimant is entitled for the refund of Rs. 13,49,349/- out of Rs. 13,49,349/- under Section 27 of the Customs Act, 1962. The remaining refund amount of Rs. 2,72,957/-is not admissible being hit by limitation of time. Accordingly, I, pass the following order."

(emphasis supplied)

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

54. It is seen that the same chartered accountant issued three identical certificates, each dated 29.12.2015, to the appellant in respect of the import of the same goods at about the same time from Delhi, Ahemdabad and Hyderabad. The Hyderabad Bench of the Tribunal accepted this certificate and held that the burden of duty had not passed on to the buyers. This order of the Hyderabad Bench has attained finality. An identical chartered accountant certificate dated 29.12.2015 also came up for consideration before the Ahemdabad Bench of the Tribunal. The Tribunal remanded the matter to the Deputy Commissioner to examine the issue afresh. The Deputy Commissioner, on remand, after carefully examining the said chartered accountant certificate dated 29.12.2015, held that the incidence of duty had not passed on to the buyers. This order passed by the Deputy Commissioner has also attained finality.

55. Once the department has allowed the order of the Hyderabad Bench of the Tribunal in respect of the imports at Hyderabad as also the order passed by the Deputy Commissioner at Ahemdabad in respect of the imports made at Ahmedabad to attain finality, the department cannot be permitted to contend in this appeal that an identical certificate issued by the same chartered accountant for the imports made at Delhi should not be accepted.

56. In this connection, reference can be made to the decision of the Supreme

Court in Marsons Fan Industries, wherein it has been held:

"3. Mr. Joseph Vellapally, learned senior counsel appearing for the appellant has brought to our notice that in a case pertaining to earlier period from February 1982 to December 1982 of the assessee, the Collector (very same officer) in Order (Original) No. 61 (30-D) 87-Collr. 57/89, dated 21st July 1989 took the view that rotors and stators were incomplete and were unfinished goods not known in the market as stators and rotors. He also states that the subsequent order dated 21st July 1989 was brought to the notice of the Tribunal but the Tribunal did not take note of it. In support of his assertion, learned senior counsel has filed an affidavit of the counsel who had appeared for the assessee before the Tribunal. He further states that the Department has accepted the subsequent decision dated 21st July 1989 for the period February 1982 to December 1982. He submits that in view of the fact that the Department has accepted the subsequent decision dated 21st July 1989 in which it has been held that the rotors and stators in the form in which they are cleared from the appellant's factory are not finished goods and, therefore, not exigible to the levy of excise duty, the present appeal be accepted and the impugned order be set aside.

4. Learned senior counsel for the Department, after taking instructions, very fairly submits that the Department has accepted the decision dated 21st July 1989 and the same has attained finality.

5. Keeping in view the fact that the Department has accepted the decision dated 21st July 1989 pertaining to the assessee itself on the similar goods, we accept this appeal and set aside the order of the Tribunal and hold that the rotors and stators which were cleared by the appellant were not finished goods and were, therefore, not exigible to the levy of excise duty for the relevant period."

(emphasis supplied)

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

"4. The Tribunal relying upon an earlier decision of another Bench of the Tribunal in Commissioner of Central Excise, Calcutta-I v. Bitumen Products (India) [1999 (107) E.L.T. 58 (T)], held that 'Bituminised Hessian based felt' is covered under Chapter Heading 59.09 as contended by the assessee and not under 68.07 as contended by the revenue.

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

6. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the same has attained finality, then it is not open to the Revenue to accept judgment/order on the same question in the case of one assessee and question its correctness in the case of some other assessee. The Revenue cannot pick and choose. [See : Union of

India & Others v. Kaumudini Narayan Dalal & Another [2001 (10) SCC 231]; Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd. [2003 (158) E.L.T. 130 (S.C.)]; Birla Corporation Ltd. v. Commissioner of Central Excise [2005 (186) E.L.T. 266 (S.C.)]; Jayaswals Neco Ltd. v. Commissioner of Central Excise, Nagpur [2006 (195) E.L.T. 142 (S.C.)], etc.]”

(emphasis supplied)

58. It is, therefore, not possible to accept the contention raised by the learned authorized representatives appearing for the department that the certificate of the chartered accountant produced by the appellant to substantiate the incidence of duty had not passed on to the buyers should not be accepted because the appellant did not produce any other corroborative evidence as required under sections 28C and 28D of the Customs Act.

59. The orders dated 05.09.2019 and 26.09.2019 passed by the Commissioner (Appeals) confirming the order passed by the Deputy Commissioner for deposit of the sanctioned amount in the Consumer Welfare Fund under section 27(2) of the Customs Act, therefore, deserve to be set aside and are set aside. The appellant is held entitled to the payment of amount of Rs. 3,43,88,087/- and Rs. 2,33,05,108/-with consequential relief(s). The two appeals are, accordingly, allowed.

(Order Pronounced on 15.10.2024)