CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 3

Customs Appeal No. 50262 of 2021

(Arising out of Order-in-Appeal No. CCA/Customs/D-I/Import/NCH/612-615/2020-21 dated 20.08.2020 passed by the Commissioner of Customs, New Delhi)

Principal Commissioner of Customs **Appellant**
ACC (Import) Commissionerate,
New Custom House, New Delhi-110037.

VERSUS

M/s Lava International Limited **Respondent**
A-546, Sector-64, Noida,
Uttar Pradesh-201301.

WITH

Customs Appeal No. 50263 of 2021

(Arising out of Order-in-Appeal No. CCA/Customs/D-I/Import/NCH/612-615/2020-21 dated 20.08.2020 passed by the Commissioner of Customs, New Delhi)

Principal Commissioner of Customs **Appellant**
ACC (Import) Commissionerate,
New Custom House, New Delhi-110037.

VERSUS

M/s Lava International Limited **Respondent**
A-546, Sector-64, Noida,
Uttar Pradesh-201301.

WITH

Customs Appeal No. 50264 of 2021

(Arising out of Order-in-Appeal No. CCA/Customs/D-I/Import/NCH/612-615/2020-21 dated 20.08.2020 passed by the Commissioner of Customs, New Delhi)

Principal Commissioner of Customs **Appellant**
ACC (Import) Commissionerate,
New Custom House, New Delhi-110037.

VERSUS

M/s Lava International Limited **Respondent**
A-546, Sector-64, Noida,
Uttar Pradesh-201301.

AND

Customs Appeal No. 50265 of 2021

(Arising out of Order-in-Appeal No. CCA/Customs/D-I/Import/NCH/612-615/2020-21 dated 20.08.2020 passed by the Commissioner of Customs, New Delhi)

Principal Commissioner of Customs **Appellant**
ACC (Import) Commissionerate,
New Custom House, New Delhi-110037.

VERSUS

M/s Lava International Limited **Respondent**
A-546, Sector-64, Noida,
Uttar Pradesh-201301.

APPEARANCE:

Shri S.K. Rahman, Authorized Representative for the Appellant

Shri Rachit Jain & Shri Ashwini Bhatia, Advocates for the Respondent

CORAM :
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 20.11.2023
Date of Decision: 15.12.2023

FINAL ORDER NOs.51647-51650/2023

HEMAMBIKA R. PRIYA

The present appeal is filed by the Department to assail the Order-in-Appeal No. CCA/Customs/D-I/Import/NCH/612-615/2020-21 dated 20.08.2020 passed by the Commissioner of Customs, New Delhi wherein refund claims filed by the respondent importer was allowed.

2. The brief facts of the case are that M/s Lava International Limited (hereinafter referred to as the respondent Importer) imported mobile phones with standard accessories for home consumption. Accordingly, 447 Bills of Entry were filed during the period May to July, 2014. [These Bills of Entry are covered by the impugned four orders]. These Bills of Entry were self-assessed

under Section 17 classifying the goods under CTH 85171290 of the First schedule to the Customs Tariff Act, 1975. Additional Customs Duty also called CVD at the rate of 6% / 12.50% as leviable under Section 3(1) of the Customs Tariff Act read with Notification No. 12/2012-CE dated 17.03.2012 was paid. The Respondent importer did not claim exemption under Sl. No. 263A of the notification and had self-assessed CVD @ 6% / 12.50%.

3. However, based on a subsequent order of the Supreme Court in **SRF Limited Vs. Commissioner of Customs**, the Respondent importer filed the refund claim for differential CVD, along with manually reassessed Bills of Entry, wherein CVD was leviable @ 1%. The details of four refund applications are as per table below:-

Sl. No.	**Date of filing refund claim**	**Order in Original (OIOs) No./Date**	**Bill of Entry No.**	**Amount of Refund involved (in Rs.)**
1.	26.04.2018	490/AT/2018/18.06.2018	111	9,90,55,214
2.	26.03.2018	129/AKP/2018/27.04.2018	106	9,85,92,161
3.	04.05.2018	492/AT/2018/18.06.2018	110	8,61,48,176
4.	27.04.2018	489/AT/2018/18.06.2018	120	9,98,40,874
		Total	**447**	**38,36,36,425**

3.1 The refund sanctioning authority sanctioned the claim noting that the Bills of Entry had been reassessed, and the claims were filed well within one year from the date of such reassessment. Further the Chartered Accountant certificates were submitted to satisfy the requirements of unjust enrichment under Section 28D. The refund sanctioning authority also issued a corrigendum dated 31.07.2018 replacing the words 'on payment of duty under protest' by 'against duty not paid under protest' in paragraph 1 of the Order-in-Original dated 18.06.2018. The impugned orders were

reviewed by the Commissioner of Customs, ACC Imports, New Delhi under Section 129D, and appeals were filed before the Commissioner of Customs (Appeals), who passed the impugned order upholding the Order-in-Original.

4. The learned counsel submitted that the issue relating to applicability of exemption notification with the conditions of non-availment of Cenvat credit in relation to imported goods was settled by the Hon'ble Supreme Court of India in the favour of importers in **SRF Ltd. Vs. Commissioner of Customs, Chennai – 2015 (318) ELT 607 (SC).** Further, the Hon'ble Supreme Court had also dismissed the Review Petition filed against the said judgment. After the above judgment was delivered, the Respondent filed letters dated 16.05.2015 and 05.06.2015 requesting the Customs for re-assessment of the impugned Bills of Entry and sought refund of the differential CVD which had been paid during clearance. Reminder letter dated 21.12.2017 was issued requesting re-assessment of the impugned Bills of Entry.

5. These Bills of Entry were finally re-assessed in 2018, by the Deputy Commissioner on 12.3.2018/ 13.3.2018/25.4.2018 by manually/physically making the requisite changes in the duty liability on the face of the impugned Bills of Entry. Further, the learned Counsel contended that this re-assessment had been accepted by the Customs authorities as no appeal was filed by the department against the said re-assessment of the impugned Bills of Entry. Consequently they had attained finality. Thereafter, four refund applications was filed on 26.03.2018, 26.04.2018,

27.04.2018 and 04.05.2018 and the same was granted by the Assistant Commissioner (Refund), New Customs House, New Delhi vide four Orders-in Originals.

6. At the outset, the learned Counsel submitted that this issue was no longer res-integra as the identical issue had been decided in favour of the respondent in its own case in Final Order No. 50112-50117/2023. Hence all the four appeals are liable to be dismissed. The learned Counsel further stated that the undisputed facts were that the respondent had sought re-assessment vide letters dated 16.05.2015 and 05.06.2015 post **SRF Limited** decision of Supreme Court. The impugned Bills of Entry were re-assessed in the year 2018. Even though the Department had issued a corrigendum to change the words "re-assessment" to "amendment under Section 149" the same would amount to re-assessment/modification of Bills of Entry, in accordance with the **ITC Limited** decision. Consequently, refund had been claimed post such amendment under Section 149 of the Customs Act.

7. The learned Counsel submitted that the respondent had correctly claimed refund of duty paid and such refund was in consonance with the provisions of Customs Act and the decision in **ITC Limited**. As per the said decision, the provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the Bill of Entry, which had been self-assessed. The learned Counsel submitted that re-assessment or modification of an assessment can be done either under Section 128 or under other relevant provisions of the Customs Act including

Section 17(3), (4) & (5) or Section 149/154 of the Customs Act. Accordingly, once a self-assessment order is duly modified/amended/re-assessed, refund application may be made on the basis of such modified/amended/re-assessed assessment order on Bill of Entry. He contended that in the present case, the respondent had followed the exact procedure laid down by the Hon'ble Supreme Court. The respondent had not availed the 1% CVD exemption at the time of import of mobile phones. This issue was settled in favour of the importers by the Hon'ble Supreme Court in the **SRF Limited,** which came in the month of March, 2015. Thereafter, the impugned Bills of Entry were manually re-assessed in March-April 2018, following which the respondent filed a formal refund application in the months of March-June 2018.

8. The learned Counsel submitted that Bills of Entry are either amended under Section 149 or re-assessed under Section 17 and consequential refund is granted. He relied on the following cases in support of his contention:

(i) Neyveli Lignite Corporation India Limited Vs.Commissioner of Customs – 2022 (4) TMI 1374 – Madras High Court.

(ii) Sinochem India Company Pvt. Ltd. Vs. Union of India & ORS and Hindustan unilever Ltd. Vs. The Union of India & ORS – 2021 (9) TMI 869 – Bombay High Court.

(iii) Principal Commissioner of Customs, New Delhi (Import) Vs. Vivo Mobile India Pvt. Ltd. – 2021 (9) TMI 646 – CESTAT New Delhi.

(iv) Brightpoint India Pvt. Ltd. Vs. Commissioner of Customs, Mumbai (Air Cargo Import) – 2021 (11) TMI 285 – CESTAT Mumbai.

(v) Kirloskar Ferrous Industries Ltd. Vs. Commissioner of Customs, Mangalore – 2021 (4) TMI 1086 – CESTAT Bangalore.

(vi) Calison Fibres Pvt. Ltd. Vs. Commissioner of Customs (Import), Nhava Sheva – 2019 (7) TMI 1060 – CESTAT Mumbai.

9. The learned Counsel submitted that Section 27(1B)(c) provides that in case of any refund arising out of re-assessment, the time limit under Section 27(1), i.e. one year from the date of payment of duty shall be calculated from the date of re-assessment. In the present case, the impugned Bills of Entry were re-assessed/amended in March-April, 2018 and the refund applications were filed in March-June, 2018. Therefore, the refund applications in the instant case were within limitation and not time barred. Hence the aforesaid appeals are liable to be dismissed.

10. The learned Authorized Representative submitted that the self assessed Bills of Entry pertaining to the year 2014 were incorrectly re-assessed on 12.3.2018, 13.03.2018 and 25.04.2018, which was after four years from the date of Bill of Entry, or three years of the SRF judgment. He contended that the officers had realized their mistake and subsequently termed it as "amendment under Section 149" on 30.11.2018, whereas the refunds were sanctioned on 27.04.2018 and 18.06.2018. He contended that the refunds had been sanctioned on wrong re-assessments and hence the refund orders are not legal and proper. The learned Authorized Representative further submitted that the departmental appeals were against the impugned order because an error/mistake had been committed by the officer which had revenue implication to the tune of Rs.38.36 Crore. He submitted that the "re-assessment"

later called as "amendment" as carried out by the officer was not legal and proper.

11. The learned Authorized Representative contended that in 2014, the impugned Bills of Entry had been filed in electronic mode and assessed accordingly. After the SRF judgment, on the request of the respondent importer, the Bills of Entry were manually re-assessed. He submitted that for any manual assessment of Bill of Entry, prior approval of Commissioner is required but in these cases, the same had not been taken. He stated that Board's instruction No. 06/2017 dated 02.06.2017 had reiterated that manual filing and processing of bills of entry shall be allowed only in exceptional and genuine cases, which is to be permitted by the Principal Commissioner/Commissioner of Customs strictly in accordance with the legal provisions w.e.f. 15.06.2017. Such strict guidelines had been issued as the Public Accounts Committee had adversely commented on the continuous instances of manual filing and processing of Bills of entry at several EDI locations in their fiftieth report.

12. The learned Authorized Representative contended that as per the Supreme Court judgment on ITC, to claim the benefit of S. No. 263A of Notification No. 12/2012-CE dated 17.03.2012 the respondent importer should have appealed against the self assessment suo moto before the Commissioner (Appeals). Once self assessment has been done and out of charge has been given, the officer does not have power to recall the Bill of Entry and re-assess it to extend the benefit of notification. The learned

Authorized Representative contended that the doctrine of functus officio holds that once an assessment had been done, the importer had to file an appeal only and the Customs officer lacked the power to re-assess the Bill of Entry. This principle was well established in Customs Act, 1962 and had been upheld in catena of judgments.

13. The learned Authorized Representative further contended that as per Section 27(1) of Customs Act, 1962, the time limitation for filing any refund is from relevant date of payment of duty. In the instant case, the time lines were that the Bills of Entry were filed and assessed between May, 2014 to July 2014; the refund applications were filed between 26.3.2018 to 4.5.2018, well after the expiry of the prescribed time-limit. He further submitted that all refund orders says "refund claim is not barred by limitation as per provision to Section 27(1)", whereas the refund claims were time barred by four years. The refund was sanctioned on the basis that the "date of re-assessment was 12.03.2018, and 13.3.2018, 18.3.2018 and 25.04.2018 which within one year from the date of re-assessment". However, on 30.11.2018 (after 8 months) a letter was issued substituting the word "re-assessment" with "amendment under Section 149". Thus the refund sanction orders were a bundle of errors. The respondent did not pay duty under protest as stipulated in second proviso of Section 27 of the Customs Act. The learned Authorized Representative stated that the importer had taken advantage of Section 149 wherein no time limit had been prescribed.

14. He further submitted that the importer cannot take benefit S.No. 263A of Notification No. 12/2012-CE dated 17.03.2012 as condition 16 says, "if no credit is taken in respect of inputs or capital goods used in manufacture of goods." Credit taken would arise only when central excise duty is paid on the inputs or capital goods. In the case of domestic supply, the duty paid on inputs are supplied with invoice on which Cenvat credit can be taken. However, in cases of import, no central excise duty is paid on inputs or capital goods used in manufacture of finished goods which are imported. As regards the final order passed by the Tribunal in the respondent importer case, the learned Authorized Representative submitted that aspects such as apparent mistakes in refund sanction orders, time bar issue, had not been properly presented before the CESTAT. Applying the doctrine of per incuriam, the earlier order may not influence the decision making in the instant appeal. The learned Authorised Representative at the end prayed that the case may be remanded to the original authority.

15. We have heard the rival contentions. The two issues for consideration in the appeal is as follows:

(a) Whether refund can be claimed by the respondent on Bills of Entry amended under Section 149 of the Customs Act, 1962.

(b) Whether the said refund claims are time-barred.

16. We note that the issue is no longer res integra. The Principal Bench of this Tribunal in the respondent importer's own case;

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had considered these two issues in detail and held as under:

> **"11.** It transpires that the respondent had earlier filed Bills of Entry in respect of the imported mobile phones and parts and accessories of mobile phones but did not claim the benefit of the Notifications under which a manufacturer is given an option to pay lesser rate of duty subject to fulfilment of certain conditions. Subsequently, in view of the decision of the Supreme Court in SRF regarding the conditions attached to the Notification, the Bills of Entry were amended in 2018 by the Deputy Commissioner, which order attained finality as no appeal was filed by the department to assail this order. Refund applications filed by the respondent were, however, rejected by the Assistant Commissioner for the reason that not only were they time barred, but otherwise also the respondent should have filed appeals against the assessment order rather than seeking amendment in view of the decision of the Supreme Court in ITC. The Commissioner (Appeals), however, allowed the appeals filed by the respondent holding that neither were the refund claims barred by time nor was it necessary for the respondent to file appeals against the assessment order when the respondent had sought amendment in the Bills of Entry and the Bills of Entry were amended, which order had attained finality.
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> **12.** Two issues would, therefore, have to be examined in this appeal, namely, as to whether refund could have been claimed by the respondent as the Bills of Entry were amended under section 149 of the Customs Act and whether the refund claims filed by the respondent were barred by time.
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> **13.** In regard to the first issue much emphasis has been placed by the learned special counsel appearing for the department on the decision of the Supreme Court in ITC. The issue involved before the Supreme Court in all the Civil Appeals was whether, in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty can be entertained. The Bench of the Tribunal at Kolkata had opined that unless the order of assessment is appealed, no refund application against the assessed duty can be entertained. On the other hand, the Delhi High Court had opined that when there is no assessment order for being challenged in appeal, because there is no contest or lis and hence no adversarial adjudication, a refund application can be maintained even if appeals are not filed against the assessed bills of entry. The Madras High Court had also similarly opined. The first question that arose for consideration before the Supreme Court was whether a self-assessment, when there is no speaking order, can be termed to be an order of self-assessment. It was urged on behalf of the assessees that there is no application of mind in such a situation and merely an endorsement is made by the authorities concerned on the Bills of Entry which endorsement cannot be said to be an order, much less a speaking order. This contention of the assessees was not accepted by the Supreme Court and it was held that the endorsement made on the Bills of Entry would be an order of assessment and that when there is no lis, a speaking order is not required to be passed in "across the counter affair". The Supreme Court then examined the provisions of sections 17 and 27 of the Customs Act, both prior to the amendments made by Finance Act, 2011 and after the amendments, and observed that there is no difference even after the amendments as self-assessment is also an assessment.

14. It needs to be noted that in *Escorts Ltd.* v. *Union of India & Ors* 2002-TIOL-2706-SC/1998 (97) E.L.T. 211 (S.C.), the issue that had arisen for consideration before the Supreme Court was regarding the Bills of Entry classifying the imported goods under a particular tariff item and payment of duty thereon. The Supreme Court held that in such a case signing the Bills of Entry itself amounted to passing an order of assessment and, therefore, an application seeking refund on the ground that the imported goods fell under a different tariff item attracting lower rate of duty, should be filed within six months after the payment of duty. The Supreme Court, therefore, held that the signature made in the Bills of Entry was an order of assessment of the assessing officer.

15. The Supreme Court, thereafter, in ITC observed that the provisions relating to refund were more or less in the nature of execution proceedings and it would not be open to an authority, while processing a refund application, to make a fresh assessment on merits. The relevant portions of the judgment of the Supreme Court are reproduced below:

> "44. *The provisions under section 27 cannot be invoked in the absence of amendment or modification having been made in the bills of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27.* The refund proceedings are in the nature of execution for refunding amount. It is not assessment or reassessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, reassessment is not permitted nor conditions of exemption can be adjudicated. Reassessment is permitted only under section 17(3),(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or reassessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under section 27.
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> ** ** **
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> 47. When we consider the overall effect of the provisions prior to amendment and post amendment under Finance Act, 2011, *we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of section 27 to set aside the order of self-assessment and reassess the duty for making refund;* and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Act.
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> 48. Resultantly, we find that the order(*s*) passed by the Customs, Excise and Service Tax Appellate Tribunal is to be upheld and that passed by the High Courts of Delhi and Madras to the contrary, deserves to be and are hereby set aside. We order accordingly. We hold that the application for refund were

not maintainable. The appeals are accordingly disposed of. Parties to bear their own coasts as incurred."

(*emphasis supplied*)

16. It would, at this stage, be appropriate to examine sections 17, 27, 149 and 154 of the Customs Act.

17. Section 17 of the Customs Act deals with assessment of duty. While sub-section (1) deals with assessment, sub-section (4) deals with reassessment. The relevant portions of section 17 are reproduced below:

"**17. Assessment of duty**. -

(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary:

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any reassessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said reassessment in writing, the proper officer shall pass a speaking order on the reassessment, within fifteen days from the date of reassessment of the bill of entry or the shipping bill, as the case may be."

18. Section 27 of the Customs Act deals with claim for refund of duty and the portion of this section relevant for the purposes of these appeals is reproduced below:

"27. Claim for refund of duty

(1) Any person claiming refund of any duty or interest,-

(*a*) paid by him; or

(*b*) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest."

** ** **

(1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely:-

(*a*) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year shall be computed from the date of issue of such order;

(*b*) where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment , decree, order or direction;

(*c*) where any duty is paid provisionally under section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of reassessment, from the date of such reassessment.

(2) If, on receipt of any such application, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund."

19. Section 149 of the Customs Act deals with amendment of documents and is reproduced below:

"**149. Amendment of documents. -**

Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended in such form and manner, within such time, subject to such restrictions and conditions, as may be prescribed:

PROVIDED that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be."

20. Section 154 of the Customs Act deals with correction of clerical errors and is reproduced below:

"154. Correction of clerical errors, etc.

Clerical or arithmetical mistakes in any decision or order passed by the Central Government, the Board or any officer of customs under this Act, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be."

21. In paragraph 44 of the judgment of the Supreme Court in ITC, which has been reproduced in paragraph 16 of this order, the Supreme Court observed that the provisions of section 27 cannot be invoked in the absence of amendment or modification having been made in the Bills of Entry on the basis of which self-assessment was made. The Supreme Court further observed that refund proceedings are in the nature of execution proceedings and, therefore, the order of self-assessment is required to be followed unless modified/amended before the claim for refund is entertained under section 27. In this connection, the Supreme Court relied upon the decision of the Supreme Court in *Priya Blue Industries Ltd.* v. *Commissioner of Customs (Preventive)* 2004 (172) E.L.T. 145 (S.C.)/2004 taxmann.com 347 (SC).

22. The Supreme Court ultimately observed in paragraph 47 of the judgment that the overall effect of the provisions of section 27 of the Customs Act, both prior to the amendment and post amendment, is that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified "in accordance with law by taking recourse to appropriate proceedings".

23. In view of the aforesaid judgment of the Supreme Court in ITC. It was open to the respondent to invoke the provisions of section 149 or 154 of the Customs Act for seeking amendment in the Bills of Entry or correction in the Bills of Entry for claiming refund.

24. The Bombay High Court in *Dimension Data India* v. *Commissioner of Customs and anr* 2021 (1) 1042 Bombay High Court 2021 (376) E.L.T. 192 (Bom.) examined this precise issue and after referring to the provisions of sections 149 and 154 of the Customs Act, observed as follows:

"18. *From a careful analysis of section 149, we find that under the said provision a discretion is vested on the proper officer to authorise amendment of any document after being presented in the customs house*. However, as per the proviso, no such amendment shall be authorised after the imported goods have been cleared for home consumption or warehoused, etc. except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, etc. Thus, amendment of the Bill of Entry is clearly permissible even in a situation where the goods are cleared for home consumption. The only condition is that in such a case, the amendment shall be allowed only on the basis of the documentary evidence which was in existence at the time of clearance of the goods.

19. *This bring us to section 154 of the Customs Act which deals with correction, clerical errors, etc*. It says that clerical or arithmetical mistakes in any decision or order passed by the Central Government, the Board or any officer of customs under the Customs Act or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be.

Thus, section 154 permits correction of any clerical or arithmetical mistakes in any decision or order or of errors arising therein due to any incidental slip or omission. Such correction may be made at any time.

20. *From a conjoint reading of the aforesaid provisions of the Customs Act, it is evident that customs authorities have the power and jurisdiction to make corrections of any clerical or arithmetical mistakes or errors arising in any decision or order due to any accidental slip or omission at any time which would include an order of self-assessment post out of charge*.

21. Having noticed and analysed the relevant legal provisions, we may now turn to the decision of the Supreme Court in *ITC Ltd.* v. *Commissioner of Central Excise, Kolkata IV* (*supra*). The question which arose before the Supreme Court was whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty could be entertained.

22.1. *From the question itself, it is clear that the issue before the Supreme Court was not invocation of the power of reassessment under section 17(4) or amendment of documents under section 149 or correction of clerical mistakes or errors in the order of self-assessment made under section 17(4) by exercising power under section 154 vis-à-vis challenging an order of assessment in appeal*. The issue considered by the Supreme Court was whether in the absence of any challenge to an order of assessment in appeal, any refund application against the assessed duty could be entertained. In that context Supreme Court observed in paragraph 43 as extracted above that an order of self-assessment is nonetheless an assessment order which is appealable by "any person" aggrieved thereby. It was held that the expression "any person" is an expression of wider amplitude. Not only the revenue but also an assessee could prefer an appeal under section 128. Having so held, Supreme Court opined in response to the question framed that the claim for refund cannot be entertained unless order of assessment or self-assessment is modified in accordance with law by taking recourse to appropriate proceedings. It was in that context that Supreme Court held that in case any person is aggrieved by any order which would include an order of self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Customs Act (*emphasis ours*).

22.2. *Therefore, in the judgment itself Supreme Court has clarified that in case any person is aggrieved by an order which would include an order of self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Customs Act before he makes a claim for refund. This is because as long as the order is not modified the order remains on record holding the field and on that basis no refund can be claimed but the moot point is Supreme Court has not confined modification of the order through the mechanism of section 128 only*. Supreme Court has clarified that such modification can be done under other relevant provisions of the Customs Act also which would include section 149 and section 154 of the Customs Act."

28. Thus, in view of the aforesaid decisions of the Bombay High Court in Dimension Data India and the Telangana High Court in Sony India, the respondent could take recourse to appropriate proceedings, including the provisions of section 149 or 154 of the Customs Act for

either seeking amendment of the Bills of Entry. These two decisions have placed reliance on the decision of the Supreme Court in ITC.

29. In the present case, the order carrying out an amendment in the Bills of Entry under section 149 of the Customs Act attained finality, as the department did not challenge these orders in appeal. It is only during the course of refund applications that the department took a stand that since the order of the assessment was not assailed by the respondent in appeal under section 128 of the Customs Act, the refund applications could not be allowed. Such a stand could not have been taken by the Department. If the department felt aggrieved by the order seeking an amendment in the Bills of Entry under section 149 of the Customs Act, it was for the department to have assailed the order by filing an appeal under section 128 of the Customs Act. This plea could not have been taken by the department to contest the claim of the respondent while seeking refund filed as a consequence of the reassessment of the Bills of Entry or amendment in the Bills of Entry.

30. The Commissioner (Appeals), therefore, committed no illegality in taking a view that refund has to be granted to the respondent as the order for amendment in the Bills of Entry had attained finality.

31. The second issue that needs to be decided is whether the refund claims were barred by time. The department contends that the period of one year should be counted from the date of assessment and not from the date of amendment was carried out in the Bills of Entry. This contention of the department has not found favour with the Commissioner (Appeals) and nor are we inclined to accept this plea of the department. The Commissioner (Appeals) held that if section 149 of the Customs Act relating to amendment in the Bills of Entry is made applicable, the cause of action for claiming refund would arise only after the amendment is made and so the limitation for claiming refund would start from that date. In coming to this conclusion, the Commissioner (Appeals) placed reliance upon the decision of the Bombay High Court in *Keshari Steels* v. *Commissioner of Customs, Bombay* 2000 (115) E.L.T. 320 (Bom.), wherein what was examined was whether the rejection of the refund claim on the ground of limitation contemplated under section 27 of the Customs Act was justified. It was held by the Bombay High Court that the refund was within time from the date the rectification was carried out and limitation was not to be counted from the date of assessment. This decision has been affirmed by the Supreme Court in 2000 (121) E.L.T. A139 (S.C.). The Commissioner (Appeals) as also relied on the decision of the Tribunal in *Commissioner of Cus. (Import)* v. *Indian Farmers Fertiliser Co-Op. Ltd.* 2008 (230) E.L.T. 667 (Tri.-Mumbai), which decision relied upon the decision of the Bombay High Court in Keshari Steels.

32. The decision of the Bombay High Court in Keshari Steels and the decision of the Tribunal in Indian Farmers were considered by the Bombay High Court in *Commissioner of Cus. (Import)* v. *Indian Farmers Fertiliser Co-Op. Ltd.*2009 (243) E.L.T. 687 (Bom.) and it was held that:

> "2. *Vide* order dated 13-12-2001, the assessing officer rectified the mistake by modifying the assessment order and holding that the goods were assessable at the rate of 5%, but rejected claim as being time-barred under the provisions of Section 27 of the Customs Act, 1962. *The tribunal relying upon the judgment of this Court in Keshari Steels v. Collector of Customs, Bombay [2000 (115) E.L.T. 320 (Bom.)] has held that the rejection of refund claim of the appellant as being time-barred under the provisions of Section 27 of the Customs Act, 1962 is not in*

accordance with law. The tribunal however remanded the matter to consider the question of unjust enrichment.

3. We have heard learned counsel for the appellant. It is contended that the tribunal erred in holding that the claim is not time-barred. It is contended that the limitation runs from the date of payment of duty and not from the date of rectification. We find it difficult to accept this contention. *Till the assessment order is rectified, the question of refund would not arise at all. In the present case, the assessment order was rectified on 13-12-2001 pursuant to the order of the Supreme Court dated 13-3-2001. In the present case, the refund claim was made even prior to the rectification. Therefore, the refund claim could not be said to be time-barred.*"

(*emphasis supplied*)

33. It would be seen that the Bombay High Court held that the question of refund would arise only when the assessment order is rectified.

34. The Commissioner (Appeals), therefore, committed no illegality in holding that the refund claims were not barred by time.

35. In view of the aforesaid discussion, there is no illegality in the order of the Commissioner (Appeals) allowing the six appeals filed by the respondent.

36. The present appeals that have been filed by the department to assail the orders passed by the Commissioner (Appeals), therefore, deserve to be dismissed and are dismissed. The six stay applications filed by the department in the six appeals, therefore, also stand rejected."

17. It has also been brought to our notice that the aforesaid order of the Tribunal has attained finality, as no appeal has been filed. In view of the same, we dismiss the appeals filed by the Department.

(pronounced in the court on 15.12.2023)

(BINU TAMTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER(TECHNICAL)

RM/SS