CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 51132 OF 2020

(Arising out of Order-in-Appeal No. CCA/Customs/D-I/Import/NCH/616-621/2020-21 dated 24.08.2020 (received on 28.08.2020) passed by Commissioner of Customs (Appeals), NCH, New Delhi)

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

Versus

M/s Lava International Limited, **...Respondent**
A-56, Sector-64, Noida,
Uttar Pradesh-201301

With

CUSTOMS APPEAL NO's.

50236 of 2021	**50237 of 2021**	**50238 of 2021**
50239 of 2021	and	**50240 of 2021**

APPEARANCE:

Shri Mihir Ranjan, Special Counsel and Ms. Jaya Kumari, Authorized Representative for the Department

Shri B.L. Narasimhan, Shri Rachit Jain and Shri Ashwani Bhatia, Advocates for the Appellant

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 30.11.2022
Date of Decision: 10.02.2023

FINAL ORDER NO. 50112-50117/2023

JUSTICE DILIP GUPTA:

M/s Lava International Limited[1], respondent in all the six appeals filed by the department, imported mobile phones during February 2014 to July 2014 classifying them in the Bills of Entry under Customs Tariff

1. **the respondent**

Item[2] 8517 12 90 of the First Schedule to the Customs Tariff Act, 1975[3]. The respondent also imported parts and accessories of mobile phones during the said period. Additional duty of customs[4] leviable under section 3(1) of the Tariff Act @ of 6% under Serial No. 263A of the Notification No. 12/2012-CE dated 17.03.2012 was paid by the respondent. Under the said Notification a manufacturer is also given an option to pay excise duty at the rate of 1% on mobile phones subject to the fulfillment of the condition that CENVAT credit on inputs and capital goods is not claimed under rule 3 read with rule 13 of the CENVAT Credit Rules, 2004[5] for manufacture of the mobile phones. Under Serial No. 132 of Notification No. 1/2011-CE dated 01.03.2011, as amended by Notification No. 16/2012-CE dated 17.01.2012, a manufacturer is also given an option to pay excise duty at the rate of 2% on 'parts, components and accessories namely, battery chargers, PC connectivity cables, memory card and hands-free headphones of mobile handsets' falling under any Chapter under the Tariff Act. This is also subject to the fulfillment of the condition that CENVAT credit on inputs and capital goods is not claimed. The above benefits were not availed by the respondent at the time of import as it was under an impression that it did not satisfy the condition set out in the Notification.

2. The issue relating to applicability of conditions of non-availment of CENVAT credit in relation to the imported goods under the Notification was settled by the Supreme Court in favour of the importers in **SRF Ltd.** vs. **Commissioner of Customs, Chennai**[6]. The Supreme

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2. CTI
3. the Tariff Act
4. CVD
5. the 2004 Rules
6. 2015 (318) E.L.T. 607 (S.C.)

Court also dismissed the review petition filed by the department and the decision is reported in **2016 (340) E.L.T. A202(S.C.)**.

3. After the aforesaid judgment was delivered by the Supreme Court in **SRF**, the respondent filed letters dated 16.05.2015 and 05.06.2015 for re-assessment of the Bills of Entry and also claimed refund of differential CVD. This refund request was rejected verbally and the respondent was asked to get re-assessment of these Bills of Entry. The Bills of Entry were initially re-assessed in March 2018 by the Deputy Commissioner by manually/physically making the requisite changes in the duty liability on the face of the Bills of Entry, but the Deputy Commissioner, by a letter dated 22.11.2018, amended the re-assessment orders under section 154 of the Customs Act, 1962[7] to the effect that the word 're-assessed' was directed to be read as 'amendment' under section 149 of the Customs Act. This order amending the Bills of Entry has been accepted by the customs authorities as no appeal has been filed by the department.

4. Consequently, the respondent applied for refund of differential CVD and the details of the six refund applications are as follows:

S. No.	**Date of filing Refund Claim**	**Amount of Refund (in Rs.)**
1.	15.06.2018	6,86,36,737
2.	15.06.2018	7,29,79,493
3.	28.06.2018	4,83,13,149
4.	15.06.2018	2,41,26,536
5.	04.05.2018	7,12,89,293
6.	28.06.2018	9,03,97,041
Total		**37,57,42,248**

5. These six refund applications were rejected by a common order dated 25.11.2019 by the Assistant Commissioner for the reason that

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7. the Customs Act

they were time barred and for the reason that the Supreme Court in **ITC Ltd.** vs. **Commissioner of Central Excise, Kolkata-IV and others**[8] had held that an assessment order can be challenged in an appeal filed under section 128 of the Customs Act.

6. The respondent filed six appeals against the said order dated 25.11.2019 before the Commissioner (Appeals), which appeals were allowed by order dated 21.08.2020 for the following reasons:

(i) The Bills of Entry were amended and no appeal has been filed by the department against such orders. Thus, the orders attained finality and it would not be open for the refund sanctioning authority to challenge them while dealing with refund applications;

(ii) Refund has been filed consequent to amendment made in the Bills of Entry. Thus, refunds filed within one year from date of such amendment cannot be said to be time barred; and

(iii) The Supreme Court in **ITC** held that the claim for refund cannot be entertained unless the order of assessment is modified in accordance with law by taking recourse to appropriate proceedings and it does not restrict such proceedings only to an appeal filed under section 128 of the Customs Act.

7. The relevant portions of the aforesaid order dated 21.08.2020 passed by the Commissioner (Appeals) are reproduced below:

> "5.4.9 Thus if the self-assessment is modified under any of the above provisions of the Act and the same results in lowering of duty liability than what was paid on account of self-assessment, refund claim would

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8. 2019 (368) E.L.T. 216 (S.C.)

arise and the same has to be entertained under section 27 of the Customs Act, 1962. **Hon'ble Supreme Court has nowhere stated that reassessement can only be done after obtaining an appellate order by filing appeal under section 128 of the Act. Thus, I find no contradiction in the reassessments done and the law laid down by Hon'ble Supreme Court in ITC Ltd. [2019 (368) ELT 246 (SC)].**

5.5 Another plea that has been taken by the Refund Sanctioning Authority is that the reassessment done by the Deputy Commissioner Gr VA was modified to 'amendment under Section 149 of the Act' by the Deputy Commissioner Gr VA in terms of powers conferred to him under section 154 of the Act. Without going into merits of this action of Deputy Commissioner Gr VA, **even if it is accepted that bills of entry were not reassessed but amended under section 149 of the Act, the fact still remains that the assessment in the impugned BoEs got modified/amendment was in accordance with the law and entitled the Appellant refund of excess CVD paid.**

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5.7.3 **For argument sake, even if it is accepted that bills of entry were not reassessed but amended under section 149 of the Act, the claims are still within time.** It is admitted fact that by way of reassessment (or amendment under Section 149 of the Act), the bills of entry has been modified and CVD rate has been shown to be leviable @1% and the CVD amount has also been modified. Evidently, CVD paid was more than the amount indicated by such reassessment (or amendment under Section 149 of the Act). **Thus, the cause of action for claiming refund arose only after such amendment. It is trite law that limitation period would start from the date of cause of action in such cases.** There are several case laws which lay down that in cases of amendment or rectification of bills of entry, the limitation for filing refund claim would start from the date of such amendment or rectification."

(emphasis supplied)

8. Shri Mihir Ranjan, learned special counsel appearing for the department assisted by Ms. Jaya Kumari, learned authorized representative for the department submitted that:

(i) The Commissioner (Appeals) erred in not appreciating the correct factual and legal position;

(ii) The respondent had necessarily to file an appeal against the assessment order;

(iii) The Commissioner (Appeals) overlooked the fact that after the order was passed, the officer had become functus officio;

(iv) The Commissioner (Appeals) failed to appreciate that as per section 27 (1B)(b) of the Customs Act, a refund is admissible within one year of the date of judgment, decree, order, or direction as a consequence of which refund was barred by time;

(v) The Commissioner (Appeals) wrongly assumed that the Bills of Entry were re-assessed @1% additional duty of customs leviable under section 3(1) of the Tariff Act based on the judgment of the Supreme Court in the **SRF** as the Assistant Commissioner could not have made a re-assessment, as only an appeal could have been filed; and

(vi) The Commissioner (Appeals) erred in considering the case as falling under section 154 of the Customs Act.

9. Shri B.L. Narasimhan, learned counsel for the respondent assisted by the Shri Rachit Jain and Shri Ashwani Bhatia submitted that:

(i) The respondent had sought amendment in the Bills of Entry and the Bills of Entry were amended in the year 2018. This would be in accordance with the judgment of the Supreme Court in **ITC** and refund can be claimed on the basis of such amendment made under section 149 of the Customs Act;

(ii) The respondent correctly claimed refund of duty paid by it and such refund is in consonance with the provisions of the Customs Act and the judgment of the Supreme Court in **ITC**;

(iii) The amendment in the Bills of Entry attained finality in the absence of an appeal and the Deputy Commissioner does not have the power to review his own order;

(iv) The claim for refund is not time barred; and

(v) Sections 17 or 149 of the Customs Act do not provide time limit for seeking amendment of the Bills of Entry.

10. The submissions advanced by the learned special counsel appearing for the department and the learned counsel for the respondent have been considered.

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 fulfillment 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.

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.

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 assesses 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 assesses 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**[9], 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,

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9. 2002-TIOL-2706-SC

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 bill 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 re-assessment 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, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment 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 re-assessment 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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> 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."
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> **(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 re-assessment. The relevant portions of section 17 are reproduced below:

> "**17. Assessment of duty –**
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> **(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.
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> **(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 re-assessment 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 re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment 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."

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(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 re-assessment, from the date of such re-assessment.

(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.** vs. **Commissioner of Customs (Preventive)**[10].

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10. 2004 (172) E.L.T. 145 (S.C.)

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 sections 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** vs. **Commissioner of Customs and anr**[11] 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.
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> 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

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11. 2021 (1) TMI 1042 – Bombay High Court

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.

20. **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.**

21. **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.**

22. Having noticed and analysed the relevant legal provisions, we may now turn to the decision of the Supreme Court in ITC Ltd. vs. 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 re-assessment 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."

(emphasis supplied)

25. The Telangana High Court in **M/s. Sony India Pvt. Ltd.** vs. **Union of India and another** [12] also examined almost a similar controversy as has been raised in the present appeals. The appellant therein had imported mobile phones in India for trading purposes during the period 04.08.2014 to 29.01.2015. At the time of import of the

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12. 2021 TIOL-1707-HC-Telangana-CUS

mobile phones, the petitioner had not claimed any exemption under serial no. 263A (ii) of the Exemption Notification which allowed payment of Additional Duty at the rate of 1% only in the Bills of Entry in view of the decision of the Supreme Court in **SRF**. The petitioner, in view of the decision in Supreme Court in **ITC**, made an application for amendment of the Bills of Entries under section 149 of the Customs Act so that after that the duty could be refunded. The application filed by the petitioner was however, rejected. The contentions of the petitioners, as noted in paragraphs 14, 19 and 20 of the judgment of the Telangana High Court, are reproduced below:

> 14. The petitioner contends that the impugned order has been passed in complete contradiction with the decision of the Supreme Court in ITC Ltd. (supra) wherein it has been held that a BoE is required to be amended or modified, under the relevant provisions of the Customs Act, before filing of a refund application under Section 27 of the Customs Act; that under the Customs Act, a BoE can be either modified by way of filing an appeal under Section 128 of the Customs Act or can be amended under Section 149 and / or 154 of the Customs Act; that under the Customs Act, there is no other manner in which a BoE can be modified or amended part from these two methods; **thus, from the above observations of the Supreme Court, it is very clear that a refund of any excess duty paid while filing the BoE, can be claimed under Section 27 of the Customs Act when such a BoE is amended; that the 2nd** respondent has not even considered the decision of the Supreme Court in ITC Ltd. (supra); that the Supreme Court clearly stated in the above case that a BoE has to be amended before filing a claim of refund under Section 27; and that the ratio of decision is very clearly applicable, and it is squarely covered in the present case.
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19. Petitioner also contended that the 2nd respondent erred in holding that the BoEs should have been challenged only by way of filing an appeal before the Appellate authority and on not being challenged, the assessment became final.

20. **Petitioner pointed out that a BoE can be amended either by filing an appeal u/s.128 or being amended under Sec.149 of the Act; and he could not have insisted that only an appeal is a proper remedy to amend the BoEs ignoring Sec. 149 of the Act.**

(emphasis supplied)

26. The contention of the Department, as noted in paragraphs 23, 24 and 26 of the aforesaid judgment are reproduced below:

"23. It is contended that meanwhile the Supreme Court in ITC Ltd. (2 supra) held that refund under Section 27 would only be permissible when the Bill of Entry had been amended or modified under the provisions of the Customs Act, 1962; that in ITC Ltd. (2 supra), it was held that the refund under the provisions of Section 27 of the Customs Act, 1962 would only be available when Bill of Entry has been amended or modified under the provisions of Custom Act, 1962; that in the instant case, the petitioners filed self-assessed Bills of Entry and not disputed the assessment, and the assessment had attained finality; that it is not the case of any error or lapse apparent on account of 2nd respondent's - Department; that petitioner was required to seek re-assessment as provided under the provisions of Section 128 of the Customs At, 1962 within such stipulated time and as per the conditions provided therein.

24. According to the 2nd respondent, the petitioner's request for amending the BoE is against the provisions of the Customs Act and was not sustainable.

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26. It further stated that same action cannot be sought under two different sections of the Customs Act, 1962; that there is a specific provision for re-assessment as provided under Section 128 of the Customs Act, 1962;

> that if re-assessment has to be carried out under Section 149 without any limitation of time, the existence of the provisions of Section 128 and Appeal mechanism therein would become redundant; and if at all the amendments, even in the nature of re-assessment, are to be carried out under the provisions of Section 149, there is no requirement for the existence of the provisions of Section 128 or other similar provisions."

27. The Telangana High Court noted that though there is a remedy of an appeal against the assessment of the Bills of Entry, but section 149 of the Customs Act also enables an assessee to seek amendments in the Bills of Entry. The relevant portions of the judgment are reproduced below:

> "33. **So Sec.149 is an additional remedy available to the petitioner to seek amendment of the BoEs subject to the** condition that such amendment is sought 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.
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> 34. In the decision of the Supreme Court in ITC Ltd. (supra) while holding that the refund cannot be granted by way of a refund application under Section 27 of the Act until and unless an assessment order is modified and a fresh order of assessment is passed and duty re-determined, **the Supreme Court nowhere said that such amendment or modification of an assessment order can only be done in an Appeal under Section 128.** In para 47, the Court held categorically.
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> 35. **Thus, even the Supreme Court clearly indicated that the modification of the assessment order can be either under Section 128 or under other relevant provisions of the Act i.e. Section 149.**
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> 36. Therefore, the stand of the respondents in the counter affidavit that only reassessment under Section 128 is the remedy available to the petitioner, and Section 149 cannot be invoked, is not tenable. We

also reject the plea of the 2nd respondent that there is no possibility of getting modified an order of assessment under any other relevant provision and that petitioner is trying to overcome limitations stipulated in Section 128.

37. The only condition required to be fulfilled for seeking amendment of documents such as a BoE under Section 149 is that such amendment should be sought 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.

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46. Moreover, the said order was passed on 28.06.2019 prior to the decision in ITC Ltd. (supra) on 18.09.2019. **The Supreme Court has clarified in para no.47 of ITC Ltd. (supra) that an order of assessment can be modified either under Section 128 or under other relevant provisions of the Act, and thus clarified that modification of an order of assessment can also be sought under Section 149 of the Act, its judgment has to be followed by the 2nd respondent, as it is binding under Article 141 of the Constitution of India.**

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48. Further, it is the duty and responsibility of the Assessing Officer / Assistant Commissioner to correctly determine the duty leviable in accordance with law before clearing the goods for Home consumption. The assessing officer instead, having failed in correctly determining the duty payable, has caused serious prejudice to the importer / petitioner at the first instance. Thereafter, in refusing to amend the Bill of Entry under Section 149 of the Act, to enable the importer / petitioner to claim refund of the excess duty paid, the Assessing Authority / Assistant Commissioner caused further great injustice to petitioner.

49. **Also, the Assessing Authority has failed to consider the fact that Section 149 of the Act does not prescribe any time limit for amending the Bill of Entry filed and assessed. The power to amend under Section 149 of the Act is a discretionary**

> **power vested with the authority.** Since, it is due to incorrect determination of duty by the assessing authority initially, the petitioner is compelled to seek amendment of Bill of Entry under Section 149 of the Act. Thus, the importer / petitioner cannot be penalized for what the authority ought to have done correctly by himself."
>
> **(emphasis supplied)**

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 sections 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 re-assessment 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** vs. **Commissioner of Customs, Bombay**[13], 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)** vs. **Indian**

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13. 2000 (115) E.L.T. 320 (Bom.)

Farmers Fertiliser Co-Op. Ltd.[14], 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)** vs. **Indian Farmers Fertiliser Co-Op. Ltd.**[15] 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 Vs. 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.**"
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> **(emphasis supplied)**

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14. 2008 (230) E.L.T. 667 (Tri.-Mumbai)
15. 2009 (243) E.L.T. 687 (Bom.)

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.

(Order Pronounced in Open Court on **10.02.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya/JB