

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, CHENNAI**

Customs Appeal No.40233 of 2023

(Arising out of Order in Appeal Seaport C. Cus. II No. 785/2021 dated 17.12.2021 passed by the Commissioner of Customs (Appeals – II), Chennai)

M/s. Valeo India Pvt. Ltd.

CEE DEE Yes IT Park
Block I, No. 63, Rajiv Gandhi Salai
Navalur, Chennai – 600 130.

Appellant

Vs.

Commissioner of customs

Chennai II Commissionerate
Custom House
60, Rajaji Salai
Chennai – 600 001.

Respondent

APPEARANCE:

Shri Ganesh Aravindh, Advocate for the Appellant
Shri R. Rajaraman, AC (AR) for the Respondent

CORAM

Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40393/2023

Date of Hearing : 15.03.2024

Date of Decision: 10.04.2024

The present appeals is against Order in Appeal Seaport C. Cus. II No. 785/2021 dated 17.12.2021 passed by the Commissioner of Customs (Appeals – II), Chennai.

2. Brief facts of the case are that M/s. Valeo India Pvt. Ltd., the appellant herein filed various Bills of Entry (**BE**) for the clearance of 'Electronic Parts of Lighting Equipment' through their Customs Broker. The appellant vide letter dated 13.9.2019 to the Department contended that import of certain 'lighting parts' used in manufacturing of lighting equipment was erroneously declared under a wrong Customs Tariff Heading (**CTH**) 85122010/20 and they paid higher rate

of customs duty during the period January 2019 to July 2019. They submitted that the same parts were imported earlier to the aforesaid period under the correct CTH 85129000. They had requested to consider their submission on record and allow them to amend the bills of entry under section 149 of the Customs Act, 1962 (**CA '62**). The adjudicating authority after due process of law rejected the request. On appeal, the Commissioner (Appeals) upheld the same. Hence the present appeal before this Tribunal.

3. Shri Ganesh Aravindh, learned Counsel appeared for the appellant and Shri R. Rajaraman, learned Assistant Commissioner (AR) appeared for the respondent.

4. Shri Ganesh Aravindh, learned Counsel submitted that during the period January 2019 to July 2019, they had imported various parts and components of lighting equipment vide 16 BE's by incorrectly classifying the goods under CTH 8512 2010 and 8512 2020 as 'lighting equipment', instead of CTH 8512 9000 as 'parts of lighting equipment'. Therefore, to rectify the inadvertent error in classification and seek refund of the excess duty paid on the imported components, the Appellant submitted letter dated 13.09.2019 to the Ld. Assistant Commissioner along with copies of necessary documents like erroneously and correctly filed BE's and invoices seeking amendment of Bill of Entry's under Section 149 of Customs Act, 1962. However, the same was rejected by the Ld. Assistant Commissioner vide Letter dated 22.10.2019. The letter as submitted by the learned counsel is reproduced below;

"Please refer to your letter dated 13.9.2019.

In this connection, it is informed that the goods imported like Fresnel, Bulb shield, MCA PCBA, Monodrive were all parts of light signalling equipment and are used as fittings to lighting equipment like head lamp, rear lamp, fog lamps etc., hence rightly classified under CTH

8512 2020 which covers “other automobile lighting equipment”. Your request to classify under CTH 85129000 is rejected. Once an order of assessment is passed, the duty would be payable as per the order, unless that order of assessment including self-assessment is duly modified by way of appeal. Hence you are advised to approach the appellate forum to redress the grievance.”

Accordingly, the Appellant filed an Appeal before the Ld. Commissioner (Appeals) against the Letter dated 22.10.2019. The Ld. Commissioner (Appeals) passed Order-in-Appeal Seaport C.Cus.II No. 970/2020 dated 09.10.2020, the decision of which is as under;

“8. The letter issued by the Assistant Commissioner (Gr. 5A) is ambiguous and does not speak for itself. The reason for rejection is not amplified in the letter. When the appellant has sought classification under a particular CH and the same is not acceptable to the Assistant Commissioner, he ought to have discussed proper and valid reasons to reject the same under the relevant provisions of law. In the absence of the same, I find that the letter issued by the Assistant Commissioner suffers from infirmity. I remand the case back to the LAA to issue a proper order after following the principles of natural justice within 15 days of issue of this order.”

The learned counsel stated that pursuant to the order the Ld. Assistant Commissioner passed Order in Original No. 76782/2020 (Denovo) dated 05.11.2020 the relevant portion of which is reproduced here under;

“7.2 As per sub-section (4) of section 46 of Customs Act, 1962, the importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods.

7.3 Further, no reassessment shall be allowed unless the order of assessment including self-assessment is duly modified by way of appeal as per Public Notice No 88/2019 dated 18.10.2019 in F.No. S. Misc.02/2018-19-AM-CH-ii.

8. Under such circumstances, there is no question of reassessment and issue of speaking order in case of disagreement by the importer under section 17(4) and 17(5) of Customs Act, 1962 respectively. It is not the contention of the importer that reassessment was made by the officer and in all the cases they already cleared the goods which could not be subjected for examination at present. Further, reassessment has to be made before granting Out of Charge (OCC) and clearance of goods under section 17(4) of Customs Act, 1962. Also in the absence of examination by any Department Officer, the importer's claim for CTH has not been substantiated with satisfying documentary evidences.

9. In view of the above, I pass the following order:

ORDER

- (i) I reject the importer's claim for reassessment under different CTH in the absence of legal provision as well lack of merits."

Aggrieved by the order dated 05.11.2020, the Appellant filed an appeal before the Ld. Commissioner (Appeals). The Ld. Commissioner (Appeals), however, has passed the impugned order rejecting the Appeal filed by the Appellant as reproduced below;

"6. I have carefully gone through the facts of the case, Impugned Order-In-Original, grounds of appeal and the points put forth by the appellant during the personal hearing.

.....

The Appellant contended that "he has been procuring various parts to manufacture lighting equipment under the HSN Code - 85129000 - "Parts of Electrical Lighting equipment; that, during the particular period, the appellant had inadvertently imported by mentioning wrong HSN as HSN 85122010 - Head lamps, tall lamps, stop lamps, side lamps and blinkers or HSN 85122020 - Other automobile lighting equipment; that LAA should have verified when such mistakes are brought to his knowledge and requested for rectification of mistakes under Section 149 of Customs Act; that the relief sought is for amendment on the ground of error as there is no legal flaw amenable to appeal and it is only a factual mistake which calls for rectification by amendment; that as per proviso to Section 149 of Customs Act, 1962 bill of entry amendment is allowed based on documentary evidences that were existed at the time of clearance of goods; that even after the goods were cleared for home consumption, appellant can avail the benefit of the aforementioned proviso to Section 149 and would be entitled for amendment if sufficient evidence by way of documents that were "in existence" at the time of clearance of goods; that though the erroneous classification was corroborated with proper documentary evidences LAA has failed to perform his duty while passing the rejection order."

7. I find that the subject goods were self-assessed by the appellant and the goods were cleared for home consumption. As the goods are not available for verification or examination or testing as embodied in Section 17(4), the reassessment cannot be permitted. Also the re-classifying the goods amounts to reassessment which is not permissible under Section 149 of the Customs Act, 1962.

8. For the above discussions, I find no irregularity or illegality in the order passed by the LAA, hence no reason to interfere. Therefore, I reject the appeal."

The learned counsel submitted that the impugned order is erroneous and contrary to the plain language of section 149 of the Act. He stated that on a plain reading of the provisions of the said Section 149 it is clear that a BE can be authorised to be amended even after the imported goods have been cleared for home consumption on the basis of documentary evidence that was in existence at the time the goods were cleared. Therefore, the observation that amendment under Section 149 is not permissible after clearance of the imported goods is erroneous and the impugned order must be set aside. The impugned order is contrary to the decision of the Hon'ble Supreme Court in **ITC Limited v. CCE** [2019 (368) E.L.T. 216 (S.C.)], where in it was held that claim for refund cannot be entertained unless the self-assessment is modified under section 128 or under other relevant provisions of the Act. Relevant portions of the judgment are extracted below for ease of reference:

“44. The provisions of 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.

.....

47. 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 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. “

(emphasis applied)

The Apex Court has categorically observed that self-assessment could be modified either under section 128 or under relevant provisions of the Act. He stated that the said position has been elaborated in;

1) **Sony India Pvt. Ltd. v. Union of India** [2021 (8) TMI 622 - TELANGANA HIGH COURT]

2) **Dimension Data India Pvt. Ltd. v. CC** [2021 (1) TMI 1042 - BOMBAY HIGH COURT], affirmed by the Apex Court in **Commissioner v. Dimension Data India Private Ltd.** [2022 (379) E.L.T. A39 (S.C.)]

3) **Neyveli Lignite Corporation India Limited v. CC** [2022 (4) TMI 1374 - MADRAS HIGH COURT]

4) **Stanley Engineered Fastening India Pvt Ltd v. CC**, [2023 (3) TMI 846- Madras High Court]

5) **Bharti Airtel v. UOI**, [2022 (2) TMI 154]

He stated that based on the above decisions there are 3 methods provided in the Customs Act, for any modification or amendment to be made in any Bill of Entry, which are as follows:

- a) Appeal against BE under **Section 128** of the Customs Act
- b) Amendment of the BE under **Section 149** of the Customs Act
- c) Rectification of Mistakes or clerical errors under **Section 154** of the Customs Act.

In view of the above decisions, he submitted that amendment application under Section 149 of Customs Act, 1962 can be filed to revise the classification in the Bill of Entry. He prayed that the Impugned Order-in-Appeal be set aside and the matter remanded for permitting their request for amendment of Bills of Entry under Section 149 of Customs Act, 1962 and consequently grant refund of excess duty paid by them.

4. The learned AR Shri R. Rajaraman drew attention to the following Sections of the Customs Act, 1962:

Section 2. Definitions. - *In this Act, unless the context otherwise requires.*

***** . ***** . ****

(2) **"assessment"** means determination of the **dutiability** of any goods and the **amount** of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to-

(a) the **tariff classification** of such goods as determined in accordance with the provisions of the Customs Tariff Act;

(b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;

(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;

(d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;

(e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;

(f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods

***** . ***** . *****

Section 2(16) "entry" in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes the entry made under the regulations made under section 84;

***** . ***** . *****

Section 2(4). "bill of entry" means a bill of entry referred to in section 46;

***** . ***** . *****

Section 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**³[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.

⁴[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 exporter⁶[***] 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.*

***** . ***** . *****

SECTION 46. Entry of goods on importation. -

*(1) The importer of any goods, other than goods intended for transit or transshipment, shall make **entry** thereof by presenting ¹[electronically]⁹[on the customs automated system] to the proper officer a **bill of entry** for home consumption or warehousing ¹⁰[in such **form and manner** as may be **prescribed**]:*

*****, *****, ****

*(4) The importer while presenting a bill of entry shall [***] make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, ¹²[and such other documents relating to the imported goods as may be prescribed].*

[(4A) The importer who presents a bill of entry shall ensure the following, namely:-

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it;

and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.]

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa.

***** . ***** . *****

Section 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 custom house to be **amended** ¹**[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.

. . ”

He submitted that as discussed there are specific definition of words like 'Entry', 'Bill of Entry', 'Assessment' in the Customs Act, 1962. The CTH of imported goods was essential for assessment i.e. the determination of the dutiability of any goods and the amount of duty to be paid / collected. Once assessment is complete, duty is paid and the goods given 'Out of Charge' from Customs, the goods lose their character of imported goods. Any amendment in the Bill of Entry after that which results in the entire assessment made being upset and affects the amount of duty collected, either leading to a demand or a refund, cannot be contemplated by Section 149. As per the Act assessment, includes re-assessment. As per the Hon'ble Supreme Court's judgment in **ITC Limited v. CCE** (supra) self-assessment can be modified under section 128. Hence amendment requests under Section 149 can be used only for minor amendments or for amendment of documents accompanying the Bill of Entry for which a specific provision is not there in statute book. He further stated that any amendment to the CTH amounts to a major amendment of the BE and modifies the assessment as understood in terms of Section 2 of the Customs Act, 1962. Post assessment this amendment can only be done for minor details like Custom House Code, Importer Type, CHA

Code, etc which do not impact the assessment. He stated that there is a specific provision to deal with assessment and amendment of assessment /reassessment in terms of Section 17 and Section 128 of Customs Act, 1962. Similarly there are separate provisions available for amendment of documents like IGM, Import report, Export Report, conversion of Bills for WH/Home Consumption, Bonds, Identity Cards, Passenger Manifest, ATA Carnet Form, Statement of DBK, documents pertaining to Custom Broker or CFSs etc. He submitted that only amendment in documents accompanying the BE should be allowed as per Section 149 and not the amendment of assessment, which includes, determination of dutiability, valuation, tariff classification, origin, exemption issues etc., which should be dealt as per specific provision like Section 17 and Section 46. Reading Section 149 without taking cognizance of Section 2, Section 17 and allowing reclassification /reamendment of Assessment under Section 149 will render Section 2 and 17 infructuous. Moreover, there is no time limit prescribed in Section 149. In that case, it will open a Pandoras Box and make tax administration chaotic and BE's will remain always unsettled as an Importer can request for re-opening of any age old assessment by requesting amendment. He prayed that in view of the submissions the appeal may be dismissed.

5. I find that the main dispute between the parties emanates from the action initiated by the appellant vide their letter dated 13.09.2019. The Assistant Commissioner while rejecting the Appellant's request stated that the goods imported were all parts of light signalling equipment and are used as fittings to light equipment like head lamp, rear lamp, fog lamps etc., and were hence rightly classified under CTH 8512 2020 which covers "other automobile lighting equipment". He

went on to add that once an order of assessment is passed, the duty would be payable as per the order, unless that order of assessment including self-assessment is duly modified by way of appeal. It appears that the contentious issue was the non-filing of appeal against the self-assessed BE's.

5.1 It is Revenues contention that the letter seeking an amendment altering the CTH of the Bill of Entry's which have already been cleared from Customs control cannot be done for two reasons. Firstly, re-classifying the goods by changing the CTH amounts to modifying the assessment as defined in Section 2 of Customs Act, 1962. Such a reassessment is not permissible under Section 149 of the Customs Act, 1962. Secondly as the goods are not available for verification or examination or testing as embodied in Section 17(4), the reassessment cannot be permitted. The Appellant on the other hand is of the opinion that there are 3 methods provided in the Customs Act, for any modification or amendment to be made in any Bill of Entry. Firstly by filing an appeal against Bill of Entry under **Section 128** of the Customs Act. Secondly by an amendment of the Bill of Entry under **Section 149** of the Customs Act and thirdly by a rectification of mistakes or clerical errors under **Section 154** of the Customs Act. They are hence of the view that an amendment application under Section 149 of Customs Act, 1962 can be filed to revise the CTH in the Bill of Entry. We shall examine each of the issues raised below.

6. **Re-classifying the goods by changing the CTH amounts to amendment in assessment as defined in Section 2 of Customs Act, 1962.**

6.1 It is not disputable that the declared CTH of imported goods plays a prominent role in the assessment of goods. A change in the CTH of

the goods in the Bill of Entry after assessment is over would impact the calculation of the duty payable/paid. A Coordinate Bench of this Tribunal in its judgment in **M/s Samsung India Electronics Pvt. Ltd. Vs Principal Commissioner of Customs, Air Cargo Complex (Import)**, [FINAL ORDER NO. 51665/2023, dated: 20.12.2023] examined the issues connected with assessment in detail and the relevant portion is reproduced below;

“Assessment

13. Customs duty is levied at such rates as are specified in the Schedules to the Customs Tariff Act, 1975. These rates can be based on quantity (specific rate of duty) or value (ad valorem rate of duty) and on most goods latter is the case. Based on the classification of the goods in the Schedule to the Customs Tariff Act, their value, exemption notifications, etc., the duty of customs has to be assessed.

14. Assessment is defined in Section 2(2) as follows:

.....

15. Thus, classification of the goods under the Customs Tariff is a part of assessment. The next question is who can do this assessment. Section 17, reads as follows:

Section 17. Assessment of duty. -

.....

16. Thus, as per Section 17 the importer or exporter has to self-assess duty and the proper officer can re-assess the duty. Both the self-assessment by the importer (or, as the case may be, the exporter) and the re-assessment by the proper officer fall under the definition of assessment as per Section 2(2). If the proper officer re-assesses the goods, unless the importer accepts the re-assessment in writing, he has to give a speaking order. Thus, the importer (or exporter) and the proper officer are competent to classify the goods and assess the duty payable on them.

17. After the duty is assessed on the imported goods and the duty is paid, the proper officer clears the goods for home consumption under Section 46. **Once this action is completed, they cease to be imported goods, they cease to be dutiable goods and the importer ceases to be the importer. Sections 2(14), 2(25) and 2(26) which explain this legal position read as follows.**

.....

18. This process of self-assessment by the importer and re-assessment by the proper officer comes to an end once an order permitting the clearance of goods for home consumption is issued under Section 46. Thereafter, the goods cease to be imported goods or dutiable goods and no duty can be assessed. The only exception is when the goods are

cleared for home consumption on provisional assessment in which case the assessment concludes after the assessment is finalized and an order is passed by the officer. Provisional assessment is not relevant to this appeal.

19. Assessment concludes the determination of the liability of the importer to pay duty and is similar to a decree under the Civil Procedure Code, 1908 (CPC). Section 2 (2) of CPC defines decree as "It means the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." Assessment differs from decree inasmuch as the determination of what is due as Revenue by the importer is not made by a Court of law but is determined through a quasi-judicial process by the 'proper officer' who re-assesses the duty or is self-determined by the importer. Just like a decree in Civil suits, there is a provision for appeal against assessment. It is appealable by both sides to the Commissioner (Appeals) under section 128 and also to further higher judicial fora. The Commissioner (Appeals) does not assess but either affirms, modifies or annuls the assessment order. In this process, the Commissioner (Appeals) may also decide the issue of classification of the goods.

20. The Risk Management System (RMS) of the Customs Electronic Data Interchange (EDI) system clears many consignments of imported goods based on self-assessment by the importer without the proper officer ever getting an opportunity to examine the self-assessment and reassess the goods and this is one such case. In such cases, the Bills of Entry are subject to Post Clearance Audit (PCA) which happened in this case also. A question which arises is if a Bill of Entry which is only self-assessed by the importer without any re-assessment can also be appealed against to the Commissioner (Appeals) under Section 128. The larger bench of the Supreme Court held in **ITC Ltd versus Commissioner of Central Excise Kolkata IV** [222019 (368) E.L.T. 216 (S.C.)] in the affirmative. The relevant portion of this judgment is as follows:

'42. It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder:

.....

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression "Any person" is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against any order which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as

such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

Demands under Section 28

21. While both the importer and Revenue can appeal to the Commissioner (Appeals) under Section 128 against an assessment (including self-assessment) of a Bill of Entry, the proper officer has another option of issuing a Show Cause Notice under Section 28 to demand and recover duties not levied, not paid, short levied or short paid or erroneously refunded. The nature of this power of ‘the proper officer’ was held by the larger bench of Supreme Court as the power to review the earlier assessment in **Canon India Pvt. Ltd. versus Commissioner of Customs** [232021 (376) E.L.T. 3 (S.C.)]. The relevant text of this judgment reads as follows:

12. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. *Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on —the proper officer‖ which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods. (emphasis supplied)*

22. While Section 128 does not place any restriction, other than the limitation of time, for filing an appeal against assessment, issue of SCN under Section 28 is restricted by WHEN, WHO and WHY. The notice has to be issued within the normal period of limitation (or the extended period of limitation) by ‘the proper officer’ and only to recover duties not paid, short paid, not levied, short levied or erroneously refunded.

23. To sum up, the power to assess duty lies with the importer and the proper officer. Classification, valuation and applying an exemption notification, are all part of the process of this assessment. Hence, the power to decide the classification lies with the importer during self-assessment, with the proper officer during re-assessment and while issuing an SCN under Section 28 and while adjudicating, with the Adjudicating Authority and with any appellate authority in the judicial hierarchy who deals with the appeals. . .”

(Emphasis supplied)

In the light of the above it needs to be examined whether the action of amending the CTH mentioned in a assessed Bill of Entry is merely procedural.

6.2 It is well settled that the concepts of chargeability, assessment, quantification and recovery of tax are independent concepts under any

taxing law. Article 265 of the Constitution of India says that "No tax shall be levied or collected except by authority of law". In **M/s. Ujagar Prints Vs Union of India** [AIR 1989 SC 516] the Supreme Court consisting of five Judges observed as follows :-

"The term "levy" appears to us to be wider in its import than the term "assessment". It may include both of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at which it has to be taxed....."

As seen at Section 2(2) of the Customs Act, "assessment" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (**CTA'75**), or under any other law for the time being in force. Any provision made in a statute for assessing tax and determining the rights and liabilities of the taxpayer concerned must be construed as substantive law as the function is a part of levy authorized by the Constitution. As stated by the Tribunal in **Samsung India** (supra) 'Assessment concludes the determination of the liability of the importer to pay duty'. Section 17 of the Customs Act dealing with 'Assessment of duty' is hence substantive law. Moreover, once the assessment is final in terms of Section 17 *ibid*, the proper officer becomes *functus officio* [ceases to have control over the matter] and would not have the power to review or re-assess an assessment that is final, unless there is a specific provision empowering him to do so.

6.3 Further in an indirect tax regime unlike direct taxes the 'incidence of duty' gets passed on to another person. This is what led to the principle of 'unjust enrichment' and the Apex Court in **Mafatlal Industries & others Vs. UOI** [1997 (5) SCC 536] observed that:

"Where the burden of duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is

suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund.”

Tax paid on goods hence gets passed on down the production or consumption chain with the incidence of the tax coming to rest with the final consumer. In such circumstances, it is felt that any action that can upset an assessment and alter the amount of tax collected from goods cleared from Customs charge and passed on to the ultimate customer, should not be tampered with administratively by way of an amendment. Changes to substantive rights and liabilities that have been finalized, must be subjected to the more rigorous and transparent process of a quasi-judicial appellate proceeding with statutory safeguards like time limit, review and further appeal etc present.

6.3 The CTH plays a crucial role in the assessment of imported goods. It helps classify goods into specific categories. The effective customs duty rates are determined based on the CTH. Some tariff headings may be subject to preferential treatment under trade agreements or special arrangements. They also help enforce regulations related to health, safety, environment, and other aspects. Further as stated in the Tribunal's judgment in **Samsung India** (supra - at para 20 and extracted above), that 'the Risk Management System (RMS) of the Customs Electronic Data Interchange (EDI) system clears many consignments of imported goods based on self-assessment by the importer without the proper officer ever getting an opportunity to examine the self- assessment and reassess the goods'. As per Section 17(2) even the verification of self-assessment is done by the proper officer is on the basis of risk evaluation through appropriate selection criteria. The CTH of the goods plays an important role in risk-profiling of the imported goods under RMS paving the way for self-assessment.

It facilitates efficient customs clearance and ensures transparency in trade transactions. The Customs department also uses the tariff headings wise data of import goods to maintain accurate records of imports. In summary, the Customs Tariff Heading serves as a critical reference point for assessing duties, managing trade agreements, and ensuring compliance with regulations when dealing with imported goods.

6.4 In the instant case the request for amending the CTH declared in the Bill of Entry would finally result in a refund. This would make it necessary to calculate the duties payable afresh. The redetermination of duty as a principle, would include determining the import permissibility of the revised CTH in terms of the EXIM policy and any other laws regulating imports/exports, determining duties now leviable on the goods on import – (Basic, Additional, Anti-dumping, Safeguards etc.). Permissibility of various benefits under different schemes or applicability of any exemption notification benefits etc. The goods may require the value to be re-fixed based on the Tariff Values fixed for the changed CTH or to be scrutinized for the basis of duty calculation changing from specific duty to ad-valorem duty etc. Its only after this process is complete that the duty liability, which is required to be paid by the importer as per the revised CTH can be determined and the refund claim examined along with unjust enrichment etc. Hence the administrative action of amending the CTH in the BE would virtually amount to an order of reassessment by the same proper officer after the original assessment done had concluded the determination of the liability of the importer to pay duty and the goods have been cleared from Customs controls. Once assessment is concluded it should not be administratively tinkered with either at the behest of the importer or

of the department, without it being challenged in appeal. A similar issue has been examined in a catena of judgments of the Apex Court which shall be discussed below.

6.5 As pointed out by the Tribunal in **Samsung India** (supra), the nature of the power of 'the proper office' under Section 28 of CA '62 was held by the larger bench of Supreme Court in **Canon India Pvt. Ltd.** (supra) to be broadly a power to review the earlier decision of assessment. It held that such a power is not inherent in any authority. It has been conferred by Section 28 and other related provisions. On similar lines in the case of power to amend a document under Section 149, the power to review the earlier decision of assessment is not inherent with the proper officer and hence his action should not amount to reassessment. It vests at the Appellate level and should be done by appealing against the earlier self-assessment in line with the Apex Court's judgment in **ITC Vs CCE** (Supra). The power of re-assessment by the proper officer, under Section 17(4), is available only until before the assessment is concluded. In such a situation using Section 149 to reopen an earlier self-assessment may not be statutorily feasible, more so, when such an assessment is appealable against.

6.6 Further due to lack of any time limit under Section 149 the fear of failure to assert one's legal right in a timely manner would not exist. Those indolent towards their rights can seek remedy at any point of time in future by cleverly seeking a 're-assessment' through the amendment route much after the rights of Revenue has crystalised. This may then bring uncertainty and inconsistency in assessments. Statutory timelines for appeals are not to be circumvented in a manner allowing unscrupulous importers to seek concessions or those who have slept over their rights to revive stale claims, much after the goods

have been cleared. Persons with good causes of action should pursue a proper remedy with reasonable diligence at every available opportunity.

6.7 It is also to be mentioned that although rectification of mistakes or clerical errors are permissible under **Section 154** of the Customs Act, the Appellant has not used that provision to alter / rectify the BE. Hence the Appellant himself acknowledges that the change sought to be made in the BE is not merely an error or mistake. Rightly so as the amendment request is not for only one Bill of Entry but for Bills of Entry filed over a period of time. Even a bonafide error made over a period of time would be in the nature of negligence which in common parlance means and implies a failure to exercise due care, expected of a reasonable prudent person.

7. If the goods are not available for verification or examination or testing as embodied in Section 17(4), the reassessment cannot be permitted.

7.1 While the classification of certain goods is subject to drawing a sample and sending it for test / examination for expert comment / report, it is not universally required. Section 17(2) states that the proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary. Section 17(4) states that 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, reassess the duty leviable on such goods. Prima facie the section indicates that the matter would be required to be decided on a case-by-case basis. The decision whether to verify, examine or

test the goods prior to re-assessing it would rest on the subjective satisfaction of the assessing officer especially if the nature or identity of the goods has to be ascertained. Such a decision should be made by due application of mind and the satisfaction recorded by the authority should be objective and based on the facts and material on record. It is for this reason that section 17(5) provides for the passing of a speaking order in the case of reassessment.

7.2 However, once a decision is taken by the proper officer to verify / examine or test goods, then, as per the rule of prudence in law, appellate power is not to be exercised by an Authority for the purpose of substituting one's subjective satisfaction with another, without there being any specific reason for such substitution. In **V. Ramana v. S.P. SRTC and Others** [(2005) 7 SCC 338], the Apex Court upon referring to a large number of decisions held :

"The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the *Wednesbury's* case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision." (emphasis added)

In **Tata Cellular Vs Union of India** [(1994) 6 SCC 651], it has been held by the Apex Court that the duty of the court is to confine itself to the question of legality. Its concern should be whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the Rules of natural justice, reached a decision which no reasonable tribunal would have reached or abused its powers. The Court held that it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that

policy is fair. It is only concerned with the manner in which those decisions have been taken.

8. There are 3 methods provided in the Customs Act, for any modification or amendment to be made in any Bill of Entry. Hence an amendment application under Section 149 of Customs Act, 1962 can be filed to revise the classification in the Bill of Entry.

8.1 We find that the present issue arises with an aim of the Appellant getting a refund of excess duty perceived to have been paid. From the inception of the Customs Act the “assessment” of imported goods was done by the ‘proper officer’. A question arose, as in the present case, as to whether a refund could be claimed after the goods were assessed and cleared. The Hon’ble Supreme Court in **Collector of Central Excise, Kanpur v. Flock (India) (P) Ltd** [(2000) 6 SCC 650 / (2000) 120 ELT 285], held that it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing the order. The Hon’ble Court held;

“6. . . . The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.

*****. *****. *****

Therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which, if we may term it so, is in the nature of execution of a decree/order.” (emphasis added)

The matter again came up before the Apex Court in **Priya Blue Industries Ltd. v. Commr. of Customs** [(2005) 10 SCC 433 : (2004) 172 ELT 145]. The Hon’ble Court held that the once goods were

assessed by an appealable order any refund that arises as a consequence of the assessment, could not be entertained much less considered on merits in the absence of a challenge to the assessment made by way of an appeal. The judgment stated;

“6. We are unable to accept this submission. Just such a contention has been negated by this Court in *Flock (India) case* (2000) 6 SCC 650. Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.” (emphasis added)

The Hon’ble Court further, saw no substance in the Review Petition filed against the ratio in *Flock India’s case* (supra) and dismissed the same.

8.2 Consequent to the introduction of the self-assessment regime under the Customs Act by the Finance Act 2011, a question arose as to whether an assessment of imported goods having been made by the assessee himself could be challenged in appeal to examine its correctness. The larger bench of the Supreme Court in **ITC Ltd Vs Commissioner of Central Excise Kolkata IV** [2019 (368) E.L.T. 216 (S.C.)] answered in the affirmative. What is of interest is that the judgment at para 41 observed as under;

“41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.” (emphasis added)

The judgment went on to state;

“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.”
(emphasis added)

It is the Appellants contention that the Apex Court has categorically observed that self-assessment could be modified either under section 128 or under relevant provisions of the Act. According to them on a plain reading of the provisions of Section 149, it is clear that a Bill of Entry can be authorised to be amended even after the imported goods have been cleared for home consumption on the basis of documentary evidence that was in existence at the time the goods were cleared. The Appellant’s claim to amend a document under the said section is not disputed. The question is whether an amendment facility permitted under Section 149 is among the ‘relevant provisions of the Act’ that empowers and can be used as the route to review and undo the assessment already made, which assessment order as per the Hon’ble Supreme Court’s judgment in Flock India (supra), ‘is in the nature of execution of a decree/order’.

8.3 From the discussions above regarding the impact of a change of CTH declared in the Bill of Entry on the assessment already made, it appear that as per the Hon’ble Supreme Court’s judgement discussed above the request for change in CTH and consequently of a final assessment could only be made before a superior authority in appeal.

9. Judgments

9.1 I now examine the host of judgments cited by the Appellant above in taking forward its interpretation of the Apex Court’s judgment in ITC Ltd (Supra). The Appellant has stated that in **Sony India Pvt. Ltd. v. Union of India** [2021 (8) TMI 622 - TELANGANA HIGH COURT] the Hon’ble Telangana High Court has observed that 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". They further stated that the decision of the Hon'ble High Court in Sony (Supra) has been affirmed by the Hon'ble Supreme Court in **Union of India v. Sony India Pvt. Ltd.** [2023 (4) TMI 1086 - SC ORDER]. The facts of the case were that the petitioner in the said case imported mobile phones and paid Countervailing Duty (C.V.D.) under Section 3(1) of the Customs Act at the rate of 6% as per Sl. No. 263A(i) of Notification No. 12/2012-C.E., dated 17-3-2012 (Exemption Notification). The petitioner could not claim exemption under Sl. No. 263A(ii) of the Exemption Notification which allowed a payment of C.V.D. at 1%, as the Department had taken a stand that such exemption is available only when the assessee has not taken credit in respect of the inputs and capitals goods under the Cenvat Credit Rules, 2004 for the manufacture of mobile phones and during the relevant period, the EDI system did not permit availment of the lower rate of tax as per the Exemption Notification. A Writ of Mandamus was issued by the Hon'ble High Court to the department to amend the subject Bills of Entry under Section 149 of the Customs Act so as to enable the importer / petitioner to seek refund of excess duty paid under Section 27 of CA'62.

9.2 The Hon'ble High Court of Madras which is the jurisdictional High Court examined a similar matter in **Neyveli Lignite Corporation India Limited v. CC** [2022 (4) TMI 1374 - MADRAS HIGH COURT]. The petitioner had imported solar panel modules for the purpose of establishing 15 MW (AC) Grid Inter Active Solar PV Power Project and had filed BE's in which the petitioner is stated to have classified the imports under the heading 8501 of the Customs Tariff Act, 1975 by

mistake and thus, calculated the basic customs duty at 7.5%. The correct classification was ostensibly under CTH 8541 of Customs Tariff Act, 1975, in which case the imported goods would have attracted nil rate of duty. After the Bill of Entries were filed, a Circular was issued by the Board dated 06.04.2018 which clarified the position that solar modules equipped with bypass diode merit classification under Heading 8541. The Hon'ble High Court held that Sections 149 and 154 provide for a machinery for altering the assessment. These are two of the three methods available under the provisions of the Customs Act, 1962, the third being Section 128 *ibid*. If one of the three methods are available, the importer would be entitled to claim refund under Section 27 of the Customs Act, 1962. The Hon'ble Court directed the department to complete the assessment after amending the BE under Section 149 of the Customs Act, 1962, as had been requested by the importer. The Appellant has also cited the judgments of the Hon'ble Madras High Court in the case of **Stanley Engineered Fastening India Pvt Ltd v. CC**, [2023 (3) TMI 846- Madras High Court] and **Bharti Airtel v. UOI**, 2022 (2) TMI 154 which are on similar lines.

9.3 I find that the rule of judicial precedence, holds that a decision of the jurisdictional High Court is binding on the subordinate courts, authorities and Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. Judicial discipline requires that in matter on which the jurisdictional High Court had already expressed its views the same should be taken as binding on the Tribunals. I respectfully abide by the same.

10. In the light of the ratio of the judgments of the Hon'ble Madras High Court and other Hon'ble High Courts as above, the impugned order is set aside and the matter is remanded to the proper officer. He

is directed to process the request of the appellant dated 13.9.2019 for amendment of the BE's as per section 149 of CA '62. On being satisfied he should re-assess the impugned goods to duty by passing a speaking order. After the re-assessment order is issued the appellant will be eligible to claim consequential refund, if any, as per law. The lower authority shall follow the principles of natural justice and afford a reasonable opportunity to the appellant to state their case both orally and in writing if they so wish, before finalizing the matter. The appellant should also co-operate with the adjudicating authority in completing the process expeditiously and in any case within ninety days of receipt of this order. The appeal is disposed of accordingly.

(Pronounced in open court on 10.04.2024)

(M. AJIT KUMAR)
Member (Technical)