

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

PRINCIPAL BENCH,
COURT NO. I

E-HEARING

CUSTOMS APPEAL NO. 50215 OF 2024

[Arising out of the Order-in-Original No. 49/2023/VCG/Pr. Commr./ICD-Import/TKD dated 22/11/2023 passed by The Principal Commissioner of Customs (Import), New Delhi – 110 020.]

M/s Aurum Appliances, ...Appellant
D-8, Shanti Kunj (Ground Floor), Vasant Kunj,
New Delhi – 110 070.

Versus

The Principal Commissioner of Respondent
Customs (Import),
Inland Container Depot, Tughlakabad,
New Delhi – 110 020.

**WITH
CUSTOMS APPEAL NO. 50400 OF 2024**

[Arising out of the Order-in-Original No. 49/2023/VCG/Pr. Commr./ICD-Import/TKD dated 22/11/2023 passed by The Principal Commissioner of Customs (Import), New Delhi – 110 020.]

M/s A.M. Express Worldwide Logistics, ...Appellant
217, Inland Container Depot, Tughlakabad,
New Delhi – 110 044.

Versus

The Principal Commissioner of Respondent
Customs (Import),
Inland Container Depot, Tughlakabad,
New Delhi – 110 020.

APPEARANCE:

Shri Alok Agarwal, Shri Prachit Mahajan and Ms. Saumya Shrivastava, Advocates for the appellant.
Shri Rakesh Kumar, Authorized Representative for the Department

CORAM:

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

FINAL ORDER NO'S. 51105-51106/2025

DATE OF HEARING : 29.05.2025
DATE OF DECISION: 01.08.2025

P.V. SUBBA RAO

The Order in Original dated 22.11.2023¹ passed by the Principal Commissioner of Customs, Inland Container Depot², Tughlakabad³, New Delhi deciding the proposals made in the show cause notice dated 24.01.2023⁴ issued by the Commissioner of Customs, ICD TKD is assailed by the importer **M/s. Aurum Appliances**⁵ and its customs broker **M/s. A M Express Worldwide Logistics**⁶ in these two appeals.

2. The importer imported De-humidifiers of Westinghouse brand weighing less than 20 kg each and filed Bills of Entry through its CB and self-assessed duty, classifying them under **Customs Tariff Item**⁷ **8479 89 20** and cleared them. The SCN was issued to the importer and to the CB proposing to reclassify them under **CTI 8509 80 00**, recover the differential duty under section 28 of the Customs Act, 1962⁸, hold the goods liable to confiscation under section 111 of the Act and impose penalties on the importer and CB. These proposals in the SCN were decided in the impugned order confirming demand of duty of Rs. 78,06,352/- on the

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1. **impugned order**
 2. **ICD**
 3. **TKD**
 4. **SCN**
 5. **importer**
 6. **CB**
 7. **CTI**
 8. **Act**

importer and imposing an equal amount as penalty under section 114A and imposing penalty of Rs. 78,06,352/- on the CB under section 112.

3. Aggrieved, the importer and the CB filed these appeals.

4. The importer had also imported the same goods in the past and filed Bill of Entry No. 7981861 dated 27.12.2016 and self-assessed duty classifying the same goods under **CTI 8479 89 20** but it was re-assessed by the proper officer under **CTI 8509 80 00**. The importer did not contest the re-assessment and therefore, it attained finality.

5. After 27.12.2016, the importer filed several Bills of Entry up to 31.5.2017 classifying the goods under **CTI 8509 80 00** and paid duty accordingly. There is no dispute with respect to these Bills of Entry.

6. Thereafter, from 25.01.2018 to 19.05.2022 the importer filed several Bills of Entry again classifying the goods under **CTI 8479 89 20** and paying duty at lower rates. The **Directorate General of Revenue Intelligence⁹** initiated investigation into these Bills of Entry. After DRI commenced investigation, i.e., from 20.5.2022, the importer filed Bills of Entry again classifying the goods under **CTI 8509 80 00** and there is no dispute about those Bills of Entry.

9. DRI

7. With respect to the disputed Bills of Entry, after the initiation of investigation by the DRI, the importer submitted a letter dated 17.06.2022 agreeing with the classification under **CTI 8509 80 00**, paid the differential duty voluntarily with applicable interest and requested DRI to close the proceedings.

8. However, the SCN was issued to the appellant which culminated in the impugned order.

Submissions on behalf of the importer and the CB

9. Learned counsel for the appellants, i.e., the importer and the CB made the following submissions:

- (i) Air dehumidifiers are correctly classifiable under **CTI 8479 8920**.
- (ii) Classification should not be based on the Chapter Notes or Section Notes when it is possible to classify goods on the basis of the heading itself.
- (iii) Specific entry of dehumidifiers under **CTI 8479 8920** takes precedence over the general entry **CTI 8509 80 00** as per Rule 3(a) of the Rules of Interpretation of the Tariff.
- (iv) Residual entry **CTI 8509 80 00** can be resorted to only for those goods which do not fall under any of the entries.
- (v) According to the department, in view of note 1(f) to Chapter 84, 'electro-mechanical domestic appliances of 8509 are not covered under Chapter 84.' This contention of the department is misplaced since various electro-mechanical domestic appliances,

such as water pump, fan, air-conditioners dishwashing machines remain classifiable under specific headings under Chapter 84, in spite of the exclusion under Note 1(f) to Chapter 84.

- (vi) The dispute is only regarding classification of the goods and therefore, extended period of limitation under the section 28(4) is not invocable in respect of the disputed bills of entry. Of the 31 disputed bills of entry, only 9 fall within the normal period of limitation and demand could have been issued only under section 28(1) of the Customs Act.
- (vii) The goods were cleared after self-assessment which is also an assessment and there is no evidence of collusion, wilful statement or suppression of facts. Therefore, extended period of limitation is not invocable.
- (viii) Since the department did not appeal against the self assessment of the Bills of Entry, no demand of duty can be made against the appellant in view of the judgement of the Supreme Court in **ITC Ltd versus CCE Kolkata**¹⁰.
- (ix) The penalty imposed on the Customs Broker cannot be sustained.
- (x) The appeal may be allowed, and the impugned order may be set aside.

Submissions on behalf of the Revenue

10. Shri Rakesh Kumar, learned authorized representative for the Revenue vehemently supported the impugned order made the following submissions:

- (i) The submission of the learner, Counsel that per **ITC Ltd.**, no demand issued under section 28 without

10. 2019 (368) E.L.T. 216(S.C.)

assailing the self-assessment of the Bills of Entry is not correct. In **ITC Ltd.**, the question before the Supreme Court was whether refund could be sanctioned modifying the self -assessed bills of entry and the Supreme Court answered in negative. This question in this appeal is not sanction of refund but of demand which can always be raised under section 28.

- (ii) Goods must be classified under the Customs Tariff following the General Rules of Interpretation. Rule 1 of these Rules states that 'The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions'. This is followed by other Rules. In this case, classification can clearly be made as per the Customs Tariff heading and the Section and Chapter Notes.
- (iii) Chapter Note 1 (f) to Chapter 84 explicitly excludes certain types of goods from the Chapter including 'electro-mechanical domestic appliances falling under 8509'. Therefore, such goods falling under **Customs Tariff heading 8509** cannot fall under any **CTI** under Chapter 84.
- (iv) Chapter Note 4 to Chapter 85 clarifies the scope of **CTH 8509** and it includes electro-mechanical appliances for domestic use and weighing less than 20 kg. Electro-mechanical appliances are those which have both electrical and mechanical parts and the dehumidifiers in dispute squarely fall under this category. They weigh less than 20 kg and are meant for domestic use and therefore, they squarely fall

under **CTH 8509**.

- (v) The importer had filed Bill of Entry No 7981861 dated 27.12.2016 and self-assessed duty classifying the same goods under **CTI 8479 89 20** but it was re-assessed by the proper officer under **CTI 8509 80 00**. The importer did not contest the re-assessment and therefore, it attained finality.
- (vi) After 27.12.2016, the importer filed several Bills of Entry up to 31.5.2017 classifying the goods under **CTI 8509 80 00** and paid duty accordingly. There is no dispute with respect to these Bills of Entry.
- (vii) After 31.5.2017, i.e., from 25.01.2018 to 19.05.2022 the importer filed several Bills of Entry again classifying the goods under **CTI 8479 89 20** and paid duty at lower rates. After DRI commenced investigation, i.e., from 20.5.2022, the importer again started filing Bills of Entry classifying the goods under **CTI 8509 80 00** and there is no dispute about those Bills of Entry.
- (viii) Thus, this is a case where the appellant had knowingly and intentionally entered the wrong **CTI** in its Bills of Entry during the disputed period without mentioning the weight of the dehumidifiers in the description and thereby evaded duty. After it was caught and DRI started investigation, it again started classifying the goods correctly.
- (ix) Therefore, in the facts of the case, extended period of limitation under section 28 (4) as well as the penal provisions were correctly invoked.
- (x) The impugned order may be upheld and the appeal may be dismissed.

Findings

11. The arguments advanced by the learned counsel for

the appellants and the learned authorized representative for the Revenue have been considered. The questions to be decided in these two appeals are as follows:

- a) Are the de-humidifiers weighing less than 20 kg imported by the importer classifiable under **CTI 8509 80 00** (as held in the impugned order) or under **CTI 8479 89 20** (as asserted by the importer)?
- b) Could the demand have been issued under section 28 of the Act without the Revenue first assailing the self-assessment of Bills of Entry by importer before the Commissioner (Appeals)?
- c) Has the extended period of limitation under section 28(4) been correctly invoked in this case to raise a demand?
- d) Were the goods liable for confiscation under section 111(m)?
- e) Has the penalty under section 114A been correctly imposed on the importer?
- f) Has the penalty been correctly imposed on the CB under section 112?

Classification of de-humidifiers

12. The two competing entries are **CTI 8509 80 00** (as held in the impugned order) and **CTI 8479 89 20** (as asserted by the importer in this appeal). The relevant entries and Chapter Notes are reproduced below:

CHAPTER 84

Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof

NOTES :

1. This Chapter does not cover :

(a)

(b) to (e)

(f) electro-mechanical domestic appliances of heading 8509; digital cameras of heading 8525;

(g)

**8479 MACHINES AND MECHANICAL APPLIANCES
HAVING INDIVIDUAL FUNCTIONS, NOT SPECIFIED OR
INCLUDED ELSEWHERE IN THIS CHAPTER**

8479 10 00 – Machinery for public works, building or
the like

8479 20 - Machinery for the extraction or preparation of
animal or fixed vegetable or microbial fats or
oils:

8479 20 10 --- Oil-seed crushing or grinding machinery
including purifying tanks

8479 20 90 --- other

8479 30 00 - Presses for the manufacture of particle
board or fibre building board of wood or
other ligneous materials and other
machinery for treating wood or cork

8479 40 00 – Rope or cable-making machines

8479 50 00 - Industrial robots, not elsewhere specified
or included

8479 60 00 - Evaporative air coolers
- Passenger boarding bridges :

8479 71 00 – Of a kind used in airports

8479 79 00 -- Other

-Other machines and mechanical appliances:

8479 81 00 -- For treating metal, including electric wire
coil-winders

8479 82 00 -- Mixing, kneading, crushing, grinding,
screening, homogenising, emulsifying or
stirring machines sifting

8479 83 00 -- Cold isostatic presses

8479 89 -- Soap cutting or moulding machinery

**8479 89 10 --- Air humidifiers or dehumidifiers
(other than those falling under heading
8412 or 8424)**

.....

CHAPTER 85

**Electrical machinery and equipment and parts
thereof; sound recorders and reproducers, television
image and sound recorders and reproducers, and parts
and accessories of such articles**

NOTES :

4. Heading 8509 covers only the following electro-mechanical machines of the kind commonly used for domestic purposes :

(a) floor polishers, food grinders and mixers, and fruit or vegetable juice extractors, of any weight;

(b) Other machines provided the weight of such machines does not exceed 20 kg.

The heading does not, however, apply to fans and ventilating or recycling hoods incorporating a fan, whether or not fitted with filters (heading 8414), centrifugal cloths-dryers (heading 8421), dish washing machines (heading 8422), household washing machines (heading 8450), roller or other ironing machines (heading 8420 or 8451), sewing machines (heading 8452), electric scissors (heading 8467) or to electro-thermic appliances (heading 8516).

**8509 ELECTRO-MECHANICAL DOMESTIC APPLIANCES,
WITH SELF CONTAINED ELECTRIC MOTOR, OTHER
THAN VACUUM CLEANERS OF HEADING 8508.**

8509 40 - Food grinders and mixers; fruit or vegetable
juice extractors

8509 40 10 --- Food grinders

8509 40 90 --- Other

8509 80 00 - Other appliances

8509 90 00 - Parts

13. The undisputed facts are that the disputed goods were de-humidifiers of Westinghouse brand meant for domestic use and weighed less than 20 kg. De-humidifiers are, undisputedly electro-mechanical appliances as they have both electric and mechanical parts. The importer's contention is that when there is a specific heading for dehumidifiers under **CTI 8479 89 10**, they should fall under it and not as 'other electro-mechanical appliances' under **CTI 8509 80 00**.

14. We find that in classifying the goods under the Customs Tariff, the Rules of Interpretation play a vital role. It is a well-settled legal position that these Rules should also be applied seriatum, Rule 1 followed by Rule 2, and so on. Rule 1 states that classification should be as per Chapter Headings and Sub-Headings and the corresponding Chapter Notes and Section Notes. These Notes spell out the scope of the Section, Chapter, Headings and Sub-Headings or specifically include or exclude certain types of goods from their scope.

15. **CTI 8479 89 10** does, specifically cover air humidifiers and de-humidifiers but Chapter Note 1(f) to Chapter 84 specifically excludes certain types of goods from the scope of the entire chapter including goods falling under heading 8509. Even if the goods otherwise match the description of one of the headings, if they are excluded by Chapter Note 1(f), they

cannot be classified under any heading under Chapter 84. Therefore, **CTI 8479 89 10** covers only such humidifiers and dehumidifiers as would not get excluded by Chapter Note 1(f).

16. What needs to be examined next is if the disputed goods fall within the scope of Chapter Note 1(f) to Chapter 84, i.e., if they are electro-mechanical domestic appliances of Heading 8509. There is no dispute that the goods were domestic appliances. There is also no dispute that they have both electrical and mechanical parts and therefore, they are electro-mechanical appliances. What needs to be examined is whether they fall under **CTH 8509**. If they do, Chapter Note 1(f) excluded them from the scope of Chapter 84 and not otherwise.

17. **CTH 8509** covers all electro-mechanical domestic appliances with a self-contained motor except vacuum cleaners. The disputed goods are electro-mechanical appliances for domestic use, have self-contained motors and they are not vacuum cleaners. These facts are not in dispute. For this reason, they fall under **CTH 8509**. However, this heading must also be read with the corresponding Chapter Note, which is Chapter Note 4 to Chapter 85. This Note indicates which types of goods are covered under **CTH 8509** and which types of goods are excluded. As per this Note, they:

- (a) must be electro-mechanical appliances;
- (b) must be meant for domestic use;
- (c) they must weigh less than 20 kg; and

(d) they must not be fans and ventilating or recycling hoods incorporating a fan, whether or not fitted with filters (heading 8414), centrifugal cloths-dryers (heading 8421), dish washing machines (heading 8422), household washing machines (heading 8450), roller or other ironing machines (heading 8420 or 8451), sewing machines (heading 8452), electric scissors (heading 8467) or to electro-thermic appliances (heading 8516).

18. The disputed goods meet the criteria laid down in (a), (b) and (c) above and are not one of the goods listed in (d) above. Therefore, they fall within the four-digit **CTH 8509**. This CTH is further divided into 'Food grinders and mixers; fruit or vegetable juice extractors' 'other appliances' and 'parts'. The disputed goods are not food grinders and mixers or juice extractors. They fall under the category of 'other appliances' within **CTH 8509** and the correct **CTI** is **8509 80 00** as asserted by the Revenue.

19. Since the goods fall under **CTH 8509 (CTI 8509 80 00)**, as per Chapter Note 1(f), they cannot fall under Chapter 84 or any of the **CTI** under it including **CTI 8479 89 10** claimed by the importer. In fact, the claim of the importer is specifically based on ignoring Chapter Note 1(f).

20. Learned counsel for the appellant argued that **CTI 8479 89 10**, being a more specific heading for dehumidifiers, should prevail over the general **CTI 8509 80 00**. There is no force in this argument because **CTI 8479 89 00** covers only such

dehumidifiers as are not excluded from Chapter 84 by Chapter Note 1 (f). Since the disputed goods fall under **CTH 8509**, they are excluded by Chapter Note 1 (f) to Chapter 84 and do not fall under **CTI 8479 89 00**, let alone, being specifically covered by it. Secondly, **CTH 8509** is also not a generic entry; its scope is restricted by Chapter Note 4 to Chapter 85 and the disputed goods squarely fall within its ambit.

21. Learned counsel also submitted that where there is a specific entry, the goods cannot be relegated to the residual category of 'other appliances'. This submission deserves to be rejected. **CTI 8509 80 00** covers appliances not covered by earlier sub-headings and CTI within **CTH 8509**. It is not a residuary entry for the entire tariff.

22. **We have no manner of doubt that the disputed goods are correctly classifiable under CTI 8509 80 00.**

Demand raised without assailing the self-assessment

23. Learned counsel submitted that the Department should have assailed its self-assessed Bills of Entry before Commissioner (Appeals) if it wanted to change the classification and without assailing them, no demand could have been raised under section 28. He placed reliance on **ITC Ltd., Priya Blue¹¹ and Flock India¹²**.

11. 2004 (172) E.L.T. 145 (S.C.)

12. 2000 (120) E.L.T. 285 (S.C.)

24. We find that this submission of the learned counsel is based on a complete mis-understanding of the judgment of the Supreme Court in **ITC Ltd.** and the difference between a demand raised under section 28 and refund under section 27. The judgments in **ITC Ltd., Priya Blue** and **Flock India** were on the question as to if refund could be sanctioned so as to modify the assessment or it could be sanctioned only if the duty was paid in excess of what was assessed.

25. To examine this issue, it is profitable to understand the law laid down by successive judgments. In **Flock India**, the Assistant Collector had, after examining the classification lists filed by Flock India (as assessees were required to during the relevant period), rejected the classification claimed and passed an order changing the classification. This order of the Assistant Collector was appealable but the assessee had not appealed to the Collector (Appeals). Instead, it directly filed a refund application for the differential duty. Supreme Court held that refunds can be claimed if they flow from the assessment and not so as to modify the assessment. Therefore, unless the assessment is appealed against and is modified, no refund could be sanctioned.

26. The ratio of **Flock India** was followed by the Supreme Court in **Priya Blue** which was a Customs matter. It needs to be pointed out that unlike a SCN for demand of duty, sanction of refund is not an adjudication procedure to modify the

assessment. The officer sanctioning the refund cannot sit in judgment or modify the assessment by the assessing officer. Since every Bill of Entry is an assessment by itself, Bills of Entry can and are often appealed against.

27. Later, the Customs procedures changed and self-assessment and selective re-assessment by the officers were introduced initially, as a practice. In 2011, Section 17, which deals with assessment, itself was amended and the concept of self-assessment and selective re-assessment were introduced in the Customs Act itself. The question which then arose was if the goods were cleared without any assessment by the proper officer, whether a refund be claimed because there is no order or assessment by the proper officer to appeal against. In **Aman Medical Products Ltd. vs Commissioner**¹³ and **Micromax Informatics Ltd. vs UOI**¹⁴ Delhi High Court held that in cases where there is no assessment or order by the proper officer, refunds can be claimed without any appeal to the Commissioner (Appeals) to assail the self-assessment.

28. These and several other cases were carried in appeal before the Supreme Court by the Revenue. The Constitution Bench of Supreme Court in **ITC Ltd.** decided that all assessments including self-assessments can be appealed against before the Commissioner (Appeals) and no refund can be sanctioned unless the assessment is modified.

11. 2010 (250) E.L.T. 30 (Del.)

12. 2016 (342) E.L.T. A183 (Del.)

29. Learned counsel has mis-construed this requirement for sanction of refund under section 27 as the requirement for issuing an SCN demanding duty under section 28. Neither **Flock India** nor **Priya Blue** nor **Aman Medical** nor **Micromax** dealt with the question of demand under section 28. Even the decision of the Constitution Bench of Supreme Court in **ITC Ltd.** is also not regarding demands under section 28 but only regarding refunds under section 27. While assessment is like a decree, refund is like its execution. Needless to say that in an execution petition, the decree cannot be changed.

30. It has been made explicit by the Supreme Court in **Priya Blue** that the assessment can be modified either through an appeal or under section 28. The relevant portion of this judgment are as follows:

6. We are unable to accept this submission. Just such a contention has been negated by this Court in Flock(India)'s case (supra). **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.**

7. We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. It was still held, in

Flock (India)'s case (supra), that in the absence of an Appeal having been filed no refund claim could be made.

8. The words "in pursuance of an Order of Assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of Assessment to claim refund. These words do not lead to the conclusion that without the Order of Assessment having been modified in Appeal or reviewed a claim for refund can be maintained.

9. In our view, the ratio in Flock (India)'s case (supra) fully applies. We, therefore, see no substance in the Review Petition. Accordingly, the Review Petition stands dismissed with no order as to costs.

(emphasis supplied)

31. This legal position was quoted with affirmation in **ITC**

Ltd. The relevant portion of the judgment is as follows:

40. In Priya Blue Industries Ltd. v. Commissioner of Customs(Preventive) - 2004 (172) E.L.T. 145 (S.C.) = (2005) 10 SCC433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus :

"6. We are unable to accept this submission. Just such a contention has been negated by this Court in Flock (India) case (2000) 6 SCC650. **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.

7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the

claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an appeal having been filed no refund claim could be made.

8. The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained."**(emphasis supplied)**

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."

32. Thus, both **ITC Ltd.** and **Flock India** make it explicit that the assessments can be modified either through an appeal to the Commissioner (Appeals) or modified under section 28. The submission of the learned counsel is quite the opposite of the law laid down by the Supreme Court and hence cannot be accepted. It would also be pertinent to mention that if the submission of the learned counsel is accepted, it will result in absurd consequences. If a notice under section 28 is issued, after considering the reply and hearing the noticee, the proper officer (Commissioner or Additional Commissioner or Joint Commissioner or Deputy Commissioner or Assistant Commissioner) has to adjudicate the matter and pass an order. If the assessment was already appealed against before Commissioner (Appeals) and was either affirmed or annulled or modified, the assessment order merges with the order of the

Commissioner (Appeals). The question of the proper officer again issuing a notice under section 28 on the same issue after the Commissioner (Appeals) had decided the matter does not arise because the proper officer cannot sit in judgment over the order of Commissioner (Appeals).

33. The judgments of the Supreme Court in **Flock India** and **ITC Ltd.**, make it more than explicit the nature of the power under section 28 and that an assessment can be modified by resorting to section 28 or in an appeal. **Demand under section 28 can be issued so as to modify the assessment including self-assessment.**

Demand invoking extended period of limitation under section 28(4)

34. According to the learned counsel, the appellant believed that the disputed goods fall under **CTI 8479 89 10**, and not under **CTI 8509 80 00**. Therefore, even if the demand was issued under section 28, the elements required to invoke extended period of limitation under section 28(4) viz., collusion, wilful misstatement or suppression of facts were not present in this case.

35. According to the learned authorized representative for the Revenue, the question of classification of the goods was settled when the Bill of Entry No 7981861 dated 27.12.2016 was re-assessed by the proper officer under **CTI 8509 80 00** and the appellant did not contest the re-assessment. In all

subsequent Bills of Entry filed up to 31.5.2017, the appellant itself classified the goods under this CTI and paid duty. Thereafter, from 25.01.2018 to 19.05.2022 the importer filed several Bills of Entry again classifying the goods under **CTI 8479 89 20**. After DRI started investigation, i.e., from 20.5.2022, the importer filed Bills of Entry again classifying the goods under **CTI 8509 80 00**. This conduct of the appellant shows that the classification of the goods under **CTI 8479 89 20** was not on account of any honest belief of the appellant but merely to evade duty by mis-classifying the goods. When caught, it paid duty correctly otherwise, it evaded duty by mis-classification.

36. The submission of the learned authorized representative for the Revenue deserve to be accepted. It is true that usually, any classification of the goods in the Bill of Entry during self-assessment is only a matter of belief or opinion of the importer and it can hold a different opinion than the officer re-assessing the goods. In this case, the appellant had initially filed the Bill of Entry dated 27.12.2016 classifying under **CTI 8479 89 20** and the Bill of Entry was re-assessed by the officer under **CTI 8509 80 00**. The appellant paid duty accordingly and did not contest the classification.

37. Further, in all the Bills of Entry filed up to 31.5.2017, the appellant classified the goods under the same **CTI 8509 80 00**. It then started classifying the goods again under **CTI**

8479 89 20 and paying duty at a lower rate until DRI started investigation. The appellant thereafter, classified the goods under **CTI 8509 80 00** and started paying duty at a higher rate. This shows that the appellant had no honest belief or opinion about the classification but it only tried to take advantage and pay lower duty if mis-classifying the goods was not detected. Honest opinion cannot change suddenly after 31.5.2017 and change back after DRI starts investigation.

38. The question of deliberate mis-classification to pay lower duties was examined by the Supreme Court in **Commissioner of Central Excise, Ahmedabad versus Urmin Products Pvt. Ltd.**¹⁵ in which the decision of a Bench of this Tribunal against invoking extended period of limitation in a case involving mis-classification of the goods against **Urmin Products** was assailed by the Revenue before the Supreme Court. The Supreme Court held in favour of Revenue as the assessee had deliberately changed the classification to take advantage of lower rates of duties after budgetary changes. Relevant portion of the judgment is reproduced below:

“RE: Q. No. 1 Issue of Limitation/Section 11A of the CE Act:

36. In the instant case *i.e.*, Civil Appeal Nos.10159-10161 of 2010 - *CCE Ahmedabad v. M/s Urmin Products Pvt. Ltd.* the show cause notice came to be issued on 9-7-2007 and the OIO came to be passed on 28-1-2008 which resulted in the impugned order dated 25-3-2010.

37. **The tribunal by the impugned order has held** to the following effect:

"22. In any case, we consider that the limitation would apply in this case and show cause notice should not have been issued beyond one year in view of the fact that the appellant intimated their intention to change. Further, the appellant had also intimated that the proposed change was not in line with the industrial factory. Therefore, the extended period also could not have been applied in this case."

38. It would be apt to note at this juncture itself that the judgment of this Court in *CCE v. Cotspun* (1999) 7 SCC 633/1999 (113) E.L.T. 353 (S.C.)/1999 taxmann.com 667 (SC), whereunder, it came to be held that levy of excise duty based on an approved classification list is not a short levy and differential duty cannot be recovered on the ground that it is a short levy. It was further held that levy of excise duty based on an approved classification list is the correct levy, at least until the correctness of the approval is questioned by the issuance of a show cause notice to the assessee. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.

It was further held:

"14. The levy of excise duty on the basis of an approved classification list is the correct levy, at least until such time as to the correctness of the approval is questioned by the issuance to the assessee of a show-cause notice. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.

15. The levy of excise duty on the basis of an approved classification list is not a short levy. Differential duty cannot be recovered on the ground that it is a short levy. Rule 10 has then no application.

16. We are, therefore, of the opinion that the judgment in Ballarpur Industries which did not advert to Rule 173-B, does not lay down the law correctly and it is overruled. The decision in Rainbow Industries, on the other hand, correctly lays down the law. It was delivered in the context of Rule 173-C dealing with approved price lists and the provisions of Rules 173-C and 173-B are analogous."

39. However, the said finding in Cotspun's case would not merit acceptance for the simple reason that the amendment to Section 11A of CE Act, brought by Act 10 of 2000, would clearly take within its sweep, that even if there is non-levy or non-payment, short levy or short payment, or erroneous refund, as the case may be, on the basis of any approval, acceptance or assessment relating to the rate of duty or on valuation of excisable goods under any other provisions of the CE Act or the rules made thereunder, the Central Excise Officer can, within one year from the relevant date, serve a notice on the person chargeable with duty which has not been levied or unpaid or which has been short levied or short paid or to whom the refund has been erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

40. Notification No. 2 of 2006 dated 1-3-2006 was issued in supersession of Notification No. 13 of 2002 dated 1-3-2002 specifying thereunder the goods covered under section 4A of Act 1944 for MRP-based assessment. It was noticed that the notification did not specify the goods falling under CET SH 2403 9930 ('zarda/jarda scented tobacco') but covered the goods falling under CET SH 2403 9910 ('chewing tobacco'). Since the 'zarda/jarda scented tobacco' was not specified under MRP-based assessment under section 4A of CE Act, the goods had to be assessed under section 4 of the CE Act. The abatement provided to the goods classified under CET SH 2403 9910 was 50 percent. Hence, if the goods are cleared as 'chewing tobacco' the duty has to be paid on lower value

resulting in payment of a lesser amount of duty, as the value determined under section 4A after 50 percent abatement was much lesser compared to transactional value under section 4 of CE Act. It is for this precise reason the assessee changed the classification from 'zarda/jarda scented tobacco' to 'chewing tobacco'. 'Zarda/jarda scented tobacco' was brought into the ambit of Section 4A of the CE Act (MRP-based assessment), by virtue of amendment to Notification No. 2 of 2006 *vide* Notification No. 16 of 2006 dated 11-7-2006. In other words, 'zarda/jarda scented tobacco' was not specified for assessment under section 4A of CE Act for the period 1-3-2006 to 10-7-2006. In the light of the aforesaid discussion, we are of the considered view the contention of the assessee cannot be accepted and the Revenue was correct and justified in issuing the show cause notice.

41. One of the contentions raised by the assessee throughout has been that they had filed a letter on 30-3-2006 clearly showing the change in the classification by the assessee and the reasons for the change were shown in the statement as well as their letter dated 25-6-2007 and there was no suppression. In fact, the adjudicating authority has extracted the contents of the letter dated 30-3-2006 in paragraph 13.1 of the OIO dated 28-1-2008. However, for immediate reference and at the cost of repetition it is extracted herein below:

"This is to inform you that as per the practice followed by our industry, we classified our product; chewing tobacco into CETSH 2403 9910."

42. It is an admitted fact that till the filing of this letter, the assessee continued to classify the product as 'zarda/jarda scented tobacco' falling under CET SH 2403 9930. It is for this precise reason, that the adjudicating authority has observed, and rightly so that the letter dated 30-3-2006 had been cleverly drafted and it does not mention in detail the product which they were manufacturing at that material time namely 'zarda/jarda scented tobacco'. Though the

classification in the letter shows entry CET SH 2403 9910 ('chewing tobacco'), it would depict a picture as though it is a new product. A plain reading of the letter would not indicate that the author of the said letter intended to reveal any details about the product that is being manufactured. However, the assessee cannot feign ignorance as to the necessity of furnishing such relevant details necessary for determination of payment of duty. The assessee having been in this industry for a long period was well aware of this statutory requirement. **Upon a deeper examination of the said letter, the suppression becomes more apparent, namely the non-mentioning of change of the name and classification of the goods which they were currently manufacturing and which they ought to have disclosed.** It would be apposite to note the judgment of this court in *Continental Foundation Jt. Venture v. Commissioner of Central Excise* (2007) 10 SCC 337 = 2007 (216) E.L.T. 177 (S.C.)/2007 taxmann.com 532 (SC) that suppression means failure to disclose full information with intent to evade payment of duty. It has been further held:

"12. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the revenue invokes the extended period of limitation under section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

14. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words " misstatement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement of fact must be wilful."

It is this hiding of the fact and not specifying the details in their letter that led to the issuance of the show cause notice and invocation of Section 11A and Section 11 AC of the CE Act, by the Department. It cannot be ignored that till filing of the letter dated 30-3-2006, the assessee itself was classifying the product as 'zarda/jarda scented tobacco' falling under CET SH 2403 9930 and being a large-scale manufacturer and paying large sums of amount as duty, to contend that it was unaware of the difference between these two products, or to contend that it had classified the product as 'zarda/jarda scented tobacco' by ignorance, is not a plausible justification on part of the assessee. However, on the issuance of Notification No. 2 of 2006 dated 1-3-2006 under which 'zarda/jarda scented tobacco' was excluded or in other words not included in the said notification, the assessee changed the description of its product from 'zarda/jarda scented tobacco' to 'chewing tobacco'. The date of communication of the letter dated 30-3-2006 by the assessee also acquires significance in as much as the Notification No. 2 of 2006 dated 1-3-2006 were to take effect from 1-4-2006 and just two days before the date of the said Notification No. 2 of 2006 coming into effect, this communication dated 30-3-2006 has been forwarded to the

Department by the assessee. The intention of springing up such a letter is evident from the fact that intention was to evade payment of duty payable under section 4 of CE Act; despite knowing the fact that its product was not covered under relevant notification which provides for valuation under section 4A, yet the assessee did so, only to pay duty on lower value as per Section 4A of CE Act, by claiming the product manufactured by it as 'chewing tobacco' rather than 'zarda/jarda scented tobacco' to avail benefit of MRP-based assessment which was lower than the value as prescribed under section 4 of the CE Act.

43. Yet another factor which cannot go unnoticed is the statement of the production manager and factory in-charge and manager recorded at the time of the inspection of the units/factory of the assessee, whereunder they have clearly admitted in their statement dated 21-6-2007 recorded under section 14 of the CE Act, wherein they confirmed that in the E.R. 1 returns filed for the month of April 2006 onwards, they have revised the classification of their final product from CET SH 2403 9930 to CET SH 2403 9910 and started describing their product as 'chewing tobacco' instead of 'zarda/jarda scented tobacco' and by virtue of such declaration they continued to pay duty as per MRP-based assessment under the relevant Notification No. 2 of 2006 dated 1-3-2006 though 'zarda/jarda scented tobacco' was not covered under MRP-based assessment during the period 1-3-2006 to 10-7-2006 till the tariff entry *i.e.*, CET SH 2403 9930 being brought within the ambit of Section 4A of CE Act by issuance of Notification 16 of 2006 dated 11-7-2006. It is for this precise reason that the act of the assessee was held to be a deliberate and accordingly wilful misstatement was alleged on part of the assessee, with an intention to evade duty payable under section 4 of the CE Act, which would attract the extended period of limitation, namely proviso to Section 11A (1) being invoked. The adjudicating authority has examined the issue of invoking an extended period of limitation, in the background of the communication dated 30-3-2006 which has

been very heavily relied upon by the assessee to stave off the allegation of misrepresentation or wilful misstatement of facts and the adjudicating authority opined as under:

"It can be seen that the assessee had very cleverly drafted the letter and did not mention any details of the product which they were manufacturing at that material time *i.e.*, 'Jarda scented tobacco'. On reading this letter, any person could conclude that they have started a new product 'Chewing tobacco' which they have classified in 2403 9910 as it is the, correct subheading of Chewing tobacco. On a plain reading of the letter, at the first instance, no one will be able to understand the real motive. The assessee did not mention in the letter that they are changing the name and classification of the goods which are currently being manufactured by them which they were supposed to do. Had they mentioned this fact at that time, the issue would not have arisen at all. Intentionally, they have hidden the facts and did not elaborate in the letter. The assessee, on the contrary preferred to show the reasons in the statement recorded under section 4 on 26-6-2006 when the department caught him for evading the duty. Further, the assessee has mentioned that as per the practice followed by their industry, they classify their product Chewing tobacco into 2403 9910. The classification of the goods manufactured by an assessee is based on many factors including the raw material used, manufacturing process and the end use. If any of the deciding factors is changed then the classification may change and therefore the industry cannot decide the classification in such type of goods. The assessee intentionally hid the fact that they have changed the classification of their product *viz.* 'Jarda scented tobacco'. It is an establish fact that when there is no dispute on classification and the assessee suddenly submits a very carefully drafted letter of such type, a general inference will be drawn that a new product has been introduced in place of earlier one. The assessee, with intent to evade the Central Excise duty, deliberately resorted to mis-statement and willfully suppressed the vital facts. The assessee had changed and misclassified the product from 'Jarda scented tobacco' to

'Chewing tobacco' with an intention to evade payment of duty payable under section 4 of the Central Excise Act, 1944, despite knowing the fact that their product was not covered under the relevant Notification which provides for valuation under section 4A. The assessee did so to enable them to pay duty on lower value [as the value as per Section 4A of Central Excise Act, 1944 (MRP based assessment) was lower than the value as per Section 4 of Central Excise Act, 1944. Thus, there was a deliberate intention to evade payment of duty by the assessee, by misclassification and willful mis-statement of their product and due to this act, the department is entitled to invoke the extended period as provided in the proviso to Section 11A (1) of the Central Excise Act, 1944 to recover the differential duty along with interest under section 11 AB for the larger period upto 5 years and has also rendered themselves liable to penalty under section 11 AC of the Central Excise Act 1944. I, accordingly hold that the assessee is liable to penalty under section 11AC of the Central Excise Act, 1944."

However, the tribunal has proceeded to hold that limitation would apply and show cause notice should not have been issued beyond one year in view of the fact that the assessee intimated their intention to change - *vide* Paragraph 22 of the impugned order, without addressing the aforesaid issues which has been dealt in detail hereinabove. In other words, the tribunal by cryptic order has negated the contentions of the Revenue and held that the invocation of the extended period of limitation was not warranted. This finding, not being in consonance with the facts obtained on the hand, we are unable to subscribe our views to the judgment of the tribunal. In that view of the matter, we are of the considered view that Question No. 1 is to be answered against the assessee and in favour of the Revenue and affirm the finding of the adjudicating authority and reverse and/or *set aside* the finding recorded by the tribunal which has been observed at the initial stage herein given that it is not only contrary to the facts but also contrary to law as noticed hereinabove. **It is for these precise reasons the Adjudicating Authority was of the**

clear view that there has been a deliberate intention to avoid payment of duty by the assessee by misclassification and willful misstatement of its product and hence it was justified in invoking the extended period as provided in the proviso to Section 11A(1) of CE Act, 1944.

39. Thus, in the case of **Urmin Products**, even though the appellant had informed the department that it was changing the classification, it had cleverly drafted the letter not giving all the details and the Supreme Court held that extended period of limitation was correctly invoked.

40. In this case, the appellant had not even informed the department that it was changing the classification of the products which was already settled. The appellant simply started classifying under a different **CTI**. Two critical factors for their classification viz., that the dehumidifiers were meant for domestic use and that they weighed less than 20 kg were not even indicated. The appellant continued to pay duty at a lower rate until DRI started investigation and then it switched back to the correct CTI. Following the decision in **Urmin Products**, we find that the SCN invoking extended period of limitation was correctly invoked.

Were the goods liable for confiscation under section 111(m)?

41. Section 111 (m) reads as follows:

111. Confiscation of improperly imported goods,

etc.

The following goods brought from a place outside India shall be liable to confiscation:-

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

42. The imported goods did not correspond to the **CTI** in the Bill of Entry and therefore, they were liable to confiscation under section 111(m). Consequently, penalties were imposable under section 112 read with section 114A of the Act.

Was the penalty under section 114A correctly imposed on the importer?

43. Section 114A of the Customs Act reads as follows:

114A. Penalty for short-levy or non-levy of duty in certain cases.

Where the **duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts**, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

44. It is evident from the above that the conditions for invoking extended period of limitation and for imposing penalty under section 114A are the same. Since we have held in favour of the Revenue on the question of extended period of limitation, we also uphold the penalty imposed on the importer under section 114A.

Was the penalty correctly imposed on the CB under section 112?

45. Learned counsel submitted as follows with respect to the penalty on the Customs Broker.

“The imposition of penalty of Rs. 3,00,000/- under section 112 (a) (ii) of the Customs Act, 1962 on the Appellant No. 2 i.e. Customs Broker is not tenable since, neither the SCN nor the impugned order has brought out any specific allegation regarding the role of the Appellant No. 2 (Customs Broker) in the alleged misclassification and the Appellant No. 2 had duly filed the Bills of Entry mentioning the correct description of goods as per the Commercial Invoice and other import documents”.

46. The show cause notice states in paragraphs 12.5 and 12.6 that the Customs Broker had filed the Bill of Entry dated 27.12.2016 on behalf of the importer in which they agreed with the classification under **CTI 8509 80 00**. Thereafter, the

Customs Broker filed Bill of Entry with the changed classification which shows that the Customs Broker had not advised the importer to comply with the assessment and had also not brought the matter to the notice of the Assistant Commissioner or Deputy Commissioner. The Customs Broker had failed to comply with the Customs Brokers Licensing Regulations, 2018 and also abetted the importer in misclassifying the goods. Thus, it appears that the Customs Broker was liable for a penalty under section 112 and 114AA of the Act read with CBLR.

47. The Customs Broker, in its reply, denied all the allegations against it.

48. In the impugned order in paragraphs 7.3, 7.4 and 7.5, it is recorded, based on the statements of various persons, that the Customs Broker knew about the previous Bill of entry dated 27.12.2016 and had even told the importer about the classification and yet had filed Bills of Entry with the wrong classification. Hence, it is held that the Customs Broker was liable to penalty under section 112 (b) (ii) and a penalty of Rs. 3,00,000/- was imposed on the Customs Broker.

49. We do not find sufficient evidence and justification to hold that the Customs Broker had abetted the misclassification of goods. The proposal in the show cause notice against Customs Broker is also vague proposing action under section 112 read with CBLR, 2018. The findings against

the Customs Broker were only based on statements of various persons. We, therefore, find that the penalty on the Customs Broker deserves to be set aside.

50. In view of the above, the impugned order is modified to the extent of setting aside the penalty on the Customs Broker and the rest of the order is upheld.

51. Customs Appeal No. 50215 of 2024 filed by the importer is dismissed and Customs Appeal No. 50400 of 2024 filed by the Customs Broker is allowed.

(Order pronounced in open court on 01/08/2025.)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

PK