CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 86486 of 2022

(Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-1966/2021-22 dated 28.03.2022 passed by the Principal Commissioner of Customs (Appeals), Mumbai Zone-III)

M/s Reliance Jio Infocom Ltd. **.... Appellant**
Building No. 5C, CA-22, 1st Floor,
Reliance Corporate Park, Ghansoli,
Navi Mumbai – 400 701

Versus

Principal Commissioner of Customs (Imp.), **.... Respondent**
CRC Refund, Air Cargo Complex, Sahar,
Andheri (East), Mumbai – 400 099

Appearance:

Shri J.C. Patel, Advocate a/w Ms. Shilpa Balani, Advocate for the Appellant

Shri Manoj Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87598/2023

Date of Hearing: 06.09.2023
Date of Decision: 06.09.2023

Per: S.K. Mohanty

This appeal is directed against the Order-in-Appeal No. MUM-CUSTM-AMP-APP-1966/2021-22 dated 28.03.2022 (for short, referred to as "the impugned order"), passed by the learned Commissioner of Customs (Appeals), Mumbai-III. The impugned order has upheld the original order dated 27.05.2021, insofar as it had rejected the refund application filed by the appellant.

2. Briefly stated, the facts of the case are that during the period July'2018 and March'2019, the appellant herein had imported about 70

shipments of Small Form-Factor Pluggable (SFPs) through Sahar Air Cargo Complex, Mumbai, by classifying the same under CTH 85177090. It had filed Bills of Entry (B/Es), claiming the applicable rate of duty to be 'nil' and had also referred to exemption Notification No. 57/2017-Cus (Sr. No.5)., dated 30.06.2017. This rate of duty as well as the classification under CTH 85177090 was the self-assessment made by the appellant under sub-section (1) of Section 17 of the Customs Act, 1962 (for short, "the Act"). However, it is evident that the department disagreed with the classification and rate of duty self-assessed by the appellant and re-assessed all the B/Es by changing the classification to CTH 85176290 and the rate of duty to 10%/20%, which was applicable to the changed classification. The appellant, upon being informed of the change, protested by submitting a detailed written representation, explaining why the classification claimed by it was correct. The written representation also referred to two orders of the appellate authorities, one passed by the jurisdictional Commissioner (Appeals) at Mumbai and the other by the Commissioner of Customs (Appeals) at Hyderabad. Copies of these orders were also attached with these representations and it was claimed that the order of the Commissioner of Customs (Appeals), Hyderabad was accepted by the Department by not filing any further appeal to a higher appellate forum. It was further indicated that since the goods were urgently required, the duty as re-assessed by the proper officer would be paid under protest. These representations ended with a prayer to the proper officer to issue a speaking order. It is only after the submission of such detailed representation that duty as re-assessed by the proper officer was paid under protest for seeking clearance of the goods from the Customs department. Subsequently, as a follow-up to the prayer in the representation, appellant also submitted reminder letters to the proper officer of Customs, requesting for passing of speaking orders in terms of sub-section (5) of Section 17 of the Act. Appellant claims that no response was ever received by it either to the written representation or to the reminder letters. Also no speaking orders were issued under Section 17(5) of the Act. Since the requests for issuance of speaking orders were not being allowed by the proper officer, appellant claims that it was left with no alternative, but to file a refund application under sub-section (1) of Section 27 of the Act, claiming refund of the duties paid by it in terms of the adverse re-assessment made. This refund application was filed on 20.05.2019. The matter arising out of the refund application was adjudicated by the Learned Deputy Commissioner of Customs, CRC(I), ACC, Mumbai vide the Order-in-Original dated 27.05.2021, by rejecting the same. The original authority held that the appellant had not appealed against the assessment order(s) and thus, the refund claim was not maintainable under Section 27 of the Act. On appeal against the said original order, the learned Commissioner of Customs (Appeals) vide the impugned order dated 28.03.2022 rejected the appeal, and upheld the order passed by the original authority. She has mainly relied upon the judgment of Hon'ble Supreme Court in the case of *ITC Ltd. vs. Commissioner of Central Excise, Kolkata-IV,* reported in 2019 (368) E.L.T. 216 (S.C.), to conclude that the re-assessment made by the proper officer, not challenged in appeal, will not give entitlement for refund to the appellant. Feeling aggrieved with the impugned order dated 28.03.2022, the appellant has preferred this appeal before the Tribunal.

3.1 Learned Advocate appearing for the appellant submitted that the issue of proper classification of the imported goods i.e., SFP under CTH 85177090 is no more *res integra*, in view of the judgment dated 27.02.2023 of the Supreme Court, in Civil Appeal No. 1475-1477/2023, in appellant's own case by affirming an order passed by Tribunal as reported in 2022-TIOL-708-CESTAT-MUM. He further submitted that the classification dispute of the subject goods had actually got decided long ago in 2017 itself by an order dated 25.01.2017 by the Commissioner (Appeals), Hyderabad which was accepted by the department. This is the order that was followed by the jurisdictional Commissioner (Appeals), Mumbai–III, which was subsequently affirmed by the Tribunal and then by the Hon'ble Supreme Court in the appellant's own case. The fact that the revenue had accepted the 2017 order of the Commissioner of Customs (Appeals), Hyderabad is one of the reasons assigned for affirming the classification of SFP under CTH 85177090, that the appellant had claimed in the B/Es. Thus, during the period July 2018 to March 2019, when the subject imports were made, the issue of classification stood examined and decided in favour of the appellant, which fact was brought to the notice of the proper officer through detailed written representations filed along with copies of the two orders of the Commissioner (Appeals), referred to above. Applying the principle of judicial discipline laid down by the Hon'ble Supreme Court in the case of *Kamlakshi Finance,* reported in 1991 (55) ELT 433, the proper officer of Customs had no authority in law to re-assess the B/E in the manner he did. Learned Advocate further submitted that this patent illegality was further compounded by not passing any speaking order in any of these 70 B/Es, despite detailed written representations submitted before the customs clearance of the goods and several reminders submitted, requesting the proper officer to comply with the mandatory stipulation of passing a speaking order within 15 days of the re-assessment as provided in Section 17(5) of the Act.

3.2 Learned Advocate further submitted that in a case of this kind, where the proper officer has failed to comply with the mandatory stipulation provided in Section 17(5) of the Act of passing a speaking order, the proper course of action for the department would have been to invoke the provisions of Section 149 of the Act to suitably amend the B/E, by restoring the classification and rate of duty originally claimed and self-assessed by the appellant. In this regard, he relied upon the judgement of the Hon'ble Bombay High Court, in the case of *Dimensions Data India Pvt. Ltd. Vs Commissioner of Customs,* reported in 2021 (376) ELT 192 (affirmed by the Hon'ble Supreme Court) by dismissing an SLP filed by the Revenue as reported in 2022 (379) ELT A39(SC). He submitted that the judgement of the Hon'ble Bombay High Court has, after taking note of the ratio laid down in Hon'ble Supreme Court's judgement in ITC's case, held that filing of an appeal under Section 128 of the Act is not the only method of correcting an erroneous assessment made by the proper officer. The Hon'ble High Court took note of the observations of the Hon'ble Supreme Court in para 47 of ITC's case, which says that for claiming refund under Section 27 of the Act, an order of assessment is required to be first modified, either under Section 128 or "under other relevant provisions of the Customs Act". The Hon'ble Bombay High Court has held that Sections 149 and 154 are two such other relevant provisions of the Customs Act, which can be invoked, subject to satisfaction of the conditions prescribed in these provisions, for modifying an order of assessment on the B/E. Learned Advocate submitted that in the facts and circumstances of the present case, the provisions of Section 149 of the Act are clearly applicable and ought to have been invoked by the proper officer by modifying the erroneous re-assessment made at the time of customs clearance. He submitted that the Hon'ble High Court has clearly observed that the provisions of Section 149 of the Act are invokable post clearance of goods for correcting mistakes and errors made at the time of initial assessments prior to clearance of goods. Thus, he submitted that once the erroneous re-assessment made by the proper officer was amended under Section 149 of the Act, so as to fall in line with the appellant's claim of classification and to align the same with the two orders of the Commissioner of Customs (Appeals) (supra), the excess paid duty would become eligible for refund, in terms of para 47 of the Hon'ble Supreme Court judgement in ITC's case.

3.3 In addition to the above submissions, Learned Advocate has also relied upon the following decisions and judgements:

(i) *Commissioner of Customs, Tuticorin Vs. Sakthi Sugars Ltd. 2020 (372) E.L.T. 577 (Tri. - Chennai)*

(ii) Kirloskar Ferrous Industries Ltd. Vs. Commr of Cus., Mangalore 2021 (377) E.L.T. 878 (Tri. – Bang.)

(iii) Kothari Metal Ltd. Vs. Union of India - 2011 (274) E.L.T. 488 (CAL.)

(iv) Calison Fibers Pvt. Ltd. Vs. Commr. of Cus. (Import), Nhava Sheva 2019 (370) E.L.T. 1097 (Tri.- Mumbai).

4. On the other hand, Learned Authorized Representative (AR) appearing for Revenue reiterated the findings recorded in the impugned order. He further submitted that since the B/Es in question were self-assessed by the appellant, in absence of challenge of such assessment before the Learned Commissioner (Appeals) in terms of Section 128 of the Act for setting aside such assessment, refund claims shall not be entertained by the department. To strengthen the stand of Revenue in support of rejection of refund application, Learned AR has relied upon the judgements delivered by the Hon'ble Supreme Court in the cases of *Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd.* – 2000 (12) E.L.T. 285 (S.C.), *Priya Blue Industries Ltd. Vs. Commissioner of*

Customs (Preventive) – 2004 (172) E.L.T. 145 (S.C.) and *ITC Ltd. Vs. Commissioner of Central Excise, Kolkata-IV* – 2019 (368) E.L.T. 216 (S.C.).

5. Heard both sides and perused the case records, including the written submissions filed during the course of hearing of the present appeal.

6.1 The provisions for assessment of duties of customs on import or export of goods are contained in Section 17 of the Act. The phrase 'assessment' has been defined in Section 2(2) thereunder. Further, the provision for claim of refund of duty is contained in Section 27 of the said Act. Prior to the period 08.04.2011, the proper officer of customs was entrusted with the power to assess the duty liability in respect of the goods imported into India and those exported outside the territory of India. Similarly, the definition of 'assessment' was also worded in alignment with the above provision. Section 27 of the Act, dealing with the provisions for claim of refund of duty had also provided that duty(ies) paid by a person, in pursuance to an order of assessment; or the person who bears the incidence of such duty, may make an application for refund of such duty.

6.2 The above statutory provisions underwent drastic changes with effect from 08.04.2011, by way of substitution by the Finance Act, 2011. The phrase 'self-assessment' was inserted in the amended definition of assessment in Section 2(2) of the Act. The concept of 'assessment of duty' as per Section 17 of the Act, which was hitherto the sole responsibility of the proper officer of customs, was shifted to the importer or exporter to 'self-assess the duty' on the imported or exported goods. Similarly, Section 27 of the Act, dealing with the provision for claim for refund of duty was also amended, providing that any person claiming refund of any duty or interest, paid by him; or borne by him, may make an application to the Assistant/Deputy Commissioner of Customs, within the prescribed time frame. The amended provisions under Sections 2(2), 17 & 27 of the Act of 1962 (w.e.f. 08.04.2011) are extracted herein below:

Customs Act, 1962

"Section 2. Definitions
In this Act, unless the context otherwise requires—
(2) "assessment" includes provisional assessment, self assessment, reassessment and any assessment in which the duty assessed is nil;

***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 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.

(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

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

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act 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.

(6) Where re-assessment has not been done or a speaking order has not been passed on re-assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.

Explanation. — For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall *continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.*

Section 27. Claim for refund of duty. –
(1) Any person claiming refund of any duty or interest, —
(a) paid by him; or
(b) borne by him,

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

7. Consequent upon the above amendments made in the Customs statute, the Central Board of Excise and Customs (CBEC), in the Department of Revenue, Ministry of Finance had issued the Circular No. 17/2011-Customs dated 08.04.2011, clarifying the amended provisions of Section 17 *ibid*, under the title "*Implementation of 'Self-Assessment' in Customs*". The relevant paragraphs in the said circular are quoted herein below:

"2. New Section 17 of the Customs Act, 1962 provides for self-assessment of duty on imported and export goods by the importer or exporter himself by filing a Bill of Entry or Shipping Bill, as the case may be, in the electronic form (new Section 46 or 50). The importer or exporter at the time of self-assessment will ensure that he declares the correct classification, applicable rate of duty, value, benefit of exemption notifications claimed, if any, in respect of the imported/export goods while presenting Bill of Entry or Shipping Bill. This should not pose any new difficulties since the importers/exporters and CHAs have been filing these documents containing the required details regularly in the ICES.

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4. Under the new scheme of self-assessment, the Bill of Entry or Shipping Bill that is self-assessed by importer or exporter, as the case may be, may be subject to verification with regard to correctness of classification, value, rate of duty, exemption notification or any other relevant particular having bearing on correct assessment of duty on imported or export goods. Such verification will be done selectively on the basis of the output of the Risk Management System (RMS), which not only provides assured facilitation to those importers having a good track record of compliance but ensures that on the basis of certain rules, intervention, etc. high risk consignments are interdicted for detailed verification before clearance. For the purpose of verification, the proper officer may order for examination or testing of the imported or export goods. The proper officer may also require the production of any relevant document or ask the importer or *exporter to furnish any relevant information. Thereafter, if it is found that self-assessment of duty has not been done correctly by the importer or exporter, the proper officer may re-assess the duty. This is without prejudice to any other action that may be warranted under the Customs Act, 1962. On re-assessment of duty, the proper officer shall pass a speaking order, if so desired by the importer, within 15 days of re-assessment. This requirement is expected to arise when the importer or exporter does not agree with re-assessment, which is different from the original self-assessment. There may be situations when the proper officer of Customs finds that verification of self-assessment in terms of section 17 requires testing/further documents/information, and the goods can not be re-assessed quickly but are required to be cleared by the importer or exporter on urgent basis. In such cases, provisional assessment may be done in terms of Section 18 of the Customs Act, 1962, once the importer or exporter furnishes security as deemed fit by the proper officer of Customs for differential duty equal to duty provisionally assessed by him and the duty payable after re-assessment.*

5. One of the salient features of self-assessment scheme is that verification of declarations and assessment done by the importer or exporter, except for cases wherein a speaking order has been passed by the proper officer while re-assessing the duty, can also be done at the premises of the importer or exporter. This provision will be applicable as a part of an 'On Site Post Clearance Audit' (PCA) programme, which is likely to be implemented soon. Suitable legal cover has been provided vide Section 17 and Section 157 of the Customs Act, 1962. The programme is being developed and detailed instructions will follow in due course. Till that time, the current Post Clearance Audit will continue."

8. On reading of the amended provisions of Section 17 of the Act together with the Circular dated 08.04.2011 issued by CBEC, the relevant features of self-assessment and re-assessment contemplated in Section 17 of the Act can be summed up thus:

(i) The importer/exporter is responsible for self-assessment of duty on imported/export goods by way of filing the declarations and related documents; and confirming that the information furnished are true, correct and complete, in all respects.

(ii) The declaration furnished for self-assessment in respect of import/ export of goods "may" be verified by the Department. For this purpose, the Customs officer "may" call for documents like invoice, contract, product literature/catalogue, insurance documents etc. Upon verification of the import/export documents submitted by the person concerned, the department "may" also test the goods or "may" call for further particulars, for ascertaining the correctness or otherwise of the declared self-assessment.

(iii) The verification by the department "may" result in an adverse re-assessment of duty under sub-section (4) of section 17, in which eventuality, the proper officer of customs "shall" pass a speaking order under sub-section (5) of the said section 17, giving his reasons for re-assessment, within 15 days of the re-assessment, (save and except when importer/exporter accepts re-assessment in writing).

(iv) The requirement of passing a speaking order within 15 days of an adverse re-assessment made under sub-section (4) is a mandatory requirement as is evident from the use of the word "shall" in sub-section (5). The object of this statutory prescription in sub-section (5), including in particular the time period of 15 days, is to enable the aggrieved importer to exercise his statutory remedy of filing an appeal under section 128 of the Customs Act.

9. In the case in hand, it is not in dispute that the appellant had, as per the Check List submitted to the customs authorities for preparation of B/Es for home consumption in the EDI system, claimed classification of the products in question under CTH 8517 7090, which attracted 'zero' percent of duty. It is also not in dispute that while the goods were awaiting clearance, the department *suo motu* and without issuance of any notice to the appellant, modified the classification to CTH 8517 6290 and also modified the applicable rate of basic customs duty to 10/20%. What is of particular significance in this matter is the fact that the appellant, immediately on coming to know of the modification made by the proper officer, filed a detailed written representation, protesting against the modification carried out by the proper officer. One such representation dated 12.07.2018, as appearing on pages 10-11 of the appeal memorandum are extracted below:

"Ref: FCnA/IDT/CUS/RIL/34616669 Date: 12.07.2018

To
The Deputy Commissioner of Customs,
Appraising Group VA,
Air Cargo Complex, Sahar,
Andheri (East),
Mumbai-400 099.

Sir,

Sub: Payment of duty under Protest for assessment of SFP
Ref: Bill of Entry no 7160993 dated 10.07.2018

We have imported SPF SINGLE MODE 1G 10KM-40 +85D 1310NM FP GIGE 1X PN:FTLF1318P3BTL-RN (Parts for Router) from M/s Avnet Asia Pte Ltd; Singapore and have filed subject Bill of Entry claiming assessment under Customs Tariff Item 8517 70 90 with "Nil" BCD. The Bill of Entry has been assessed by RMS, as claimed. However, we understand that your office has taken a stand that SFP should be classified under 8517 62 90 with 10% BCD and accordingly Bill of Entry is being recalled for reassessment.

In this regard, we respectfully submit as under

1. *We submit that a Small Form- Factor Pluggable (SFP) is a transceiver comprising of laser diodes/LED, photo-detectors and other electronic circuits which convert electrical signal into optical domain, and vice-versa. SFP module needs to be plugged into any communication or networking equipment in order to function. It merely acts as a connector providing interface between two domains i.e. electrical and optical.*

2. *SFP module gives information regarding optical power level and electric supply parameters, however such information can be read and interpreted only when SFP is plugged into any communication or networking equipment e.g. an Ethernet switch, and only through the software operating such equipment. Thus, SFPs stand-alone do not have any power source on its own or intelligence to perform any function. Therefore, an SFP can never be an equipment but is a part, to the communication or networking equipment.*

3. *Note 2 to Section XVI of the First Schedule to the Customs Tariff Act, 1975 provides rules for classification of parts of machines. Clause (a) to Note 2 provides that parts which in themselves constitute article identifiable by name according to their function are to be classified in their respective heading, and not otherwise. Clause (b) to Note 2 provides that other parts, if suitable for use solely or principally used with the goods of heading 8517 and 8525 to 8528 are to be classified in heading 8517.*

4. *SFP module is not figuring as such in any heading or sub-heading of 85.17 or for that matter any heading or sub-heading in Section XVI. Therefore, by virtue of Note 2(b) of*

the Section Note XVI SFP will be classified under heading 8517.

5. *Sub-heading 8517 70 covers 'parts'. This sub-heading at double dash (--) 8517 70 10 covers 'populated, loaded or stuffed printed circuit boards', and 8517 70 90 'others'. SFP module not being populated circuit board shall be classifiable under 8517 70 90. Tariff rate specified for tariff item 8517 70 90 is Free/Nil.*

6. *In view of above, SFP being parts of goods falling under heading 85.17, shall be classifiable under Tariff Item 8517 70 90, and such imports shall not attract payment of basic custom duty since tariff rate of 8517 70 90 is itself Nil/Free.*

7. *We rely on Order-in-Appeal No. HYD-CUS-000-APP-130-16-17 CE dated 25.01.2017 passed by Commissioner (Appeals), Hyderabad (Annexure-1) in which it is held that SFPs are classifiable under CTH 8517 70 90 and also are entitled to the benefit of Notification 24/2005-Cus dated 01.03.2005. The said Order-in-Appeal has been accepted by the Department and accordingly the ratio thereof applies to present case.*

8. *We also rely on Order-In-Appeal No. MUM-CSTM-AMP-APP-004 to 007/17-18 dated 31.01.18 passed by Commissioner of Customs (Appeals), Mumbai – III (Annexure-2) in which it is held that SFPs are classifiable under CTH 8517 70 90.*

In view of above, we do not agree to assessment proposed by the department. However, since the goods are urgently required for our project we are willing to clear the goods as per assessment proposed by the department, but under protest.

We, therefore, request you to register our protest and re-assess the Bill of Entry so that we can pay the duty and clear the goods.

Further, we wish to inform that, immediately on payment we shall set aside the differential duty amount in our books of accounts as receivable from Customs and shall not pass on to service recipients or any other person.

We also request you to kindly issue us a speaking order at the earliest and oblige.

Thanking you,

Yours faithfully,
For Reliance Jio Infocom Ltd.,

Authorised Signatory".

10. The above representation refers to two orders of the Commissioner of Customs (Appeals), one of which is of the jurisdictional Commisisoner (Appeals) at Mumbai, while the other one is of Commissoner (Appeals), Hyderabad. It is not in dispute that these orders pertain to the very same product i.e SFP, which is the subject matter of this appeal. The protest letter records that the order of the Commissioner (Appeals), Hyderabad has been accepted by the department. We further note that the other order of the Commissioner of Customs, Mumbai was affirmed by the Tribunal in the appellant's own case on 29.7.2022, by another bench of the Tribunal of which one of us was a party as reported in 2022-TIOL-708-CESTAT-MUM. A Civil Appeal filed by the Revenue against this order of the Tribunal was dissmised by the Supreme court by an order dated 27.2.2023, thus bringing a finality to the issue of classification of Small Form-Factor Pluggable (SFP), imported by the appellant.

11. Since the issue of classification now stands concluded in favour of the appellant, it is clear that the classification and rate of duty applied by the proper officer at the time of customs clearance was incorrect, thus resulting in excess payment of duty. Neither the refund sancioning authority nor the Commissioner (Appeals), nor the Learned Authorized Representative appearing on behalf of the Revenue disputes this position. Excess payment of duty is therefore, not an issue in dispute. The only basis for rejecting the refund claim is the Hon'ble Supreme Court's judgement in the ITC's case which, in our view, has been mis-read by the lower authorities.

12. We find that the central premise of the orders passed by the lower authorities is that in view of ITC's case, a claim for refund under Section 27 of the Act can be allowed only, and only, if the re-assessment made by the proper officer under sub-section (4) of Section 17 of the Act was set aside, by an appellate authority in an appeal filed by the importer under Section 128 of the Act. This premise in our view, is totally incorrect. In our view, the judgement in ITC's case does not state that filing of an appeal under Section 128 of the Act is the only recourse, that exists for an importer to have the re-assessment set aside in accordance with law. ITC's judgement infact, clarifies in para 47 that

an adverse assessment can be set aside either under Section 128 of the Act or "under other relevant provisions of the Customs Act". We find that the Hon'ble Bombay High Court in the case of *Dimensions Data India Pvt Ltd vs Commissioner of Customs* reported in 2021 (376) ELT 192, had an occasion to examine this issue in a somewhat similar situation, and the court after taking note of the observations of the Hon'ble Supreme Court in para 47 of ITC's case, referred to and invoked Section 149 and 154 of the Act as to such "other relevant provisions of the Customs Act, which could be applied for setting aside or modify an order of assessment or re-assessment made on the Bills of Entry".

13. We find that the Hon'ble Bombay High Court in the case of *Dimensions Data India Pvt. Ltd. (supra)* observed that when the assessment made at the time of customs clearance is totally incorrect, the provisions of Section 149 of the Act empowers the proper officer to amend the bill of entry at any future point of time to correct the mistake made at the time of customs clearance, so as to enable sanction of refund of excess duties paid by an importer. We extract below the relevant passages of the judgement of the Hon'ble Bombay High Court, dealing with its analysis of the ratio laid down in ITC's case and also dealing with the application of Sections 149/154 of the Act, for post clearance re-assessment of the bills of entry for amending/correcting an incorrect/erroneous assessment, made at the time of customs clearance.

> ***"22.*** *Having noticed and analysed the relevant legal provisions, we may now turn to the decision of the Supreme Court in ITC Ltd. v. Commissioner of Central Excise, Kolkata-IV (supra). The question which arose before the Supreme Court was whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty could be entertained.*
>
> ***22.1*** *From the question itself, it is clear that the issue before the Supreme Court was not invocation of the power of reassessment under Section 17(4) or amendment of documents under Section 149 or correction of clerical mistakes or errors in the order of self-assessment made under Section 17(4) by exercising power under Section 154 vis-a-vis challenging an order of assessment in appeal. The issue considered by the Supreme Court was whether in the absence of any challenge to an order of assessment in appeal, any refund application against the assessed duty could be entertained. In that context Supreme Court observed in paragraph 43 as extracted above that an order of self-assessment is nonetheless an assessment order which is appealable by "any person" aggrieved thereby. It was held that the expression "any person" is an expression of wider amplitude. Not only the revenue but also an assessee could prefer an appeal under Section 128. Having so held, Supreme Court opined in response to the question framed that the claim for refund cannot be entertained unless order of assessment or self-assessment is modified in accordance with law by taking recourse to appropriate*

proceedings. It was in that context that Supreme Court held that in case any person is aggrieved by any order which would include an order of self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Customs Act (emphasis ours).

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

23. *In Maharashtra Cylinders Private Limited (supra), a Division Bench of this court also reiterated the proposition that unless an order of self-assessment is varied or altered, question of refunding the duty paid on self-assessment does not arise at all. Validity of an assessment cannot be considered while dealing with a refund claim. Therefore, this decision on the face of it is clearly distinguishable and is not at all applicable to the facts of the present case.*

24. *In the instant case, petitioner has not sought for any refund on the basis of the self-assessment. It has sought reassessment upon amendment of the Bills of Entry by correcting the customs tariff head of the goods which would then facilitate the petitioner to seek a claim for refund. This distinction though subtle is crucial to distinguish the case of the petitioner from the one which was adjudicated by the Supreme Court and by this Court.*

25. *Grievance of the petitioner is not on the merit of the self-assessment as the petitioner is aggrieved by the failure on the part of the respondents to carry out amendment in the Bills of Entry by replacing the incorrect CTH by the correct one namely by replacing CTH '8517 69 90' with '8517 69 30' which was declared inadvertently by the petitioner at the time of fling the Bills of Entry. This request of the petitioner, in our opinion, falls squarely within the domain of Section 149 read with Section 154 of the Customs Act. Upon amendment in the Bills of Entry by correcting the CTH, consequential reassessment order under Section 17(4) of the Customs Act would be in order.*

26. *Madras High Court in M/s. Hewlett Packard Enterprise India Private Limited (supra) correctly held that in a case of correction of inadvertent error, the appropriate remedy would be seeking an amendment to the Bills of Entry and not filing of appeal because there is no legal flaw in the order of self-assessment amenable to appeal but only a factual mistake which can be rectified by way of amendment or correction. Such correction or amendment has been sought for by the petitioner on the basis of documents which were already in existence at the time of release of the goods for home consumption.*

27. *The expression "mistake" appearing in Section 154 of the Customs Act may be defined as something done unintendedly or through inadvertence. The section itself says that the error in any decision or order should be due to any accidental slip or omission. Moreover, it can be a mistake of law or a mistake of fact. In all cases it need not be an arithmetical error alone. It may connote errors which can be discerned upon due verification. Having said so, we may also indicate that power to amend documents available under Section 149 of the Customs Act read with correction of clerical or arithmetical mistakes or errors in orders due to accidental slip or omission under Section 154 thereof is different and distinct from the appellate power exercised under Section 128 of the Customs Act. The power of amendment or correction, as the case may be, is vested on the same officer who had passed the initial order or an officer of equivalent rank. On the other*

> *hand, appellate jurisdiction is directed to correct decisions or orders passed by an inferior or lower authority. By its very nature an appellate authority is superior to the authority which had passed the order appealed against.*
>
> ***28.*** *In the light of the above, we are of the view that petitioner has made out a case for issuance of a direction to the respondents for correction of the mistake or error in classification of the goods from CTH '8517 69 90' to '8517 69 30' and thereby for amendment of the Bills of Entry. Refusal of the respondents to look into the aforesaid grievance of the respondents is therefore not justified.*
>
> ***29.*** *Accordingly, we direct respondent No. 2 to consider the prayer of the petitioner for amendment of the Bills of Entry Nos. 2434172, 2436049, 2522910, 2805152 and 2968920 (annexed as Annexure B colly to the writ petition) by exercising power under Section 149 read with Section 154 of the Customs Act and thereafter pass an appropriate order under Section 17(4) of the Customs Act after giving due opportunity of hearing to the petitioner."*

An SLP filed against the above judgement has been dismissed by the Hon'ble Supreme Court as reported in 2022 (379) ELT A39. We are of the view that in the facts of this case, particularly the indisputed non-compliance with the provisions of Section 17(5) of the Act, on the part of the assessing authority and also the fact that duty was paid under protest even before the customs clearance, the correct course of action for the department would have been to amend the B/Es under Section 149 of the Act, by treating the detailed written representations filed by the appellant as an application for amendment under that section, as was directed to be done by the Hon'ble Bombay High Court in the Dimension Data's case.

14. We are of the view that the scheme of Section 17, after its amendment w.e.f. 8.4.2011, requires an appeal to be filed either against a self-assessment made by the importer under sub-section (1) of Section 17 of the Act as was the case in the batch of appeals decided by ITC's case, or against a speaking order passed under sub-section (5) of Section 17 of the Act, in cases where the re-assessment made by the proper officer under sub-section (4) is contrary to the self–assessment made by the importer. The scheme of the amended Section 17 does not contemplate or visualise filing of an appeal against an adverse re-assessment made under sub-section (4), without there being a speaking order under sub-section (5), explaining the reasons for the adverse re-asessment. The provisions of Section 17 and Section 128 of the Act, when read together cannot contemplate a situation where appeals are filed against adverse re-assessments made by the

proper officer on the bill of entry under sub-section (4), with no speaking order in support thereof as required under sub-section (5). ITC's case, it may be noted was not dealing with non-passing of a speaking order under sub-section (5) of Section 17. That case was dealing only with situations of erroneous self-asessment made under suc-section (1) of Section 17, where absence of speaking order was held, in para 43 thereof to be of no consequence. We note that in a case, where an importer has to file an appeal against his own self-assessment, there can be no need for a speaking order, for the simple reason that, it is only the importer, who knows the reasons which he had in his mind, while making the initial self-asssessment as also the resaons for thereafter claiming that such self-assessments were erroneous. Therefore, the obesrvations in para 43 of the ITC's judgement holding that non-existance of a speaking order is no bar for filing an apepal against a self-assessment made by the importer has to be seen in the context of the facts prevailing in that case. These obervations in our view, will not apply to a situation of a present kind, where the challenge in appeal has to be made against a re-assessment made by the proper officer under sub-secion (4). We are therefore, of the view that the observations in para 43 of ITC's case, cannot be applied to situations under sub-section (5) of Section 17 of the Act where, unlike sub-section (1), the importer would be totally unaware of the reasons behind the adverse re-assessment made by the proper officer under sub-section (4). In our view, the absence of speaking order in support of the adverse re-assessment made under sub-section (4) virtually deprives the importer of his statutory right to file an appeal against the speaking order under sub-section (5). We do not think that the provisions of Section 17 and 128 of the Act, contemplate that an assessee to be able to read the mind of the proper officer and second guess what reasons he had in his mind, while re-assessing the bill of entry to its detriment. Without knowing the basis and the reasoning behind the re-assessment, it would be neigh impossible for an importer to frame his grounds of challenge/appeal. The Commissioner (Appeals), as well as all the appellate forums above would face the very same handicap and would have to be content with speculating about the reasons that existed in the mind of the proper officer, while re-assessing the bills of entry. The appellate remedy under Section 128 even if invoked by an importer would remain sub-optimal and thus ineffective in the absence of a speaking order. The relief that would flow from an appeal filed against a non-sepaking adverse re-assessment made under sub-section (4) would in most cases be only a remand back to the original authority to pass a speaking order under sub-section (5). It is precisely for avoiding such an unsatisfactory situation that sub-section (5) of Section 17 prescribes the passing of a speaking order so that the remedy of appeal is effective and fruitful.

15. The principle that a party cannot be allowed to take advantage of its own wrong is a well settled one and has been applied consistently by the Hon'ble Supreme Court as well as various Hon'ble High Courts. The case of *Priyanka Overseas Pvt. Ltd. vs UOI* reported in 1991 (51) ELT 185, is a leading authority for this proposition. Para 39 of the said decision is relevant and is extracted below:

> *"39. There is no dispute that the remaining goods were also stored in a private warehouse and the appellant had filed the bills of entry and complied with all the required formalities for debonding and clearance of the goods on 28-1-1988, therefore the appellant was entitled to an order cancelling the licence of the private warehouse enabling it to remove the goods. Had the Customs authorities passed order in accordance with law the same result would have followed as had been done on 17-12-1987. The Central Manual published by the Director of Publications, Customs and Central Excise contains direction for determining the actual date of removal of goods from warehouse in terms of Sec. 15(1)(b) of the Act. The functioning of private warehousing has been elaborated therein. Clause 10 of the Manual prescribes the type of buildings which can be approved as private warehouses under Sec.58 of the Act. Para 15 of the Manual provides for purposes of Sec.15(1)(b) of the Act, that if the goods are in private warehouse the date of cancellation of the licence of the private warehouse should be taken as the actual removal of the goods for the purposes of Sec. 15(1)(b) of the Act. Para 15 as already stated was followed in the appellant's own case on 17-12-1987 in releasing the goods. There is no valid reason as to why the same procedure should not have been followed in respect of the remaining goods in respect of which the bills of entry were filed on 28-1-1988 for debonding and clearance of goods. Merely because the Officer failed to discharge his duties by making illegal demand for deposit of redemption fine, the appellant could not be hedl liable to pay duty. The appellant is therefore entitled to the delivery of goods without paying any duty as on 28-1-1988 no duty was payable on the goods."*

16. We do not find any conflict between the ratio laid down in ITC's case and the principle enunciated in the case of Priyanka Overseas. ITC's case was not dealing with a situation of the present kind where the department had, by its own inaction, infringed a statutory requirement of passing a speaking order as mandated by Section 17(5)

of the Act, thus preventing an importer from effectively challenging the assessment made on the Bill of Entry by filing an appeal under Section 128. The entire batch of appeals which was decided by the Hon'ble Supreme Court in the case of ITC, was dealing with situations where the self- assessment made by the importer himself (under sub-section (1) of Section 17) was incorrect and led to excess payment of duty. In all customs cases, which were before the Hon'ble Supreme Court in that batch of appeals, the importers had claimed refund without challenging the self–assessments made by them in the Bills of Entry. It was in this fact situation that the Hon'ble Apex Court held that refund claims could not be entertained without the importer first taking steps to have the self-assessment modified by filing an appeal under Section 128. This case cannot be applied to a case of the present kind, where the self assessment made by the appellant was at 'nil' rate and the excess payment of duty occurred not by virtue of the erroneous self assessment made by the importer himself, but as a result of an adverse re-assessment made by the proper officer.

17. We are of the considered view that the Deputy Commissioner who has processed the refund application ought to have, instead of rejecting the refund, either requested the concerned appriasing group to issue a speaking order under Section 17(5) of the Act, provided such an order had been passed by the original re-assessing proper officer and was available on the file, or consider amending the Bills of Entry by treating the written representation of the appellant as applications for amendment of the Bills of entry under Section 149. This course of action would have been consistent not only with the view of the Hon'ble Bombay High Court's in the above cited case but also with Public Notice No.5/2012 dated 17.1.2012, issued by the Respondent in the present appeal i.e., Commisisoner of Customs (Import), ACC Mumbai. The said Public Notice states clearly that refund sanctioning authority should not insist the importer to get the bills of entry re-assessed by himself, but instead, forward the file to the assessing group for getting the bill of entry re-asessed within a specific time frame, so that the refund claim is settled within the statutory prescribed period of three months. The contents of the said Public Notice are extracted below:

"Refund in case of Amendments to Bill of Entry

1. Difficulty has been expressed by Trade to get the refund in the matter where Bills of Entry are to be finalised prior to sanction of refund, for example in the case of appellate orders revising assessments already finalized etc. In such cases Refund Section, on receipt of refund claims, issues deficiency memo to importer for producing re-assessed Bill of Entry or amendment certificate.

2. In order to address the inconvinience caused to Trade, in cases of the refund as above, following steps should be taken by the Refund Section.

(i) Refund Section shall accept the claim and no deficiency memo be issued to get the Bill of Entry re-assessed.

(ii) Refund Section officer after scrutinizing the refund claim, if required, shall forward the file to concerned assessing group for re-assessment/finalization/amendment.

(iii) Assessing group will re-assess the Bill of Entry on priority basis within five working days. Concerned Group should get the deficiencies rectified, get documents or indemnity bond from applicant whereever required within such period. In case assessing group further notices any discrepancies while re-assessing/finalizing the Bill of Entry the same may be intimated to Refund Section.

(iv) Refund Section will monitor the file movement and ensure that the claim is settled within the statutory period.
Any difficulties faced by the Trade or Officers in this regard may be brought to the notice of ADC/Refund.

[Commissioner of Customs (Import), ACC, Mumbai, Public Notice No. 5/2012, dated 17-01-2012]"

In our view, the above course of action would be perfectly in accord with the ratio laid down in the case of ITC, particularly para 47 of the said judgement, which has been quoted and applied by the Hon'ble Bombay High Court in *Dimension Data* case.

18. Before parting with the matter, we feel it necessary to emphasise that the provisions of sub-Section (5) of Section 17 of the Act are mandatory in nature as the same provides that the proper officer, "shall" pass a speaking order on the re-assessment, within fifteen days from the date of re-asessment of the bill of entry. This sub-section, unlike the preceeding sub-sections of Section 17, which use the word 'may' does not give any discretion to the proper officer in regard to the requirement of passing a speaking order within 15 days of the date of

re-assessment of the Bill of Entry. Admittedly, this requirement has not been met in the present case by the department. As obseved by us earlier, to allow the department to invoke the judgement in the case of ITC, despite the departmental officer being themselves at fault in not passing a speaking order, as required by law would tantamount to attaching a premium to non-compliance of law on the part of the officers. If such an approach is permitted to be taken, then the importer would be left at the mercy of the authorities, who may, at their own whims and fancies, either oblige the importer by passing a speaking order (so as to enable him to challenge the same in appeal and apply for refund expeditousy) or virtually frustrate the importer’s right to seek refund of excess payment of duty simply by not passing any speaking order ever, as has been done in the present case. We therefore, cannot subscribe to the proposition that a claim for refund can be denied for non-challenge of assessment in appeal, even in situations where the proper officer is himslef remiss in passing a speaking order under Section 17(5) of the Act, despite a detailed protest being lodged by the importer, even prior to the payment of duty and customs clearance.

19. In view of the above discussions, we hold that the refund application filed by the appellant is in confirmity with the statutory provisions. We do not find any merits in the impugned order dated 28.03.2022, insofar as the Learned Commissioner (Appeals) has upheld the Original order dated 27.05.2021 and rejected the appeal filed by the appellant before him. Accordingly, the impugned order is set aside and the appeal is allowed by way of remand to the original authority for taking steps for either having speaking orders issued to the appellant, provided such orders were passed by the officers who re-assessed the Bills of Entry before customs clearance and are available on the files, or have the bills of entry suitably amended by the appraising group under Section 149 of the Act, by treating the written representation already on record as applications for amendment of Bills of Entry under Section 149. All such actions must be made within three months of the receipt of this order, keeping in mind our above observations.

20. In the result, the appeal is allowed by way of remand.

(Dictated and pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

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