CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

CUSTOMS APPEAL No. 52388 of 2019

(Arising out of Order–in-Appeal No. CC(A)Cus/D-I/ACC-Export/Refund/ NCH/250-251/2019-20 dated 14.06.2019 passed by Commissioner of Customs (Appeals), New Delhi)

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

Versus

M/s. Vivo Mobile India Pvt Ltd. ....Respondent
3rd Floor, Delta Tower, Plot No. 54,
Sector-44, Gurugram, Haryana.

AND

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APPEARANCE:

Mr. Sunil Kumar, Authorised Representative of the Department
Mr. Kishore Kunal & Mr. Pratush Chaudhary, Advocates for the Respondent

CORAM: HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 26.08.2021
Date of Decision: 13.09.2021

FINAL ORDER NO. 51808-51809/2021

JUSTICE DILIP GUPTA:

The Department has filed these two Appeals to assail the common order dated 14 June 2019 passed by the Commissioner of Customs (Appeals)[1], by which the two appeals filed by **M/s. Vivo Mobile India Pvt. Ltd.**[2] have been allowed and the two orders, both dated 23 January 2017, passed by the Deputy Commissioner (Refund)[3] have been set aside. The Commissioner (Appeals) has further allowed the two Applications filed by Vivo Mobile under section 27 of the Customs Act 1962[4] for refund of Additional Customs Duty[5] and has directed that Vivo Mobile would be entitled to a refund of Rs.3,01,49,633/- and Rs.2,92,96,394/-. It needs to be noted that though the Deputy Commissioner had by said order dated 23 January, 2017 sanctioned the aforesaid refund amount but a direction was given that this amount should be credited to the Consumer Welfare Fund in terms of section 27(2) of the Customs Act.

2. To appreciate the reasons as to why the applications were filed by Vivo Mobile to claim refund, it would be necessary to state the relevant facts.

3. Vivo Mobile, which is a respondent in both the appeals, was during the relevant period engaged in import and distribution of mobile phones and its accessories in India. The relevant period in

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1. The Commissioner(Appeals)
2. Vivo Mobile
3. Deputy Commissioner
4. Customs Act
5. Additional Duty

the first appeal is from December 15, 2014 to March 24, 2015 and from May 30, 2015 to June 6, 2015 in the second appeal. It paid the Additional Duty of Customs at the rate of 6% up to February 2015 and thereafter, at the rate of 12.5% under section 3(1) of the Customs Tariff Act 1975[6] on the 12 bills of entry. However, in terms of a notification dated 17 March 2012, the Additional Duty was leviable at 1% under the entry at serial 263A for importing mobile phones, provided condition no. 16 was satisfied. Condition no. 16 provides that for an assessee to claim lesser 1% Additional Duty, it should not have taken credit under rule 3 or rule 13 of the CENVAT Credit Rules 2004[7] in respect of the inputs or capital goods used in the manufacturer of these goods.

4. The Supreme Court, in the context of import of Nylon Filament Yarn of 210 deniers, examined a similar condition no. 20 in **SRF Ltd.** V/s **Commissioner of Customs, Chennai**[8]. The Appellant had claimed nil rate of Additional Duty by relying upon a notification dated 1 March 2002. The Deputy Commissioner of Customs held that SRF Ltd. would not be entitled to exemption from payment of Additional Duty since it did not fulfill condition no. 20 of the said notification, which is to the effect that the importer should not have availed credit under rule 3 or rule 11 of the CENVAT Rules in respect of the capital goods used for the manufacture of these goods. The admitted position was that such CENVAT Credit was not availed by SRF Ltd. The Tribunal held that when the credit under CENVAT Rules was not admissible, the

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6. Tariff Act
7. CENVAT Rules
8. 2015(318) ELT 607(SC)

question of fulfilling the aforesaid condition did not arise and, therefore, as condition no. 20 was not satisfied SRF Ltd could not claim nil rate of Additional Duty. This reasoning of the Tribunal was found to be not correct by the Supreme Court in view of the judgments of the Supreme Court, wherein it was held that for the purpose of attracting Additional Duty under section 3 of the Customs Tariff Act on the import of a manufactured or produced article, the actual manufacture or production of a like article in India was not necessary and that for quantification of Additional Duty in such a case, it has to be imagined that the article imported was manufactured or produced in India and then to see what amount of excise duty was leviable thereon. SRF Ltd was, therefore, held entitled to exemption from payment of Additional Duty.

5. Vivo Mobile, on the same reasoning, claimed that it would have to pay the reduced Additional Duty at the rate of 1% in terms of condition no. 16 of the notification dated 17 March 2012, which is identical to condition no. 20 of the notification dated 1 March 2002 that was examined by the Supreme Court in **SRF Ltd**. It had, however, paid Additional Duty at the rate of 6% up to February 2015 and at the rate of 12.5% thereafter. It therefore, filed applications for refund of the excess Additional Duty that was paid by it.

6. On scrutiny of the documents submitted by Vivo Mobile with the refund claims, it was found by the Department that various documents, **including re-assessment of bills of entry in respect of the aforesaid refund amount** had not been filed.

Accordingly, a deficiency memorandum dated 28 January 2016 was issued to clarify the position. Vivo Mobile responded to the deficiency memo and pointed out that the refund applications filed by it be considered as a request for re-assessment of the bills of entry since "the filing of the refund application ipso facto means and implies that they are seeking re-assessment of all the impugned bills of entry". It was further stated that when the goods were allowed to be cleared, the valuation aspect was examined by the proper officer and the officer competent to decide the refund application had a concurrent jurisdiction. Thus, it was pleaded that the refund claim itself should be treated as a request for re-assessment of the bills of entry, in view of the decision of the Supreme Court in **Karnataka Power Ltd vs Commissioner of Customs (Appeals)**[9].

7. The Deputy Commissioner framed two questions to be decided and they are as follows:

> "(i) Whether the importer was eligible for the benefit of notification dated 17 March 2012 in terms of condition no. 16 in the light of judgement passed by the Supreme Court in SRF; and
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> (ii) Whether the importer was eligible for refund claim, if the answer to the aforesaid question is in the affirmative."

8. The Deputy Commissioner, in view of the decision of the Supreme Court in **SRF Ltd**, held that Vivo Mobile in terms of condition no. 16 of the notification dated 17 March 2012, would be required to pay Additional Duty at the reduced rate of 1%. The Deputy Commissioner then examined whether it was necessary for Vivo Mobile to get re-assessment of the bills of

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9. 2002 (142) ELT 482 (SC)

entry and for this purpose examined the decision of the Delhi High Court in **M/s. Micromax Informatics Ltd. vs. Union of India**[10] that had been placed by Vivo Mobile to contend that it was not necessary to seek re-assessment of the bills of entry. The Delhi High Court had held that an authority would not be justified in refusing to entertain an application for refund only because no appeal was filed against the assessment order, even if there was one. The Deputy Commissioner, accordingly, held that there was no necessity of seeking modification in the bills of entry. The relevant portion of the order is reproduced below:

> "In any event, after 8th April, 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a claim for refund made by such person under section 27(1) of the Act as it now stands, will have to be entertained and an order passed thereon by the authority concerned even where an order of assessment may not have reviewed or modified in appeal. **Hence, again, following judicial discipline, the refund claim of the claimants, needs to been entertained on the basis of their self-assessed Bills of Entry, though there is no modifying order for those Bills of Entry**"
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> **(emphasis supplied)**

9. After having so held, the Deputy Commissioner examined whether the refund claim was barred by limitation and whether the incidence of Additional Duty had not been passed on to the buyer, in which event it would be a case of unjust enrichment. The Deputy Commissioner found that though the refund Application had been filed in time, but the claimant had failed to prove that the claim was not hit by unjust enrichment. Accordingly, even though the refund claim was sanctioned, the Deputy Commissioner directed that the amount should be credited

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10. 2016 (335) ELT 446 (Del.)

in the account of the Consumer Welfare Fund in terms of section 27(2) of the Customs Act.

10. Feeling aggrieved, Vivo Mobile filed two appeals before the Commissioner (Appeals) against that part of the orders of the Deputy Commissioner that held that since it was a case of unjust enrichment, the sanctioned amount would not be payable to Vivo Mobile and would be required to be deposited in the Consumer Welfare Fund. The appeals filed by Vivo Mobile were allowed by the Commissioner (Appeals) for the reason that the incidence of Additional Duty had not been passed on to the buyers. The Commissioner (Appeals), therefore, directed that the amount be refunded to Vivo Mobile. The observations are as follows:

> "5.4 The period for which the impugned refund claim was filed pertains to the period of 15.12.2014 to 05.06.2015. I find that in respect of a similar case of M/s YU Televentures Pvt. ltd., wherein refund claim was filed for the period January, 2015 to February, 2015, while disposing of Writ Petition No. W.P. (c) 6750/2016, the Hon'ble Court of Delhi vide Order dated 03.08.2016 set aside the OIO dated 07.06.2016 passed by the Adjudicating authority, wherein the refund claim was rejected by the Adjudicating authority on the similar grounds. The relevant portion of the said Hon'ble High Court Order is re-produced below:
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> > "16. With the Petitioner having already placed all the relevant documents on record and with the only reason for rejection of the refund application being the untenable ground of alleged failure by the Petitioner to submit reassessed B/Es, the Court sees no reason why the Respondents should be permitted to deny the Petitioner the grant of refund any longer.
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> > 17. Accordingly, the refund claim filed by the Petitioner on 28th December 2015 is allowed. The Respondents will now pay to the Petitioner the amount of refund as claimed together with interest due thereon up to the date of refund not later than two weeks from today."

> 5.5. I also find from the records, submitted by the Appellant that in respect of the Appellant's own similar cases, refund claims of Rs. 8,05,06,281/- covering the period 15.06.2015 to 14.07.2015 have been sanctioned to the Appellant by the same Adjudicating Authority vide Order-in-Original No. 381/AT/2018 dated 28.05.2018, holding that the appellant was entitled to get the refund and the said amount was refunded to the Appellant.
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> 5.6. Similarly, I find that the Respondent Commissionerate itself has sanctioned various refund claims to another importers of similar goods, post SRF Ltd. judgement, viz. Order-in-Original No. 2828/VKJ/2016 dated 23.01.2017 etc.
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> *******
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> In view of the above discussions and findings, practices adopted in different Customs Houses while sanctioning refund to the importer on identical matter and strongly relying upon the ratio of the judgements passed by Hon'ble High Court of Delhi, Madras and Bombay, supra, I find that the impugned orders of the Adjudicating authority to credit the refund amounts of Rs. 3,01,49,636/- and Rs. 2,92,96,394/- to the Consumer Welfare Fund in terms of Section 27(2) read with Section 28D of the Customs Act, 1962 is not legally sustainable and accordingly set aside."

11. It is against the orders of the Commissioner (Appeals) that the present appeals were filed by the Department on 30 September 2019 in view of the directions issued by the Committee of Commissioners under section 129A(2) of the Customs Act. The Committee of Commissioners had observed that the Commissioner (Appeals) was not justified in placing reliance upon the decision of the Delhi High Court in **M/s. YU Televentures Pvt. Ltd. vs. Union of India**[11] since in that case the issue involved was whether refund could be granted without re-assessment of the bills of entry, **whereas in the present case the issue involved was whether there was unjust enrichment and the issue relating to re-assessment of bills of entry was not involved.** The Committee of Commissioners

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11. 2016 (340) ELT 88 (Del.)

also observed that the Commissioner (Appeals) had not dealt with the reasons given by the Deputy Commissioner relating to unjust enrichment. The grounds taken in the Appeals that were filed on 30 September 2019 are reproduction of the grounds indicated by the Committee of Commissioners for filing the appeal and they are reproduced below:

> "B. It is also observed that the case of M/s YU Televentures Pvt. Ltd. [2016(340) ELT 88(Del.)] relied upon by the Commissioner (Appeals) to apply it to the present case is erroneous one as much as in the case of M/s YU Televentures Pvt. Ltd. the issue involved was whether refund can be granted without re-assessment of the B/Es. The relevant para no- 15 to 17 are reproduced below:
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> "15. The impugned order dated 07th June 2016 passed by the respondent No-04 rejecting the petitioner's refund claim is accordingly set aside.
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> 16. With the petitioner having already placed all the relevant documents on record and with the only reason for rejection of the refund application being the untenable ground of alleged failure by the petitioner to submit re-assessed B/Es. the Court sees no reason why the respondents should be permitted to deny the petitioner the grant of refund any longer.
>
> 17. Accordingly, the refund claim filed by the petitioner on 28th December, 2015 is allowed. The respondents will now pay to the petitioner the amount of refund as claimed together with interest due thereon up to the date of refund not letter than two weeks from today"
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> Whereas, in the present case the issue involved is whether or not the refund claimant has passed the test of unjust enrichment and not grant of refund without re-assessment of the B/Es. Thus it appears that the Commissioner (Appeals) has incorrectly applied the order of the Hon'ble High Court of Delhi.
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> C. Further, going on the merits of the case the first appellate authority has also not touched upon the reason given by the Adjudicating authority to decide that why the claim is hit by unjust enrichment."

12. It transpires that against various orders passed by the High Courts and the Tribunal at Kolkata, Civil Appeals came to be decided by the Supreme Court on 18 September 2019. The

leading matter is **ITC Ltd.** vs. **Commissioner of Customs Kolkata-IV**[12]. The issue involved in all the Civil Appeals was whether, in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty can be entertained. The Bench of the Tribunal at Kolkata had opined that unless the order of assessment is appealed, no refund application against the assessed duty can be entertained. On the other hand, the Delhi High Court had opined that when there is no assessment order for being challenged in appeal, because there is no contest or lis and hence no adversarial adjudication, a refund application can be maintained even if appeals are not filed against the assessed bills of entry. The Madras High Court had also similarly opined. The first question that arose for consideration before the Supreme Court was whether a self-assessment, when there is no speaking order, can be termed to be an order of self-assessment. It was urged on behalf of the assesses that there is no application of mind in such a situation and merely an endorsement is made by the authorities concerned on the bills of entry which endorsement cannot be said to be an order, much less a speaking order. This contention of the assesses was not accepted by the Supreme Court and it was held that the endorsement made on the bills of entry would be an order of assessment and that when there is no lis, a speaking order is not required to be passed in "across the counter affair". The Supreme Court then examined the provisions of sections 17 and 27 of the Customs Act, both prior to the amendments made

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12. 2019-TIOL-418-SC-CUS

by Finance Act 2011 and after the amendments, and observed that there is no difference even after the amendments as self-assessment is also an assessment. The observations of the Supreme Court are as follows:

> "38. No doubt about it that the expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self-assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self-assessment as observed by this Court in **Escorts Ltd. v. Union of India & Ors**[13]**."**

13. It needs to be noted that in **Escort Ltd**., the issue that had arisen for consideration before the Supreme Court was regarding the bills of entry classifying the imported goods under a particular tariff item and payment of duty thereon. The Supreme Court held that in such a case signing the bills of entry itself amounted to passing an order of assessment and, therefore, an application seeking refund on the ground that the imported goods fell under a different tariff item attracting lower rate of duty, should be filed within six months after the payment of duty. The Supreme Court, therefore, held that the signature made in the bills of entry was an order of assessment of the assessing officer.

14. The Supreme Court, thereafter, in **ITC** observed that the provisions relating to refund were more or less in the nature of execution proceedings and it would not be open to an authority, while processing a refund application, to make a fresh assessment

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13. 2002-TIOL-2706-SC

on merits. The relevant portions of the judgment of the Supreme Court are reproduced below:

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

15. The Department, in view of the aforesaid judgment of the Supreme Court in **ITC,** filed applications on 8 November 2019 for raising an additional ground that the claim for refund cannot be entertained unless the Assessment Order or Self-Assessment is modified in accordance with law. The leave sought by the Appellants to add the additional ground in the memo of the two appeals was granted by the Tribunal by order dated June 08, 2020. However, it was clarified that this would not mean that the issue raised in the additional ground has been decided in favour of the Appellant.

16. Shri Sunil Kumar, learned Authorised Representative appearing for the Department, submitted that the refund applications filed by Vivo Mobile were not maintainable for the reason that the assessment orders or self-assessment orders had not been modified and in support of this contention he placed reliance upon the decision of the Supreme Court in **ITC.** Learned Authorised Representative also submitted that in any event, Vivo Mobile was not entitled to the refund amount because of the principles of unjust enrichment and the said amount was required to be deposited in the Consumer Welfare Fund.

17. Shri Kishore Kunal, learned counsel appearing for Vivo Mobile defended the order passed by the Commissioner (Appeals) but at the same time also submitted that in view of the settled position of law, both prior to and post **ITC**, amendments or corrections can be carried out in the bills of entry in view of the provisions of sections 149 and 154 of the Customs Act at the

stage of refund also. In support of this submission, learned counsel placed reliance upon paragraphs 44 and 47 of the decision of the Supreme Court in **ITC** as also the judgments of the Bombay High Court in **Dimension Data India Private Ltd.** vs. **Commissioner of Customs and ANR.**[14] and of the Telangana High Court in **M/s. Sony India Pvt. Ltd.** vs. **Union of India and Another**[15], which judgments have considered the decision of the Supreme Court in **ITC.**

18. The submissions advanced by the learned Authorised Representative appearing for the Department and the Learned Counsel appearing for the respondent Vivo Mobile have been considered.

19. As the learned Counsel for the respondent has made an alternative submission that Vivo Mobile can seek amendment/correction of the Bills of Entry under sections 149 and 154 of the Customs Act, it is not necessary to examine the submissions made by the learned Authorised Representative for setting aside the order passed by the Commissioner (Appeals).

20. In order to appreciate the alternative submissions made by the learned counsel for the respondent, it would be appropriate to first reproduce sections 149 and 154 of the Customs Act and they are as follows:

> **"149. Amendment of documents**
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> Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs

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14. 2021 (1) TMI 1042- Bombay High Court
15. 2021 TIOL-1707-HC-Telangana- CUS

house to be amended in such form and manner, within such time, subject to such restrictions and conditions, as may be prescribed:

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

154. Correction of clerical errors, etc.

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

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

"27. Claim for refund of duty

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

a) paid by him; or
b) borne by him,

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

22. In paragraph 44 of the judgment of the Supreme Court in **ITC**, which has been reproduced in paragraph 14 of this order, the Supreme Court observed that the provisions of section 27 cannot

be invoked in the absence of amendment or modification having been made in the Bills of Entry on the basis of which self-assessment was made. The Supreme Court further observed that refund proceedings are in the nature of execution proceedings and, therefore, the order of self-assessment is required to be followed unless modified/amended before the claim for refund is entertained under section 27. In this connection, the Supreme Court relied upon the decision of the Supreme Court in **Priya Blue Industries Ltd.** vs. **Commissioner of Customs (Preventive)[16].**

23. The Supreme Court ultimately observed in paragraph 47 of the judgment that the overall effect of the provisions of section 27 of the Customs Act, both prior to the amendment and post amendment, is that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified **"in accordance with law by taking recourse to appropriate proceedings"**. The Modification of the order is under the provisions of section 128(3) of the Customs Act.

24. It is for this reason that the learned counsel for the respondent submitted that even if the refund applications that were filed cannot be entertained, then too it is open to the respondent to invoke the provisions of sections 149 or 154 of the Customs Act for either seeking amendment in the Bill of Entries or seeking correction in the Bills of Entry and then refund applications can be filed.

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16. 2004 (172) E.L.T. 145 (S.C.)

25. The Bombay High Court in **Dimension Data India** examined this precise issue and after referring to the provisions of sections 149 and 154 of the Customs Act, observed as follows:

> "18. **From a careful analysis of section 149, we find that under the said provision a discretion is vested on the proper officer to authorise amendment of any document after being presented in the customs house.** However, as per the proviso, no such amendment shall be authorised after the imported goods have been cleared for home consumption or warehoused, etc. except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, etc. Thus, amendment of the Bill of Entry is clearly permissible even in a situation where the goods are cleared for home consumption. The only condition is that in such a case, the amendment shall be allowed only on the basis of the documentary evidence which was in existence at the time of clearance of the goods.
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> 19. **This bring us to section 154 of the Customs Act which deals with correction, clerical errors, etc.** It says that clerical or arithmetical mistakes in any decision or order passed by the Central Government, the Board or any officer of customs under the Customs Act or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be.
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> 20. **Thus, section 154 permits correction of any clerical or arithmetical mistakes in any decision or order or of errors arising therein due to any incidental slip or omission. Such correction may be made at any time.**
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> 21. **From a conjoint reading of the aforesaid provisions of the Customs Act, it is evident that customs authorities have the power and jurisdiction to make corrections of any clerical or arithmetical mistakes or errors arising in any decision or order due to any accidental slip or omission at any time which would include an order of self-assessment post out of charge.**
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> 22. Having noticed and analysed the relevant legal provisions, we may now turn to the decision of the Supreme Court in ITC Ltd. Vs. Commissioner of Central Excise,Kolkata IV (supra). The question which arose before the Supreme Court was whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty could be entertained.
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> 22.1. **From the question itself, it is clear that the issue before the Supreme Court was not invocation of the power of re-assessment under section 17(4) or amendment of documents under section 149 or**

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

26. The Telangana High Court in **Sony India** also examined almost a similar controversy as has been raised in these two appeals. The appellant therein had imported mobile phones in India for trading purposes during the period 04.08.2014 to 29.01.2015. At the time of import of the mobile phones, the petitioner had not claimed any exemption under serial no. 263A (ii) of the Exemption Notification which allowed payment of Additional Duty at the rate of 1% only in the Bills of Entry in view of the decision of the Supreme Court in **SRF Limited.** The

petitioner, in view of the decision in Supreme Court in **ITC,** made an application for amendment of the Bills of Entries under section 149 of the Customs Act so that after that the duty could be refunded. The application filed by the petitioner was however, rejected. The contentions of the petitioners, as noted in paragraph 14 of the judgment of the Telangana High Court, are reproduced below:

> 14. The petitioner contends that the impugned order has been passed in complete contradiction with the decision of the Supreme Court in ITC Ltd. (supra) wherein it has been held that a BoE is required to be amended or modified, under the relevant provisions of the Customs Act, before filing of a refund application under Section 27 of the Customs Act; that under the Customs Act, a BoE can be either modified by way of filing an appeal under Section 128 of the Customs Act or can be amended under Section 149 and / or 154 of the Customs Act; that under the Customs Act, there is no other manner in which a BoE can be modified or amended part from these two methods; **thus, from the above observations of the Supreme Court, it is very clear that a refund of any excess duty paid while filing the BoE, can be claimed under Section 27 of the Customs Act when such a BoE is amended; that the 2nd** respondent has not even considered the decision of the Supreme Court in ITC Ltd. (supra); that the Supreme Court clearly stated in the above case that a BoE has to be amended before filing a claim of refund under Section 27; and that the ratio of decision is very clearly applicable, and it is squarely covered in the present case.
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> 19. Petitioner also contended that the 2nd respondent erred in holding that the BoEs should have been challenged only by way of filing an appeal before the Appellate authority and on not being challenged, the assessment became final.
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> 20. **Petitioner pointed out that a BoE can be amended either by filing an appeal u/s.128 or being amended under Sec.149 of the Act; and he could not have insisted that only an appeal is a proper remedy to amend the BoEs ignoring Sec. 149 of the Act.**
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> **(emphasis supplied)**

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

> "23. It is contended that meanwhile the Supreme Court in ITC Ltd. (2 supra) held that refund under Section 27 would only be permissible when the Bill of Entry had been amended or modified under the provisions of the Customs Act, 1962; that in ITC Ltd. (2 supra), it was held that the refund under the provisions of Section 27 of the Customs Act, 1962 would only be available when Bill of Entry has been amended or modified under the provisions of Custom Act, 1962; that in the instant case, the petitioners filed self-assessed Bills of Entry and not disputed the assessment, and the assessment had attained finality; that it is not the case of any error or lapse apparent on account of 2nd respondent's - Department; that petitioner was required to seek re-assessment as provided under the provisions of Section 128 of the Customs At, 1962 within such stipulated time and as per the conditions provided therein.
>
> 24. According to the 2nd respondent, the petitioner's request for amending the BoE is against the provisions of the Customs Act and was not sustainable.
>
> 26. It further stated that same action cannot be sought under two different sections of the Customs Act, 1962; that there is a specific provision for re-assessment as provided under Section 128 of the Customs Act, 1962; that if re-assessment has to be carried out under Section 149 without any limitation of time, the existence of the provisions of Section 128 and Appeal mechanism therein would become redundant; and if at all the amendments, even in the nature of re-assessment, are to be carried out under the provisions of Section 149, there is no requirement for the existence of the provisions of Section 128 or other similar provisions."

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

> "33. **So Sec.149 is an additional remedy available to the petitioner to seek amendment of the BoEs subject to the** condition that such amendment is sought on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported as the case may be.
>
> 34. In the decision of the Supreme Court in ITC Ltd. (supra) while holding that the refund cannot be granted by way of a refund application under Section 27 of the Act until and unless an assessment order is modified and a fresh order of assessment is passed and duty re-determined, **the Supreme Court nowhere said that such amendment or modification of an assessment order can only be done**

in an Appeal under Section 128. In para 47, the Court held categorically.

35. **Thus, even the Supreme Court clearly indicated that the modification of the assessment order can be either under Section 128 or under other relevant provisions of the Act i.e. Section 149.**

36. Therefore, the stand of the respondents in the counter affidavit that only reassessment under Section 128 is the remedy available to the petitioner, and Section 149 cannot be invoked, is not tenable. We also reject the plea of the 2nd respondent that there is no possibility of getting modified an order of assessment under any other relevant provision and that petitioner is trying to overcome limitations stipulated in Section 128.

37. The only condition required to be fulfilled for seeking amendment of documents such as a BoE under Section 149 is that such amendment should be sought on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be.

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

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

49. **Also, the Assessing Authority has failed to consider the fact that Section 149 of the Act does not prescribe any time limit for amending the Bill of Entry filed and assessed. The power to amend under Section 149 of the Act is a discretionary power vested with the authority.** Since, it is due to incorrect determination of duty by the assessing authority initially, the petitioner is compelled to seek amendment of Bill of Entry under Section 149 of the Act. Thus, the importer / petitioner cannot be penalized for what the authority ought to have done correctly by himself."

(emphasis supplied)

29. Thus, in view of the aforesaid decisions of the Bombay High Court in **Dimension Data India** and the Telangana High Court in **Sony India,** the respondent can take recourse to appropriate proceedings, including the provisions of sections 149 and 154 of the Customs Act for either amendment of the Bills of Entry or for correction of the Bills of Entry. These two decisions have considered the decision of the Supreme Court in **ITC.**

30. It is expected that if such applications are now filed by Vivo Mobile, the same would be adjudicated expeditiously as the refund applications were filed in **2015.** It is, therefore, ordered that in the event applications are now filed by Vivo Mobile, they shall be decided expeditiously and preferably within a period of three months from the date of filing of the applications. The refund applications, if any filed after the decision is taken on such applications, shall also be decided expeditiously.

31. Customs Appeal No. 52388 of 2019 and Customs Appeal No. 52389 of 2019 are, accordingly, disposed of with the said observations.

(Pronounced in open Court on **13.09.2021**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

REKHA/JB

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

CUSTOMS APPEAL No. 52388 of 2019

(Arising out of Order–in-Appeal No. CC(A)Cus/D-I/ACC-Export/Refund/ NCH/250-251/2019-20 dated 14.06.2019 passed by Commissioner of Customs (Appeals), New Delhi)

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

Versus

M/s. Vivo Mobile India Pvt Ltd. **....Respondent**
3rd Floor, Delta Tower, Plot No. 54,
Sector-44, Gurugram, Haryana.

AND

CUSTOMS APPEAL No. 52389 of 2019

(Arising out of Order–in-Appeal No. CC(A)Cus/D-I/ACC-Export/Refund/ NCH/250-251/2019-20 dated 14.06.2019 passed by Commissioner of Customs (Appeals), New Delhi)

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

Versus

M/s. Vivo Mobile India Pvt Ltd. **....Respondent**
3rd Floor, Delta Tower, Plot No. 54,
Sector-44, Gurugram, Haryana.

APPEARANCE:

Mr. Sunil Kumar, Authorised Representative of the Department
Mr. Kishore Kunal & Mr. Pratush Chaudhary, Advocates for the Respondent

CORAM: **HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 26.08.2021
Date of Decision: 13.09.2021

ORDER

As the appeals have been decided, the Stay Applications have been rendered infructuous.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

JB

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

CUSTOMS APPEAL No. 52388 of 2019

Principal Commissioner of Customs New Delhi (Import) **...Appellant**

Versus

M/s. Vivo Mobile India Pvt Ltd. **....Respondent**

AND

CUSTOMS APPEAL No. 52389 of 2019

Principal Commissioner of Customs New Delhi (Import) **...Appellant**

Versus

M/s. Vivo Mobile India Pvt Ltd. **....Respondent**

APPEARANCE:

Mr. Sunil Kumar, Authorised Representative of the Department
Mr. Kishore Kunal & Mr. Pratush Chaudhary, Advocates for the Respondent

CORAM: HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT

Date of Hearing: 26.08.2021
Date of Decision: 13.09.2021

ORDER

Order Pronounced.

(JUSTICE DILIP GUPTA)
PRESIDENT

JB