REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 293-294 OF 2009

ITC LIMITED ... APPELLANT(S)

VERSUS

COMMISSIONER OF CENTRAL EXCISE, KOLKATA IV ... RESPONDENT(S)

WITH

CIVIL APPEAL NO.2960 OF 2010

CIVIL APPEAL NO.5878 OF 2011

CIVIL APPEAL NO.310 OF 2011

CIVIL APPEAL NOS.4432-4434 OF 2011

CIVIL APPEAL NO.6407 OF 2011

CIVIL APPEAL NOS.1575-1582 OF 2012

CIVIL APPEAL NO.1585 OF 2012

CIVIL APPEAL NO.1571 OF 2012

CIVIL APPEAL NO.5490 OF 2011

CIVIL APPEAL NO.5491 OF 2011

CIVIL APPEAL NO.5489 OF 2011

CIVIL APPEAL NO.6054 OF 2011

CIVIL APPEAL NO.7710 OF 2014

CIVIL APPEAL NO.59-60 OF 2016

CIVIL APPEAL NO.96 OF 2016

CIVIL APPEAL NOS. 7384-86 OF 2019
(@ SPECIAL LEAVE PETITION (C) NOS.16114-16116 OF 2017)

CIVIL APPEAL NO. 7387 OF 2019
(@ SPECIAL LEAVE PETITION (C) NO.25193 OF 2016)

CIVIL APPEAL NO. 7388 OF 2019
(@ SPECIAL LEAVE PETITION (C) NO.26530 OF 2016)

CIVIL APPEAL NO. 20852 OF 2017

CIVIL APPEAL NO. 7389 OF 2019
(@ SPECIAL LEAVE PETITION (C) NO.4294 OF 2017)

CIVIL APPEAL NO. 7391 OF 2019
(@ SPECIAL LEAVE PETITION (C) NO.6269 OF 2017)

CIVIL APPEAL NO. 7392 OF 2019
(@ SPECIAL LEAVE PETITION (C) NO.15175 OF 2017)

CIVIL APPEAL NO.18765 OF 2017

CIVIL APPEAL NO. 7393 OF 2019
(@ SPECIAL LEAVE PETITION (C) NO.31561 OF 2017)

CIVIL APPEAL NOS. 7394-96 OF 2019
(@ SPECIAL LEAVE PETITION (C) NOS.5040-5042 OF 2018)

CIVIL APPEAL NO. 7397 OF 2019
(@ SPECIAL LEAVE PETITION (C) NO.15363 OF 2018)

CIVIL APPEAL NO.10082 OF 2018

J U D G M E N T

ARUN MISHRA, J.

1. These appeals have been preferred by the assessees as well as by the Union of India aggrieved by the judgment and order passed by the High Courts and Customs, Excise and Service Tax Appellate Tribunal, Kolkata (for short referred to as "the Tribunal").

2. The question involved in these appeals is whether in the absence of any challenge to the order of assessment in appeal, any refund application against the assessed duty can be entertained?

3. The tribunal has in the case of ITC Limited opined that unless the order of assessment is appealed, no refund application against the assessed duty can be entertained. On the other hand, in the cases in which Union of India or the Department has come up in appeal, the High Court of Delhi framed question of law as "whether non filing of appeal against the assessed Bill of Entry in which there was no *lis* between the importer and the Revenue at the time of payment of duty will deprive the importer of his right to file refund claim under Section 27 of the Customs Act, 1962 (for short, "the 1962 Act")"?

4. While interpreting provisions contained in Section 27 of the Act, the High Court has opined that when there is no assessment order for being challenged in appeal, which is passed under Section 27(1)(i) of the Act, because there is no contest or *lis* and hence no adversarial assessment

order, the cases would be covered by the provision of Section 27(i) (ii) and refund applications can be maintained by the assessee even in the absence of filing appeals against the assessed bill of entry. The High Court of Madras has opined similarly.

5. In the case of *Union of India & Ors. vs. Micromax Informatics Ltd.,* reported in (2016) 335 ELT 446 (Del) the High Court of Delhi has opined that an important change has been made in Section 27 of the Customs Act in that a person can now claim refund of any duty or interest as long as such duty or interest was paid or borne by such person. The conditionality of such payment having been made pursuant to an order of assessment does not exist. It has also been observed that once an application is made under Section 27(1) of the Act, it is incumbent on the authority concerned to make an order under Section 27(2) determining if any duty or interest as claimed is refundable to the applicant. It has been opined that under Section 27 of the Act as amended, it is not open to an authority to refuse to consider the application for refund only because no appeal has been filed against the assessment order, if there is one.

6. The High court has further opined that although under Section 27(2) of the Act, the word 'assessment' includes a self-assessment, the clearance of the goods upon filing of the bills of entry and payment of duty is not *per se* an assessment order in the context of Section 27(1) (i) as it stood prior to 8.4.2011, particularly, if such duty has not been paid under protest. In any event, after 8.4.2011, as long as customs duty or interest has been borne by

a person, a claim for refund made by such person under Section 27(1) of the Act will have to be entertained and an order passed thereon by the authority concerned, even where an order of assessment may not have been reviewed or modified in appeal. Reliance has been placed on the case of *Aman Medical Products Limited v. Commissioner of Customs,* Delhi, 2010 (250) ELT 30 (Del).

7. The facts of the case of ITC Limited are that the appellants manufacture paper from both conventional and unconventional raw materials. In the course of the manufacturing activity, waste paper/ broke arises which are recycled in the manufacturing process by making pulp. Sometimes, after entry in the RG 1 register, the paper is found to be defective and incapable of being sold and as such is required to be reprocessed and if that is not possible, then it is rejected and has to be re-pulped and recycled.

8. The appellant had been paying duty on paper cleared from its factory. The rate of duty of paper manufactured from conventional and unconventional raw material differed. The appellants availed exemption under Notification No.67/95-CE dated March 16, 1995 as to the duty in respect of waste paper/ fresh broke. By Notification No.6/2000-CE dated March 1, 2000 complete exemption was granted in respect of paper up to the specified quantitative limit manufactured from unconventional raw materials. Upon receipt of a letter dated March 30, 2001 from the

Superintendent of Central Excise, the Appellant examined the matter and realized the mistake committed by it in availing the exemption under Notification No.67.95-CE in respect of waste paper/ broke utilized in the manufacture of paper cleared at 'nil' rate of duty under Notification No.6/2000-CE. From May 2001 onwards, the appellant stopped availing the exemption and started payment of duty on waste paper/broke.

9. The relevant period involved in the appeal *i.e.* July 2001 to March 2002. The Appellant's assessments for this period were provisional and these entries were finalized on 30.01.2003. The provisional assessment order was passed on 1.3.2002. The appellant has claimed that at the time of the said final assessment order dated 30.01.2003, it was not aware of the notification No.10/96-CE or the said circular dated 1.3.2001 and as such, no claim thereunder was made by it till that time nor was any such claim so considered or decided in the said final assessment order.

10. On July 18, 2003, the appellant filed a refund claim for an amount of Rs.28,73,120/- in respect of the duty paid on the said waste paper/ broke during the period from July 2001 to March 2002. The said refund claim was filed under section 11(b) of the Central Excise Act, 1944 (for short, referred to as "the 1944 Act") and within the statutory period of limitation.

11. A show cause notice was issued as to why the said claim be not rejected to which a reply was filed. The assessment committee rejected the said claim. The Commissioner of Appeals dismissed the appeal. Thereafter, successive appeal was preferred before the Tribunal. The Tribunal has

rejected the refund claim of the appellant. Hence, the appeal has been preferred under section 35(b) of the 1944 Act.

12. In the case of *Union of India & Ors. v. Micromax Informatics Ltd.*, the respondents (i.e. Micromax Informatics Ltd.) had imported mobile handsets including cellular phones during the period 30.07.2014 to 29.8.2014. At the time of customs clearance, they paid Additional Customs Duty (CVD) under Section 3(1) of the Customs Tariff Act, 1975 at the rate of 6 %. In all, the imports bills of entry were self-assessed by the respondents in terms of the Self-Assessment Scheme under section 17 of the Act and were thus finally assessed. This Court in *M/s. SRF v. Commissioner of Customs, Chennai* 2015 [318] ELT 607 (SC) held that for quantification of CVD in case of an article that has been imported, it has to be presumed that the said imported article has been manufactured in India and then the amount of excise duty leviable thereon has to be ascertained for determining the extent of exemption from payment of CVD to which the importer would be entitled. The respondent had filed the refund claim of Rs.35.89 crores for duty totally paid under the self-assessed bills of entry, under section 27 of the 1962 Act in the Air Cargo Export Commissionerate, claiming a refund of the Additional Customs Duty (CVD) in view of Serial Number 263 A and Condition No.16 of notification No.12/2002-Ex. Dated 17.03.2012 and for the said Condition No.16, mobile handsets were chargeable to a duty of 1% if no CENVAT credit had been availed by the importer. The Micromax claimed that they had made excess payment while complying with the

condition No.16 of the aforesaid notification. They claimed the refund of deferential duty of 5%. The Assistant Commissioner (Refunds) rejected all the claims as not maintainable in the absence of evidence of excess payment of duty. He further held that the Bills of Entry had already been assessed and there were assessment orders which could only be reviewed or modified in appeal. It was also observed that the respondent failed to submit any reassessment order or speaking order under section 17(5) of the 1962 Act and that it was beyond the jurisdiction of the Refund Branch to decide the issue on merits. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The High Court held that self-assessment is not an assessment order *per se* and allowed the writ petition. Hence the appeal by the Union of India.

13. In *Commissioner of Customs, New Delhi v. Aman Medical Products Ltd.*, the respondents had imported cannula for the purpose of manufacture of injection needles. At the time of filing of bills of entry, the respondent could not indicate the benefits available under notification No.6/2002 Cus, dated 1.3.2002 which provided a concessional rate of duty on the imported goods. The bills of entry were assessed finally. Subsequently, the respondent filed an application for refund. The refund claim was rejected by the Deputy Commissioner. The respondent preferred an appeal before the Commissioner (Appeals) for grant of refund of excess duty paid by them. The appeal was allowed by the Commissioner of Appeals. The Department filed an appeal before the Tribunal. The Tribunal observed that refund

claim cannot be adjudicated on merits. The respondent – Aman Medical Products Ltd filed a writ petition before the High Court. The writ petition has been allowed.

14. Shri P. Chidambaram, learned senior counsel has taken us through the definition of the 'assessment' as prevailed under the 1962 Act and the amended definition under the Act, assessment *w.e.f.* 8.4.2011, Finance Act, 2011, Section 17 and Section 27 as amended by the Finance Act, 2011. It was urged by learned senior counsel that prior to the amendment by the Finance Act, 2011, the scheme of assessment under section 17 of the Customs Act was such that once a bill of entry was filed, examination and testing of the imported goods were done by the proper officer. Thereafter, an order of assessment was passed after the physical examination. Accordingly, section 27 of the Customs Act provided that claim for refund to be made by any person who had (a) paid duty in pursuance of an order of assessment or (b) a person who had borne the duty. Earlier, there was a necessity for an order of assessment by a proper officer under section 17 of the Customs Act. After the amendment to the Act in 2011, there is no need to get the assessment of bill of exchange done for claiming a refund of excess duty paid under Section 27 of the Act, as now the bill of entry is to be self-assessed by the importer or exporter and will be subject to verification. Further, under section 17(4) of the Customs Act if it is found that self-assessment of duty has not been done correctly by an importer or exporter the proper officer, may re-assess the duty. In case of re-assessment

within fifteen days from the date of re-assessment under section 17(5), a speaking order has to be passed by the proper officer. In the case of re-assessment done under section 17(4), it is only in these circumstances an order is passed. If no order of assessment is passed in the case of self-assessment, the refund application can lie. It was urged that section 27 has also been amended by way of amendment by the Finance Act, 2011. An application for refund of duty and the requirement of order of assessment that was requisite before the amendment has now been expressly removed. It would be a retrograde step to interpret the amended provision otherwise and to deny the refund claim which is not adjudicatory when the bill of entry has been passed. In the case of self-assessment, the duty paid under a mistake can always be claimed without filing an appeal and in that event concerned officer has to look into the matter whether the claim for refund was justified.

15. Reliance has been placed on behalf of the assessee on *SRF Limited vs. Commissioner of Customs* (supra). It is not necessary to pass an order of reassessment or speaking order under the amended provisions of section 17. The decision in *Priya Blue Industries v. Commissioner of Customs* 2004 (172) E.L.T. 145 (SC) is based upon the unamended provisions, thus, cannot hold the field and is inapplicable in view of the amendment made in the provisions. Under section 17(1) of the amended provisions, bills of entry have to be self-assessed by importer or exporter. The verification of the self-assessment has now been made optional. The self-assessment is not to be

disturbed unless there is a verification required by the proper officer and for this purpose, he may examine or test goods or part thereof.

16. It was further urged on behalf of the assessee that amended section 17 and section 27 are to be read together. By amended section 27 it is now provided that an application for refund of duty will be made by any person who has paid the duty or by any person who has borne the duty. Earlier refund could be claimed by the person who has paid the duty. Under the post amendment provision the words "in pursuance to the order of assessment" have been deleted and a refund claim is maintainable by the assessee in case duty has been "paid by him". The legislative intent is clear. Now the order of assessment has been made irrelevant and a re-assessment to an order is no longer a pre-requisite for maintaining a refund claim. Now under the scheme of self-assessment, there would be no order of assessment by the proper officer.

17. It was further urged on behalf of the assessee that section 27 cannot be rendered otiose or redundant. Section 27 does not contain any stipulation which may suggest that refunds can be filed only after the Bill of Entry has been appealed against. In the absence of such a statutory condition, a restriction on refund claim cannot be imported into the statute. Taxing statute has to be strictly interpreted and there is no room to infer any intendment thereof as held by this *Court in Commissioner of Wealth Tax, Gujarat III Ahmedabad v. Ellis Bridge Gymkhana*, (1998) 1 SCC 384. Reliance has also been placed on the decision of this Court in *Maharashtra*

State Financial Corporation v. Jaycee Drugs and Pharmaceuticals (P.) Ltd. (1991) 1 SCC 637, *O.P. Singla & Anr. v. Union of India & Ors.*, (1984) 4 SCC 450, and *Union of India v. Popular Construction Co.,* (2001) 8 SCC 470.

18. It was also urged that section 27 is a remedy available to the assessee for the refund of duty paid and section 28 is a remedy available to the Department on the recovery of duty not levied and short levied or erroneously levied. Both the remedies can be availed without filing appeals. It was further urged that no appeal can be filed under section 128 of the Customs Act against the bill of entry. As the scheme of assessment under Section 17 of the Customs Act is that of self-assessment and only when such a self-assessment is disputed by the proper officer, an order of assessment is passed then he may appeal to the relevant appellate authority within 60 days of the communication of the order. It is only in a situation where speaking order is passed then the assessee is required to file an appeal. Unless a speaking order of assessment is passed, no appeal can lie and the only option for refund of duty paid is to file a refund claim. The bill of entry is merely stamped to allow clearance of the goods. No reasons are provided in the bill of entry on account of which it can be regarded as an order which can be subjected to appeal under section 128 of the Customs Act. The judgment of this Court in *Commissioner of Customs v. Sayed Ali* (265) ELT 17 (SC) is not relevant. The said judgment was passed in respect of section 28 of the Customs Act.

19. On behalf of the Union of India/Department, it is contended that self-

assessment is an assessment. It is not open to the proper officer after accepting the self-assessment to entertain a claim for refund in the absence of the self-assessment being questioned in the appeal. The direction to reassess the bill of entry after the expiry of more than a year cannot be ordered. Reliance has been placed on *Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd.*, 2000 (120) ELT 285 (SC). In the instant case, the bills of entry were filed and they were self-assessed. It is an assessment under the Act and in case benefit of notification has not been claimed, in the absence of challenge to assessment of bills of entry by way of filing the appeal, the benefit of notification cannot be claimed. An application for refund is not maintainable in view of the law laid down by this Court in *Flock (India) Pvt. Ltd. (supra) and Priya Blue Industries* (supra). Once the self-assessment/assessment attains finality and has not been questioned, it cannot be reopened at any point of time. The refund claim is not an appellate proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order. Even after the amendment is made in 2011, the conditionality of payment having been made pursuant to an order of assessment continue to exist. As the self-assessment of bills of entry is an order of assessment *per se*, unless the order of assessment passed under section 2(2) of the Act is appealed before Commissioner of Appeals for modification no claim for refund can be entertained. The provision of section 128 cannot be rendered otiose. The

amendment has been made in order to simplify the procedure but the legal effect of the self-assessment is that of assessment. While processing self-assessment some exercise has to be done. Once it is accepted, it becomes an order of assessment.

20. Right to appeal is available to any person i.e. to the department as well as to importer/exporter against an order of self-assessment. Until and unless assessment order is modified and a fresh order of assessment is passed and duty redetermined, the refund cannot be granted by way of refund application. The refund authorities cannot take over the role of Assessing Officer. The officer considering refund claim cannot reassess an assessment order. An assessment order has to be questioned within the stipulated period of limitation. The refund application cannot be entertained directly under section 27 unless the order of assessment is appealed against and is modified.

21. The first question for consideration is whether the assessment includes self-assessment also. Prior to the amendment by the Finance Act, 2011 the assessment had been defined in Section 2(2) thus:

> "2(2) "assessment" includes provisional assessment, reassessment and any order of assessment in which the duty assessed is nil;"

22. After the amendment of Section 2(2) made by the Finance Act, 2011 the definition of 'assessment' reads thus:

> "2(2) "assessment" includes provisional assessment, self-assessment, reassessment and any assessment in which the duty assessed is nil;"

23. It is apparent from the amended definition that self-assessment, provisional assessment, re-assessment and any assessment in which the duty assessed is nil, is an assessment. Assessment includes self-assessment, when the provision of self-assessment has been incorporated in Section 17(1), and corresponding change has been made in the definition of assessment in Section 2(2). Earlier the word self-assessment was not included in the definition of assessment.

24. The assessment of duty was provided in section 17 of the unamended Act prior to 2011. Pre-amended section 17 of the Customs Act is extracted hereunder:

> "17. Assessment of duty.—(1) After an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.
>
> (2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed.
>
> (3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, 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 and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefor under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be."

25. Section 17 as amended by Finance Act, 2011 is extracted hereunder:

"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 document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.]

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

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter 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.]"

(emphasis supplied)

26. Section 27 deals with a claim for refund of duty. Provision of section 27 which prevailed before amendment by Finance Act, 2011 is extracted hereunder:

"27. (1) Any person claiming refund of any duty---
(i) paid by him in pursuance of an order of assessment; or
(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant

Commissioner of Customs or Deputy Commissioner of Customs-
(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year ;
(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :
Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2):
Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest:
Provided also that in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order.
[Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction.
Explanation I.-For the purposes of this sub-section, "the date of payment of duty and interest, if any, paid on such duty", in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.
Explanation II.-Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.

(emphasis supplied)"

27. The provision of Section 27 of the Customs Act as amended by Finance Act, 2011 is extracted hereunder:

> "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:
> Provided that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill, 2011 receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2):
> Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest.
> Provided also that where the amount of refund claimed is less than rupees one hundred, the same shall not be refunded.
> Explanation. -- For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.
> (1A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty or interest, in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty or interest, has not been passed on by him to any other person.
> (1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely: --
> (a) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year shall be computed from the date of issue of such order;
> (b) where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate

authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction;
(c) where any duty is paid provisionally under section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment.]

(2) If, on receipt of any such application, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:
Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant Commissioner of Customs or Deputy Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-
(a) the duty and interest, if any, paid on such duty paid by the importer [or the exporter, as the case may be], if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use ;
(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
(d) the export duty as specified in section 26;
(e) drawback of duty payable under sections 74 and 75;
(f) the duty and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:
(g) the duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made where--
(i) such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry; or
(ii) the duty actually payable is reflected in the reassessed bill of entry in the case of reassessment.
Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal, the National Tax Tribunal or any Court or in any other provision of this Act or the regulations made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall, seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

(emphasis supplied)

28. Section 28 deals with the recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Section 28(1) is extracted hereunder:

"28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-- (1) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,--

(a) the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has

> erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;
> Provided that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;
> (b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,--
> (i) his own ascertainment of such duty; or
> (ii) the duty ascertained by the proper officer,
> the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid:
> Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred."
>
> (emphasis supplied)

29. The first question for consideration is whether in the case of self-assessment without passing a speaking order, it 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 and merely an endorsement is made by the authorities concerned on the bill of entry which cannot be said to be an order much less a speaking order.

30. In *Escorts Ltd. v. Union of India & Ors*. (1994) Supp. 3 SCC 86 the question arose for consideration as to the Bill of Entry classifying the imported goods under a certain tariff item and paying the duty thereon. This Court held that in such a case signing of the bill of entry itself amounted to passing an order of assessment. Hence, the application seeking a refund on the ground that imported goods fell under a different item attracting a far lower rate of duty, having been filed more than six months after the payment of duty, was rightly rejected as time-barred. What is of significance is that an entry made in the bill of entry has been held to

be an order of assessment passed by the Assessing Officer. This Court considered the provisions of sections 47 and 17 of the Customs Act and has observed:

> "9. Reading Sections 47 and 17 together, it is clear beyond any doubt, that as soon as the bill of entry is filed, the proper officer examines the goods, tests them, assesses the proper duty and permits clearance of goods only after the duty and other charges, if any, are paid. In the scheme of the Act, there is no room for contending that any goods will be allowed to be cleared without assessment of the duty, whether provisional or final, as the case may be.
>
> 10. Now it may be noticed that the Act does not prescribe any particular form in which the order of assessment is to be made. In the very nature of things, no formal order of assessment can be expected when there is no dispute as to the classification or the rate of duty. No formal order can be expected in such a case, it is more like 'across-the-counter' affair. In the present case, it may be reiterated that the appellant himself classified the goods under tariff item No. 73.33/40 and paid the duty at the rate applicable thereunder. At that stage, he did not raise any dispute either as to classification or as to the right of duty applicable. Hence, there was no occasion for passing a formal order since there was no lis at that stage. The bill of entry presented by the appellant was signed, signifying approval by the assessing officer. That itself is an order of assessment in such a situation. We are, therefore, not prepared to agree that there is no order of assessment in this case, and therefore, the limitation prescribed in Section 27 did not begin to run. Section 27 is emphatic in language. It says that an application for refund of duty shall be made before the expiry of six months from the date on which the duty was paid. In the face of this provision, the authorities under the Act, including the Government of India, had no option but to dismiss the appellant's application. This is also the view taken by this Court in Madras Rubber Factory Ltd. v. Union of India (1976) 2 SCC 255."
>
> (emphasis supplied)

31. It is apparent from the aforesaid discussion that the endorsement made on the bill of entry is an order of assessment. It cannot be said that there is

no order of assessment passed in such a case. When there is no *lis*, speaking order is not required to be passed in "across the counter affair".

32. Coming to the procedure of assessment of duty as prevailed before the amendment of the Act prior to the amendment made in section 17(1) by the Finance Act of 2011, the imported goods or exported goods were required to be examined and tested by the proper officer. After such examination, he had to make an assessment of the duty, if any, leviable on these goods. Under sub-section (3) of section 17, the proper officer was authorized to require the importer, exporter or any other person to produce any contract, broker's note or any other document as specified in the proviso and to furnish any required information. Notwithstanding that the statements made in the bill of entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it was found subsequently on examination or testing of the goods or otherwise that any statement in such bill of entry or document or any information so furnished was not true, he could have proceeded to reassess the duty. Where the assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of the goods, classification, exemption or concession, speaking order shall be passed within 15 days from the date of assessment of the bill of entry or the shipping bill as the case may be as provided in section 17(5).

33. Under the provisions of section 17 as amended by Finance Act of 2011, section 17(1) has provided to self-assess the duty if any leviable on

such goods by importer or exporter as the case may be. Self-assessment is an assessment as per the amended definition of section 2(2). It is further provided that proper officer may verify the self-assessment of such goods, and for this purpose, examine or test any imported goods or exported goods or such part thereof as may be necessary. The power to verify self-assessment lies with the proper officer and for that purpose under section 17(3), he may require the importer, exporter or any other person to produce such document and furnish such information, etc. If the proper officer on verification has found on examination or testing of the goods or as part thereof 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 the Act, may proceed to re-assess the duty leviable on such goods. Section 17(5) of the Act as amended provides that where re-assessment done under sub-section 17(4) is contrary to the assessment done by the importer or exporter regarding the matters specified therein, the proper officer has to pass a speaking order on the re-assessment, within 15 days from the date of reassessment of the bill of entry or the shipping bill, as the case may be. The explanation to amended section 17 has clarified that import or export before the amendment by Finance Act, 2011 shall be governed by unamended provisions of section 17.

34. Section 18 deals with the provisional assessment of duty where the importer or exporter is unable to make self-assessment or the proper officer deem it necessary to subject any imported or export goods to any chemical

or other tests; or where further inquiry is deemed necessary by the proper officer.

35. Section 27 of the Act prior to amendment by Finance Act, 2011 provided for refund procedure. Any person could claim a refund of duty and interest if any paid on such duty. Refund of duty and interest if any paid pursuant to the order of assessment or borne by him, may make an application for refund of such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs within one year in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital. In any other case before the expiry of six months from the date of payment of duty and interest. He has to further satisfy that he has not passed on such liability to any other person. The limitation of one year or six months shall not apply where any duty and interest has been paid under protest. It is made clear by the second proviso to section 27 that in case of refund becomes necessary as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months shall commence from the date of such judgment, decree, order or direction.

36. Section 27 of the Customs Act as amended by Finance Act, 2011 provides that any person claiming refund of any duty or interest paid or borne by him, may make an application in such form and manner as may be prescribed for such refund to the Assistant or Deputy Commissioner of

Customs before the expiry of one year from the date of payment of such duty or interest. If an application for refund has been made before Finance Bill received the assent of the President, it is deemed to be filed under the provision of section 27 (1) as existed and to be dealt with under section 27(2). The period of limitation of one year provided by the provisions of section 27 has to be computed in the case of goods which are exempt from payment of duty by a special order issued under section 25(2) from the date of issue of such an order as provided in section 27(1B)(a). Where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any Court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction. It is provided in Section 27(1B)(c) that where any duty is paid provisionally under Section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in the case of re-assessment, from the date of such re-assessment. The second proviso to section 27 makes it clear that limitation of 1 year shall not apply where any duty or interest has been paid under protest.

37. Under Section 27(2)(a) it is incumbent upon the applicant to satisfy that the amount of duty or interest of which refund has been claimed, had not been passed by him to any other person, the provision aims at preventing unjust enrichment.

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.* (*supra*).

39. In *Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd.* 2000 (120) ELT 285 (SC)= (2000) 6 SCC 650, the question which came up for consideration before this Court was non-challenge of an appealable order where the adjudicating authority had passed an order which is appealable under the statute, and the party aggrieved did not choose to file an appeal. This Court held that it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing the order. The provisions of the Central Excise Act, 1944 came up for consideration. The Court has observed:

> "10. Coming to the question that is raised, there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing its order. If this position is

> accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view was taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that whereas a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, if an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for the refund which, if we may term it so, is in the nature of execution of a decree/order. In the case at hand, it was specifically mentioned in the order of the Assistant Collector that the assessee may file an appeal against the order before the Collector (Appeals) if so advised."
>
> (emphasis supplied)

40. In *Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive)* 2004 (172) ELT 145 (SC)= (2005) 10 SCC 433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus:

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

> competent officer. The officer considering the refund claim cannot also review an assessment order.
>
> 7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an appeal having been filed no refund claim could be made.
>
> 8. The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained."
>
> (emphasis supplied)

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

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

> "128. Appeals to [Commissioner (Appeals)]. -- (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order:

> [Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]
> [(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:
> Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]
>
> (2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

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

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

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. In *Hero Cycles Ltd. v. Union of India* 2009 (240) ELT 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the

mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in *Priya Blue Industries Ltd.* (*supra*).

45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in *Central Office Mewar Palace Org. v. Union of India* 2008 (12) STR 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act.

46. The decision in *Intex Technologies (India) Ltd. v. Union of India* has followed *Micromax* (supra). The reasoning employed by the High Courts of Delhi and Madras does not appear to be sound. The scope of the provisions of refund under Section 27 cannot be enlarged. It has to be read with the provisions of Sections 17, 18, 28 and 128.

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.

48. Resultantly, we find that the order(s) passed by 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 applications for refund were not maintainable. The appeals are accordingly disposed of. Parties to bear their own costs as incurred.

..... J.
(Arun Mishra)

..... J.
(Navin Sinha)

..... J.
(Indira Banerjee)

New Delhi;
September 18, 2019.