TELANGANA HIGH COURT

M/S. SONY INDIA PVT. LTD. VERSUS UNION OF INDIA AND ANOTHER

Seeking amendment in the bills of entry - non-availability of the decision in the case of M/S SRF LTD., M/S ITC LTD VERSUS COMMISSIONER OF CUSTOMS, CHENNAI, COMMISSIONER OF CUSTOMS (IMPORT AND GENERAL) , NEW DELHI [**2015 (4) TMI 561 - SUPREME COURT]** at the time of the clearance of the goods pertaining to the Bills of Entry in the present case - re-assessment, pertaining to a different period has not been considered by the 2nd respondent - assessment of the Bills of Entry - appealable order or not - HELD THAT:- It provides a remedy of appeal against any order passed by the Dy. Commissioner of Customs, who is lower in rank than a Commissioner of Customs, to the Commissioner (Appeals) - the petitioner has a remedy of an appeal against the assessment of the BoEs in question.

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

In the decision of the Supreme Court in ITC LIMITED VERSUS COMMISSIONER OF CENTRAL EXCISE, KOLKATA -IV [2019 (9) TMI 802 - SUPREME COURT] 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 - 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.

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 - 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 is also rejected.

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.

The impugned order passed by the 2nd respondent cannot be sustained and is violative of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India and also the Customs Act, 1962, and it is accordingly set aside - petition allowed.

No.- Writ Petition No.4793 of 2021
Dated.- August 12, 2021
Citations:

ITC LIMITED Versus COMMISSIONER OF CENTRAL EXCISE, KOLKATA -IV - 2019 (9) TMI 802 - Supreme Court
M/s SRF Ltd., M/s ITC Ltd Versus Commissioner of Customs, Chennai, Commissioner of Customs (Import And General) , New Delhi - 2015 (4) TMI 561 - Supreme Court

MA Murthy Versus State Of Karnataka And Others - 2003 (9) TMI 76 - Supreme Court
UNION OF INDIA Versus SOLAR PESTICIDE PVT. LTD. - 2000 (2) TMI 237 - Supreme Court
MAFATLAL INDUSTRIES LTD. Versus UNION OF INDIA - 1996 (12) TMI 50 - Supreme Court
GOLAKH NATH Versus STATE OF PUNJAB - 1967 (2) TMI 95 - Supreme Court
M/s. Usha International Limited, M/s. Jay Engineering Works Limited Versus The Assistant Commissioner of Customs, The Assistant Commissioner of Customs, The Commissioner of Customs - 2018 (9) TMI 1454 - MADRAS HIGH COURT

HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO AND HONOURABLE SRI JUSTICE T. VINOD KUMAR

Petitioner Advocate : Avinash Desai

Respondent Advocate : Namavarapu Rajeshwar Rao ASSGI

Order: (Per Hon'ble Sri Justice M.S. Ramachandra Rao)

This Writ Petition is filed under Article 226 of the Constitution of India challenging the order dt.07.02.2020 in C.No. S/26/MISC/ 1222020-ACC of the Office of the Assistant / Deputy Commissioner of Customs, Air Cargo Complex, Shamshabad, Hyderabad (2nd respondent herein).

2. The Petitioner herein is a private limited company having its registered office at New Delhi. It is carrying on the business of manufacture of and marketing of different types of electronic goods and consumer electronics including mobile phones.

3. During the period 04.08.2014 to 29.01.2015 it imported mobile phones in India for trading purposes.

4. On import of the said mobile phones under the Bills of Entry (BoEs), it classified them under the Customs Tariff Item No.8517 12 90 of Schedule I to the Customs Tariff Act, 1975 and paid Countervailing Duty (C.V.D.) under Section 3(1) of the Customs Act at the rate of 6% as per Sl.No.263A(i) of Notification No.12/2012-CE dt.17.03.2012 (Exemption Notification).

5. But, under Sl.No.263A(i) of the Exemption Notification, the mobile phones were chargeable to concessional rate of 1% subject to the condition No.16 of the Exemption Notification, and that this condition specified that no credit should have been availed on the inputs or capital goods used in the manufacture of mobile phones.

6. At the time of import of mobile phones in the BoE, petitioner had not claimed any exemption under Sl.No.263A(ii) of the Exemption Notification which allowed a payment of C.V.D. at 1%.

7. Petitioner contends that this reduced rate was not availed of by it as the 2nd respondent had taken a stand that such exemption is available only when the assessee has not taken credit in respect of the inputs and capitals goods under the CENVAT Credit Rules, 2004 for the manufacture of mobile phones; since the inputs and capital goods in the present case were procured and utilized outside India, the 2nd respondent was of the view that the reduced rate would not be available to importers like the petitioner; and during the above period, the EDI system did not permit availment of the lower rate of tax as per the Exemption Notification.

8. In 2015, the *Supreme Court in M/s. SRF Limited vs. Commissioner of Customs 2015 (318) ELT 603* held that where lower rate of Excise Duty has been provided with condition of non-availment of CENVAT Credit, CVD shall also be applicable at lower rate as an importer-trader cannot avail CENVAT Credit in any case, and that the condition attached to the lower rate is deemed to be fulfilled.

9. Therefore, by virtue of the above decision, the petitioner contends that importers and itself were also eligible to avail of the benefit of the reduced rate of 1% under the Exemption Notification; and after the above decision by the Supreme Court, it sought to claim benefit of the Exemption Notification (SL.No.263A) for import of Mobile handsets including cellular phones.

10. But the EDI System used for filing the Bills of Entry was not updated to make available the benefit of the said Notification to imported goods; the benefit of the Notification was not extended to petitioner, despite it seeking the same; and due to deficiency in the system, the benefit of exemption otherwise eligible was deprived to it and it was forced to pay CVD at merit rate.

11. To show that the EDI system was not updated during the relevant period, it relied on letter dt.17.05.2016 issued under the Right to Information Act by the DG Systems and Data Management, New Delhi.

12. The petitioner contends that the *Supreme Court in ITC Ltd. vs. Commissioner of Central Excise (2019) 17 SCC 46* held that refund under Sec.27 would only be permissible when the BoE has been amended or modified under the provisions of the Customs Act; and so petitioner submitted letter dt.22.11.2019 before the 2nd respondent requesting to amend 136 BoEs under Section 149 of the Customs Act to reassess the BoEs and grant subsequent refund, by making the following submissions, viz.,

(a) that Section 149 provides for amendment of a BoE to be permitted on the basis of documentary evidence which was in existence at the time when the goods were cleared, deposited or exported;

(b) that the Supreme Court in ITC Ltd. (2 supra), held that the self-assessed BoE must be either amended or modified under the relevant provisions of the Customs Act; that the observations of the Supreme Court show that apart from Section 128 of the Customs Act, there are other relevant provisions of the said Act under which a BoE can be modified before refund can be claimed under Section 27 of the Customs Act;

(c) that Section 149 does not prescribe any time limit or any other restriction and that this has been recognized in the various cases by the CESTAT; and

(d) that Section 17(5) provided that where reassessment 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 reassessment within 15 days from the date of reassessment of the Bill of Entry or the shipping bill, as the case may be, and relied on the decision in Usha International Ltd. vs. Assistant Commissioner of Customs, Chennai 2019 (365) E.L.T. 56 (Mad.).

<u>The impugned order dt.7.2.2020</u>

13. The 2nd respondent then issued the impugned order dt.07.02.2020 in C.No.S/26/MISC/122-2020-ACC rejecting petitioner's request / application vide letter dt.22.11.2019 for amendment in the Bills of Entry under Section 149 r/w Section 17 of the Customs Act stating as under :

"(a) that the judgment of the Hon'ble Supreme Court in SRF Limited (supra) was delivered on 26.03.2015 and the same was not available at the time of the clearance of the goods pertaining to the Bills of Entry in the present case;

(b) an application filed on similar ground by petitioner for re-assessment, pertaining to a different period has not been considered by the 2nd respondent and the appeal against the order of rejection was dismissed by the Ld. Commissioner (Appeals).

(c) as the assessment of the Bills of Entry is an appealable order and in the absence of the same being challenged by the importer, the same attains finality. Thus, it is assumed that the importer has accepted the assessment of the Bills of Entry."

Contentions of Petitioner

14. The petitioner contends that the impugned order has been passed in complete contradiction with the decision of the *Supreme Court in ITC Ltd. (2 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. (2 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.

15. The petitioner further contended that it sought amendment of BoEs to claim the benefit of Exemption Notification which could not be claimed due to non-availability of the Exemption Notification in Respondents' EDI systems; that if the BoEs are amended, it would be eligible for refund of the excess duty paid and which can be claimed under Section 27 of the Customs Act; and that the impugned order is completely illegal as the 2nd respondent was bound to follow the decision of the Supreme Court which he failed to do and failed to exercise the jurisdiction.

16. The petitioner also contended that the 2nd respondent had referred to in Order-in-Appeal No.HYD-CUS-000-APP-022-19-20 dt.28.06.2019 passed by the Commissioner of Customs and Central Excise (Appeal-I), Hyderabad for upholding the rejection of the amendment application filed by petitioner for a different period; that this order was passed prior to the decision in *ITC Ltd. (2 supra) on 18.9.2019* which laid down the law very clearly; and so could not have been relied on by the 2nd respondent.

17. It is further contended by the petitioner that the impugned order has erroneously rejected the amendment of the BoEs under Section 149 of the Customs Act; that Section 149 provided for amendment of a BoE on the basis of documentary evidence which was in existence at the time when the goods were cleared, deposited or exported; that the only restriction is Section 30 and 41 of the Act which relates to export and import manifest which are not allowed to be amended or where there is a fraudulent intention; that in the present case, the petitioner applied for amendment of the BoEs on the strength of documents which were in existence at the time of clearance of the goods, i.e., the Exemption Notification; that in the impugned order, the 2nd respondent has erroneously held that the amendment has been sought on the basis of the decision of the Supreme Court in SRF Ltd. (1

supra) and that the decision in SRF Ltd. (1 supra) was pronounced on 26.03.2015 which was after the relevant period of the clearance of the goods pertaining to the 136 BoEs, and hence the benefit of the same will not be available to petitioner.

18. Petitioner asserts that the Supreme Court in SRF Ltd. (1 supra) clarified that an importer would also enjoy the same benefit as a manufacture if it is importing a like product for which a beneficial rate of duty is available for a manufacturer; that the said decision in SRF Ltd. (1 supra) did not introduce a new benefit under the provisions of the Customs Act but merely provided clarifications regarding a benefit that was already provided under the provisions.

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.

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.

The contentions of 2nd respondent:

21. Counter-affidavit was filed by 2nd respondent contending that at the time of import, the petitioner herein had not claimed the benefit of concessional rate of duty under the Entry 263(ii) of the Notification; that later, the Supreme Court in SRF Ltd. (1 supra) held that the lower rate of Excise Duty has been provided with the condition of non-availment of CENVAT Credit; that CVD shall also be applicable at lower rate as an importer-trader cannot avail CENVAT credit in any case.

22. The respondents contend that in order to seek refund of excess CVD paid on the import of Mobile Phones during the period May 2014 to January, 2014 (a period different from the subject period in this Writ Petition); that the petitioner herein filed refund applications under Section 27 of the Customs Act, 1962, and the same was rejected by the original authority; and aggrieved by the orders, the petitioner herein filed Appeal before the 2nd respondent wherein the appellate authority held that appellant should have applied for re-assessment under the provisions of Section 128 of the Customs At, 1962 instead of seeking amendment under the provisions of Section 149 of the Customs Act, 1962 as reassessment was the only remedy available to petitioner; and aggrieved by the orders of the Appellate Commissioner, the petitioner filed Appeal before the CESTAT, which is pending.

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.

25. The 2nd respondent further stated that the provisions of Section 149 have not provided that the amendment of documents unconditional. The proper officer is vested with the power to allow the amendment by exercising his discretion; and in the instant case, for bypassing the provisions of Section 128 of the Act to re-assess, no valid grounds have been displayed or presented by petitioner, and therefore, the proper officer has rejected the request of petitioner.

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.

The consideration by the Court

27. Heard Sri Kamal Sawhney, learned counsel for Sri Avinash Desai, learned counsel for petitioner and Sri B.Narasimha Sarma, learned Special Senior Counsel for the respondents.

28. We have noted the submissions of both sides.

29. The provisions of Section 128 of the Customs Act, 1962 states as under :

"(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [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.]

30. So it provides a remedy of appeal against any order passed by the Dy. Commissioner of Customs, who is lower in rank than a Commissioner of Customs, to the Commissioner (Appeals).

31. Therefore, the petitioner has a remedy of an appeal against the assessment of the BoEs in question.

32. But there is another provision in the Customs Act, 1962 which also enables an assessee to seek amendment of a BoE. It is Section 149 of Customs Act, 1962, which reads as under :

"149. Amendment of documents : Save as otherwise provided in sections 30 and 41 the proper officer may in his discretion authorize any document after it has been presented in the customs house to be amended.

Provided that no amendment of a bill of entry or shipping bill or bill of export shall be so authorized 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."(emphasis supplied)

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. (2 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:

"47….. we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act." (emphasis supplied)

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.

38. In the impugned order dt.07.02.2020, the 2nd respondent stated that the judgment of the Supreme Court in M/s. SRF Ltd. (1 supra) was delivered on 26.03.2015 and the same was not available/ in existence at the time i.e. August, 2014 to January, 2015 when the goods pertaining to the relevant BoEs were cleared, and so the amendment that petitioner requested cannot be made to those BoEs.

39. It is clear that the 2nd respondent had taken the decision of the Supreme Court as "documentary evidence" which was not in existence at the time of clearance of the goods.

40. Law declared by the Supreme Court, unless made prospective in operation in its judgment, is always deemed to be the law of the land. It cannot be construed as applicable only after the date of pronouncement of the judgment of the Supreme Court.

41. In *M.A. Murthy v. State of Karnataka (2003) 7 SCC 517,* the Supreme Court had declared:
" 8. … Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak Nath v. State of Punjab AIR 1967 SC 1643 …. It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that

the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs."
(emphasis supplied)

42. That apart, in our opinion, the term "documentary evidence" used in Section 149, in the context of amendment to BoEs or like documents, cannot include decisions of Courts.

43. In para 6.2 of the counter affidavit, the 2nd respondent admits the principle laid down in M/s. SRF Ltd. (1 supra) and that importers can take benefit of the same, but in the impugned order he has denied to the petitioner benefit of the same by giving the untenable reason that the judgment therein was delivered after the dates of clearance of the goods. We deprecate this view of the 2nd respondent.

44. The last reason given by the 2nd respondent in the impugned order to reject the amendment sought of the BoEs by the petitioner is that for a different period he had rejected similar plea and the same was confirmed by the Commissioner (Appeals) in Appeal No.31 of 2019 on 28.06.2019.

45. Admittedly, the said order has been challenged before the CESTAT, Hyderabad in an Appeal and the said Appeal is pending. So the said order has not attained finality.

46. Moreover, the said order was passed on 28.06.2019 prior to the decision in ITC Ltd. (2 supra) on 18.09.2019. Once the Supreme Court has clarified in para no.47 of ITC Ltd. (2 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.

47. He cannot refuse to follow it on the ground that the Commissioner (Appeals) did not grant relief to the petitioner for the different period. In fact, if the said decision in M/s. ITC Ltd. (2 supra) had been rendered before the decision in the Appeal was given by the Commissioner (Appeals), even the said officer would have followed it.

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.

50. For the above reasons, we hold that the impugned order dt.07.02.2020 passed in C.No.S/26/MISC/122-2020-ACC by the 2nd respondent cannot be sustained and is violative of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India and also the Customs Act, 1962, and it is accordingly set aside.

51. A Writ of Mandamus is issued to 2nd respondent to amend the subject Bills of Entry under Section 149 of the Customs Act to reflect the rate of tax as 1% as per Sl.No.263A(i) of Notification No.12/2012-CE dated 17.03.2012 within four (04) weeks from the date of receipt of copy of this order to enable the importer / petitioner to seek refund of excess duty paid under Section 27 of Customs Act, 1962.

52. Upon the petitioner making such application for refund of excess duty levied and paid, it is for the concerned authority to further look into the refund application and pass orders in the light of ratio laid down by the Supreme Court in *Mafatlal Industries Ltd., vs. Union of India (1997) 5 S.C.C. 536* (the principle which is followed in relation to imports for captive consumption in *Union of India vs. Solar Pesticide (P) Ltd. (2000) 2 S.C.C. 705 = (2000) 116 E.L.T. 401 (S.C.)).*

53. Accordingly, the Writ Petition is allowed as above. No order as to costs.

54. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.