CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI
WEST ZONAL BENCH

CUSTOMS APPEAL No.85509 OF 2022
CUSTOMS APPEAL No.85515 OF 2022

[Arising out of Order-in-Appeal No.MUM-CUSTM-AMP-822 & 823-2021-22 dated 27th October 2021 passed by the Commissioner of Customs(Appeals), Mumbai-III]

PACIFIC CYBER TECHNOLOGY PVT LTD
22 Piramal Industrial Estate No.4,S.V.Road,
Goregoan West, Mumbai
Maharashtra-400062 **Appellant**

Vs.

COMMISSIONER OF CUSTOMS (IMPORT)
Air Cargp Complex, Navpada, Sahar Village, Andheri
East Mumbai-400099 **Respondent**

Appearance:
Present for the Appellant: Shri Prashant Patankar, Consultant
Present for the Respondent:Shri A.K.Srivastava (AR)

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO.85527-85528/2025

Date of Hearing: 10.12.2024

Date of Decision:08.04.2025

PER:AJAY SHARMA

These appeals have been filed challenging the impugned Orders-in-Appeal dated 27.10.2021 passed by the Commissioner(Appeals), Mumbai, Zone III by which the learned Commissioner allowed both the appeals filed by revenue by setting aside the Order of re-assessment dated 5.2.2020 and the Order-in-Original dated 5.3.2020 passed by the respective lower authorities.

2. The issue to be decided herein is whether the re-assessment of the Bill of Entry in question has been rightly done by the concerned lower authority in accordance with Section 149 of the Customs Act, 1962 or was the said Bill of Entry required to be challenged by the importer before the appellate authority u/s. 128 ibid which would have been the appropriate proceedings?

3. The facts leading to the filing of the instant appeal are stated in brief as follows. M/s. Pacific Cyber Technology Pvt. Ltd.- Appellant (Importer) herein filed *Bill of Entry No.* 5936140 dated 4.12.2019 at JNCH concerning Invoice No. SKW20191119-1 dated 19.11.2019. Another *Bill of Entry No.* 5793005 dated 22.11.2019 at Air Cargo Complex has also been filed by them inadvertantly for the same invoice No.SKW20191119-1 dated 19.11.2019 in place of correct Invoice No. SKW20191121-3 dated 22.11.2019 and customs duty of Rs. 14,72,009/- has been paid vide challan dated 22.11.2019 whereas the correct customs duty for the said B/E would have been Rs.4,41,603/-.Resultantly they paid excess customs duty of Rs. 10,30,406/-.

4. Upon realising the mistake, the appellant approached the concerned officer for re-assessment of B/E No. 5793005 dated 22.11.2019 in order to correct the invoice particulars alongwith relevant Invoice No. SKW 20191121-3 dated 22.11.2019. Upon which the amendment of the B/E was allowed and the B/E dated 22.11.2019 was re-assessed and the order of re-assessment dated 5.2.2020 was passed by the Assistant Commissioner of Customs and customs duty was re-assessed as Rs.4,41,603/-. Thereafter the appellant applied for refund of Rs.10,30,406/- excessively paid by them and the same was sanctioned by the Asstt. Commr. of

Customs, Refund Section, ACC, Mumbai vide Order-in-Original dated 5.3.2020. Both the orders i.e. Order of re-assessment dated 5.2.2020 and Order dated 5.3.2020 sanctioning refund were challenged by Revenue before the 1st appellate authority i.e. Commissioner of Customs (Appeals), Mumbai, Zone-III, who vide impugned order dated 27.10.2021 allowed both the appeals filed by revenue by setting aside the Order of re-assessment dated 5.2.2020 as well as the Order-in-Original dated 5.3.2020 granting refund.

5. According to Revenue, the order of re-assessment dated 5.2.2020 is not correct because the same cannot be done u/s. 149 of Customs Act, 1962 and therefore re-assessment done by the lower authority cannot survive. It is the submission of revenue, which finds favour with the first appellate authority, that as per proviso to Section 149 of the Customs Act, 1962 *no amendment of a bill of entry is authorised to be amended after clearance of the imported goods* and since in the instant matter the request for re-assessment has been made after the clearance of the imported goods and the goods were not present at the time of re-assessment, therefore the said section has no application. It is also the case of revenue that the appellant herein has not filed any appeal against self-assessment of the Bill of Entry and the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified u/s. 128 ibid or under the other relevant provisions of the Customs Act. Learned Commissioner (Appeals) i.e. the first appellate authority while allowing the appeal of revenue observed that since the bill of entry has been re-assessed without getting the order modified u/s. 128 ibid

therefore the same is void and resultantly no refund can be claimed by the appellant. Learned Authorised Representative appearing on behalf of Revenue, while reiterating the findings of the learned Commissioner, has submitted that in the instant case the re-assessment has to be done subject to outcome of an appellate order after following the procedure prescribed by law. According to learned authorised representative the appellant herein ought to have challenged the assessment order in appellate forum and has to get the self-assessment modified u/s. 128 ibid and only thereafter the re-assessment can be done in accordance with the order of the Appellate Authority. In support of his submissions, learned Authorised Representative relied upon the law laid down by the Hon'ble Supreme Court in the matter of *M/s. ITC Ltd. vs. CCE, Kolkata-IV; 2019 (368) ELT 216 (SC) = (2019) 17 SCC 46.*

6. I have heard learned Consultant for the appellant and learned Authorised Representative on behalf of Revenue and perused the case records including the synopsis/written submissions and case laws placed on record. Learned consultant for the appellant mainly relied upon section 149 ibid while submitting that the re-assessment in their case is squarely covered under the proviso to Section 149 ibid. Per contra learned Authorised Representative pressed upon Section 128 ibid. For ready reference Sections 128 and 149 ibid 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."

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*"**149. Amendment of documents.** 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 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."

[Emphasis supplied]

7. In order to appreciate the facts of the matter, correct Air-way Bill and the Bill of Lading numbers for the two consignments with their respective invoices/packing list are as extracted as under:-

AWB No.910-14270664(20/11/2019) HAWB No.0013849		**HBL No.DMCQBKKH021368** (18/11/2019)	
Pallets	10	Pallets	20
Gross weight	2,143 kg	Gross weight	6,960.400 kg
Invoice No.SKW20191121-3 (22/11/2019)		**Invoice No.SKW20191119-1 (19/11/2019)**	
Pallets	10	Pallets	20
Gross weight	2,148.20 kg	Gross weight	6,960.400 kg
Quantity	36,000	Quantity	1,20,000 nos.
Net Weight	1,998 kg	Net Weight	6,660 kg

As per Packing List		As per Packing List	

8. From the above table it is clear that same goods i.e. pallets were imported in both the invoices. In one invoice i.e. Invoice dated 22.11.2019 it was 10 pallets (quantity 36,000) with the gross weight of 2143/2148.20 kg whereas in the Invoice dated 19.11.2019, 20 pallets (quantity 1,20,000 nos.) were imported having gross weight of 6960.400 kg. But due to oversight for the import of 10 pallets of invoice dated 22.11.2019 customs duty applicable for 20 pallets has been paid.

9. While deciding against the applicability of S.149 ibid, learned Commissioner (Appeal) has recorded a finding that the *proviso therein has given emphasis that no amendment of a bill of entry is authorised to be amended after clearance of the imported* goods, which in my view is completely unfounded and without any basis. Learned Commissioner also relied upon the decision of the Hon'ble High Court of Delhi at New Delhi in the matter of *Terra Films Pvt. Ltd. vs. Commissioner; 2011(268) ELT 442 (Del.)* and recorded a finding that the said decision highlighted that for amendment to be allowed u/s. 149, it should be based on documentary evidence in existence and physical verification of the documents and examination vis-à-vis the goods, otherwise it is impossible.

10. Section 17(4) or (5) ibid, as the case may be, comes into effect only if the proper officer, while examining the goods self assessed by the importer, came to the conclusion that it was not done properly and then re-assesses the duty leviable on such goods. It is only in such cases where re-assessment arrived at by

the proper officer u/s.17(4) ibid is contrary to the self assessment done by the exporter/importer, the need to pass a speaking order on re-assessment arises but not in the cases like the present one where the importer himself has requested for re-assessment. In the instant case the issue is only of clerical error/mistake in the B/E as the appellant has mistakenly mentioned particulars of invoice dated 19.11.2019 instead of invoice dated 22.11.2019 in the Bill of Entry No. 5793005 dated 22.11.2019 and paid the Customs duty accordingly.

11. The relevant paragraphs of the decision of Hon'ble Delhi High Court in the matter of *Terra Films Ltd. (supra)*, which was relied upon by the learned Commissioner while rejecting the amendment, are extracted hereunder:-

> *" 6. As per proviso of this Section 149, no amendment of a shipping bill was to be allowed after the export goods have been exported except on the basis of the documentary evidence, which was in existence at the time the goods were exported. The submission of the learned counsel for the appellant/exporter in this regard was that the exporter was in possession of all the documents at the time of export to show that it was entitled to claim under the DEPB/DECC cum drawback scheme. From the plain reading of Section 149, it may be seen that exporter could not claim amendment in routine and as a matter of right. The discretion vested in the Proper Officer to permit amendment in any document after the same has been presented in the Customs house. Though this discretion was to be exercised judiciously, but it was qualified with the proviso that the amendment could be allowed only if it was based on the documentary evidence in existence at the time the goods were exported. The Commissioner in the remand case has rightly observed that the present case in fact relates to the request for conversion of shipping bills from one export promotion scheme into another and was not merely of an amendment in the shipping bill. The request was made for conversion from one scheme to another after the lapse of long period of more than one year. It was a case of request for "conversion" and not of "amendment" inasmuch by converting from one scheme to another, it was not only addition of word 'cum' duty drawback, but change of entire status and character of the documents. Even if it was to be taken as a case of amendment, the proper officer may not be in possession of*

the documents sought to be amended after lapse of such a long period, particularly when the goods already stood exported. For enabling an exporter to draw the benefits of any scheme, not only physical verification of documents would be required, but as is noted by both the authorities below, the verification of the goods of export as also their examination by the Customs was necessarily required to be done. In the given factual circumstances, that was rightly held to be impossible. The Commissioner in the remand case rightly distinguished the cases cited on behalf of the exporter from the facts of the present. The finding of fact as arrived at by the Commissioner has been rightly upheld by the CESTAT."

[Emphasis supplied]

According to me the reliance placed on the aforesaid decision for rejecting the amendment is totally misplaced as the Hon'ble High Court therein has specifically observed that *it was a case of conversion from one scheme to another and not merely of an amendment in the shipping bill*. Whereas the instant matter is simply for amendment that too of clerical error, supported by documentary evidence available at the time the goods were imported and cleared for home consumption.

12. The law on this issue has already been settled by the Hon'ble High Court of Judicature at Bombay in the matter of *Dimension Data India Pvt. Ltd. vs. Commissioner of Customs;2021(376) ELT 192 (Bom.)* in which the Hon'ble High Court, while referring the law laid down by the Hon'ble Supreme Court in the matter of *ITC Ltd. (supra),* has held that in the *ITC decision* the Hon'ble Supreme Court has clarified that in case any person is aggrieved by an order which would include an order of re-assessment, he has to get the order modified u/s. 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. The

Hon'ble High Court has also held that in *ITC decision (supra)* the Hon'ble Supreme Court has not confined modification of the order through the mechanism of Section 128 only and it has been clarified therein 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. The relevant paragraphs of the judgment of Hon'ble Bombay High Court in the matter of *Dimension Data India Pvt. Ltd. (supra)* are extracted as under:-

> "14. Short point for consideration is whether request of the petitioner for correction of inadvertent mistake or error in the self-assessed Bills of Entry and consequential passing of orders for re-assessment is legal and valid ? Corollary to the above is the question as to whether even in a case of this nature, petitioner is required to be relegated to the remedy of appeal?
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> 17. Section 149 deals with amendment of documents. It says that save as otherwise provided in sections 30 and 41 which deals with delivery of arrival manifest or import report and delivery of departure manifest or export manifest or export report, the proper ofcer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended in such form and manner and within such time, subject to such restrictions and conditions, as may be prescribed. As per the provisio, 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.
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> 18. From a careful analysis of section 149, we fnd that under the said provision a discretion is vested on the proper ofcer 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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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

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

22.2. Therefore, in the judgment itself Supreme Court has clarified that in case any person is aggrieved by an order which would include an order of self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Customs Act before he makes a claim for refund. This is because as long as the order is not

modified the order remains on record holding the field and on that basis no refund can be claimed but the moot point is Supreme Court has not confined modification of the order through the mechanism of section 128 only. Supreme Court has clarified that such modification can be done under other relevant provisions of the Customs Act also which would include section 149 and section 154 of the Customs Act.

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

25. Grievance of the petitioner is not on the merit of the self-assessment as the petitioner is aggrieved by the failure on the part of the respondents to carry out amendment in the Bills of Entry by replacing the incorrect CTH by the correct one namely by replacing CTH '85176990' with '85176930' which was declared inadvertently by the petitioner at the time of fling the Bills of Entry. This request of the petitioner, in our opinion, falls squarely within the domain of section 149 read with section 154 of the Customs Act. Upon amendment in the Bills of Entry by correcting the CTH, consequential re-assessment order under *section 17(4)* of the Customs Act would be in order.

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

> lower authority. By its very nature an appellate authority is superior to the authority which had passed the order appealed against."

13. Now coming to the facts in the present case, I am of the view that the reliance placed by the learned commissioner on the decision of the Hon'ble Supreme Court in the matter of *ITC (supra)*, for coming to the conclusion that the assessment order has to be challenged by the importer in appellate forum and re-assessment be done afterwards in commensurate with the order of the Appellate Authority, is also misplaced as in the light of the decision of the Bombay High Court (supra) in which the *ITC (supra)* decision has been explained by observing that even the order of self-assessment can also be modified u/s. 149 ibid.

14. In view of the decision of the Hon'ble Bombay High Court (supra), I am of the view that the issue involved herein is no longer *res integra* and learned Commissioner (Appeals) is not justified in setting aside the Order of re-assessment dated 5.2.2020 and the Order-in-Original dated 5.3.2020 passed by the respective lower authorities which are completely in conformity with the aforesaid decision. Accordingly the appeals herein are allowed by setting aside the impugned order.

(Pronounced in open Court on 08.04.2025)

(Ajay Sharma)
Member (Judicial)

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