

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5751 OF 2016

Micromax Informatics Limited

... Petitioner

V/s.

The Union of India and ors.

... Respondents

Mr.Tarun Gulati with Mr.Ankit Sachdeva with Ms.Divyasha Mathur i/by M/s PDS Legal for the Petitioner.
Ms.P.S.Cardozo for the Respondents.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : NOVEMBER 30, 2018.**

ORAL JUDGMENT (PER AKIL KURESHI, J.):-

1. With the consent of the learned Advocates for the parties, the petition was taken up for final disposal at this stage. Petitioner is a company registered under the Companies Act. The Petitioner has challenged orders passed by the Respondent No.3 rejecting the Petitioner's refund claims for the period between July, 2014 to June, 2015.

2. Brief facts are as under:

As part of its business activities, the Petitioner Company had imported mobile handsets under various bill of entries filed during the period between July, 2014 to June, 2015. On such imports, the Petitioner had made payment of additional duty of customs commonly referred to CVD at the rate of 7.21% till 28th February, 2015 and for the period post 1st March, 2015; the Petitioner had paid such duty at the rate of 13.5% as prescribed. The case of the Petitioner is that under a Notification No.12 of 2012 dated 17th March, 2012 as amended from time to time, the applicable rate of duty on mobile phones was effectively 1% CVD. This concessional rate of duty would be available provided no Cenvat credit on inputs or capital goods has been availed.

3. Initially, the Petitioner paid higher rate of duty as mentioned above on the basis of Department's stand that on imported goods since no duty of excise is levied, the question of not availing Cenvat credit does not arise. In other words, the benefit of the said exemption notification dated 17th March, 2012 was not allowed to the importers. The Petitioner would

point out that the question whether the benefit of exemption notification dated 17th March, 2012 would be available also in case of the importers was considered by the Supreme Court in case of **M/s SRF Limited Vs. CC, Chennai**¹. The Supreme Court held that an import of goods would also be entitled to claim the benefit of exemption from payment of CVD in terms of said notification.

4. The case of the Petitioner is that the duty paid by the Petitioner at the higher rate on its import was therefore refundable. The Petitioner would further point out that after the said judgment of the Supreme Court in case of **M/s SRF Limited (supra)** in any case the Petitioner was entitled to clear the imported goods by paying reduced CVD in terms of the said notification dated 17th March, 2012. The process of filing bill of entry having been made automatic and online, unless and until the Department changed its electronic system to accept the bill of entry disclosing CVD at the concessional rate, no importer could file the bill of entry without declaring the full rate of CVD.

1 2015(318) ELT 607(SC)

The Petitioner accordingly wrote letters dated 22nd April, 2015, 24th April, 2015, 30th April, 2015 and 4th May, 2015 requesting the Department to make necessary changes in its electronic system so that the portal would accept the bill of entry taking into account the concessional rate of duty as per the said notification. For example in the letter dated 22nd April, 2015 after referring to the judgment of the Supreme Court in case of SRF Limited (supra) the Petitioner requested that:

“Thus, we request your Goodself to allow the Company to clear all future consignments of mobile phones at a CVD rate of 2% instead of 13.5%. We note that EDI does not permit filing of a Bill of Entry by us by availing benefit of the above notification. Further, filing manual bill of entries for every import will be cumbersome and administratively not possible to manage. Accordingly, we request you to either permit import against a bond/Letter of Undertaking under provisional assessment or alternately consider payment of duty would be under protest” for all subsequent imports till amendment in the EDI system.”

5. The Department however did not make necessary changes. In the meantime, the Petitioner's import consignments having arrived, the Petitioner was in urgency to have the same cleared. Under compulsion, therefore, the Petitioner filed bill of entries

without availing benefit of exemption notification and also paid the full CVD only upon which the goods were cleared.

6. In such background, the Petitioner filed several refund applications before the Competent Authority. The Petitioner's claim in brief is that the duty collected by the Department is without authority of law, since the benefit of exemption notification is made available according to law declared by the Supreme Court in the said judgment in case of **M/s SRF Limited (supra)**. In response to such refund applications, the Deputy Commissioner of Custom Refund Cell, Mumbai wrote his first letter to the Petitioner on 18th September, 2013, which is titled as "Deficiency cum personal hearing memo". In such letter, the said authority pointed out as many as 10 different deficiencies in the Petitioner's refund applications, one of them being as under:

“9. Duplicate (Importer's) copy of re-assessed Bills of Entry.”

7. The Petitioner replied to such letter of the Deputy Commissioner dated 18th September, 2015 under communication

dated 16th December, 2015. The Petitioner sought to meet with all the deficiencies pointed out by the said authority. In the context of the deficiency No.9 which is reproduced above, the Petitioner made following detailed representation :

“Duplicate (Importer's) copy of re-assessed Bills of Entry.

At the outset, we would like to submit that there is no requirement under the Customs Act, 1962 to get the BOEs re-assessed for the purpose of claiming refund of excess additional duty of customs ('CVD') paid by the Company.

That the Company has filed the refund claims under Section 27 of the Customs Act, 1962. We have reproduced the relevant extracts of Section 27 of Custom Act for your ready reference:

“Section 27(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.

Section 27(2)-”.... 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 section 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”

Mere reading of the above section makes it abundantly clear that there is no requirement on the claimant to first challenge the assessment under BOE or to get the BOEs re-assessed for the purpose of claiming the refund. The refund proceedings are altogether separate and can be undertaken without any appeal or re-assessment of BOEs.

Notwithstanding the above, in various judicial pronouncements it has been held that filing of refund claim with the authorities amounts to filing

a request of re-assessment of BOEs.

A few relevant judgments are discussed below:

In the case of **Aman Medical Products Limited Vs. Commissioner of Customs, Delhi 2010 (250) E.L.T. 30(Del)('Aman Medical case')** the Hon'ble Delhi High Court examined section 17 and 27 of the Customs Act and in that context held that bill of entry even if assessed by the proper officer, in absence of any lis or dispute does not become an adversarial or appealable order and therefore refund application under section 27 of the Customs Act filed by the appellant is valid.

It is submitted that the aforesaid decision of the Hon'ble Delhi High Court has also been recently relied upon by the Delhi CESTAT in the case of **M/s Seiko Brushware (India), M/s Seiko Bristle Corporation & M/s Seiko Brushware (India) Versus C.C. New Delhi (Import & General)(2015(12) TMI 169 – CESTAT New Delhi)**. In this case, the appellant filed refund on the ground that the goods were assessed at a higher rate while the goods were eligible for the benefit of a lower rate as per an exemption Notification. The authorities rejected the refunds placing reliance on the Priya Blue case as there was no order of assessment reviewed by a higher appellate authority. The CESTAT relied on the Aman Medical case to allow the appeals by way of remand to the original adjudicating authority for de novo consideration of the appellant's refunds with direction to complete the same within 3 months from the date of receipt of the order after giving appellants an opportunity of being heard.

In the case of Mecon Ltd. Vs. Commissioner of Customs, Calcutta 2003(153) E.L.T. 574 (Tri.-Kolkata) the Hon'ble Tribunal has held that the filing of refund claim amounts to filing a request for re-assessment of bill of entry and same is required to be made and as per the provisions of Section 27 of Customs Act, 1962.

Similarly, in the case of Hindustan Petroleum Corpn. Ltd. Vs. Commissioner of Cus., Chennai 2003 (156) E.L.T. 425 (Tri-Chennai) it was held that when a refund claim is filed by the assessee by not accepting the classification and rate of duty, etc., mentioned in the bill of entry, such refund claim is entertainable because the assessment also gets challenged by filing such refund claim.

Further, in the case of **Ruchi Soya Industries Ltd. Vs. Commr. of Cus.(Acc. & Import), Mumbai 2013(290) E.L.T. 105(Tri.-Mumbai)** it was held that the applicant is entitled to claim refund without challenging the assessment of bill of entry.

A copy of above judgments is enclosed herewith for your reference.

Thus basis above, we would like to submit that the statutory right for filing the claim for refund of duty paid has been conferred upon the assessee by the specific provisions of Section 27 of Customs Act and there is no obligation on the Company to either first challenge the assessment done under the BOEs or to get the BOEs re-assessed for the purpose of claiming the refund of excess paid CVD. Accordingly, the refund claim filed by the Company is correct”

8. On 23rd January, 2016, the Department addressed another “Deficiency cum Personal hearing Memo”. This was in continuation of the Petitioner's letter clarifying the deficiencies pointed out by the Department earlier. In this letter it was stated as under:

- “1. You have not complied for the Deficiency Memo in totality.**
- 2. You have not submitted the re-assessed B/Es, on the basis of which you are Claiming refund.”**

9. Thus, while asserting that the Petitioner has not fully complied with the deficiency memo, the Department confined the objection to the refund application only on one ground namely that the Petitioner had not submitted reassessed bill of entries on the basis of which the Petitioner was claiming the refund.

10. According to the Petitioner, before any response could be made to the said communication of 23rd January, 2016 to the Respondent, yet another Deficiency cum Personal hearing Memo came to be issued on 10th February, 2016, in which also identical

remarks were made as were contained in the memo dated 23rd January, 2016.

11. The Petitioner under communication dated 24th February, 2016 made a detailed representation. The Petitioner referred to the provisions of Section 27 of the Customs Act, 1962 (“the Act” for short), referred to several judgments of various Tribunals and contended that a statutory right for filing refund claim has been conferred on an assessee under Section 27 of the Act. There is no obligation on the Petitioner either to first challenge the assessment or to get the bill of entry reassessed before making the claim of refund.

12. On 4th March, 2016, the Petitioner once again wrote to the Department and pointed out that the Petitioner had also filed refund claims before the Assessment Commissioner, New Delhi under similar circumstances. Such refund claims were rejected on the ground that the bill of entries having been assessed unless the same are reviewed or set aside in appeal, refund claims would not be maintainable. The petitioner pointed out

that against such decision of the Departmental authority the Petitioner had approached Delhi High Court by filing a writ petition. Delhi High Court had allowed the petition holding that under Section 27 of the Act as it now stands, 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.

13. The Competent Authority however was not satisfied. By the impugned order dated 30th March, 2016, he rejected the Petitioner's refund claim. Relevant portion of his order reads as under :

“6. In view of the facts above and on scrutiny of refund claim/documents submitted by the importer it appears that the refund application submitted by the importer is not maintainable for lack of documents/procedure conditions/deficiencies as mentioned below:

(A) The claimant has not complied with the Deficiency Memo in totality.

(B) In terms of Board Circular No. 24/2004-Cus dated 18.03.2004, “a Refund Claim is not maintainable, when the assessee did not challenge the final assessment order”. In the instant case, as the final assessment has not been challenged, therefore, refund claim at this juncture does not arise. Further, the said refund does not arise as the importer has

not submitted the re-assessed Bills of Entry on the basis of which the claim for refund has been filed.

(c) Further, the Hon'ble Supreme Court dated 17.09.2004 in the case of **M/s Priya Blue Industries Ltd. Vs. Commissioner of Customs- Appeal No. 9045 of 2003** has held that "Once an Order of Assessment is passed the duty should be payable as per final order. Unless that order of assessment has been reviewed under Section 28 of the Customs Act and/or modified in Appeal that understands. So long Order of Assessment stands for duty would be payable as per that Order of Assessment. A Refund claim is not a Appeal proceeding. The Officer considering a refund claim cannot also review an assessment order". Hence, in the instance case, the refund of excess duty paid as per the Assessment Order (Final Assessment of Bills of Entry) shall not arise at this juncture.

DISCUSSION AND FINDINGS

9. In have carefully gone through the records of the case and submissions made by the importer. I find that M/s Micromax Informatics Ltd. had filed a refund claim amounting to Rs.7,75,14,764/- on 03.07.2015 on account of Excess Additional Customs Duty (CVD) paid against 99 Bills of Entry.

10. In find that the importer filed a refund application in terms of Notification No.12/2012-Ex dated 17.03.2012(Sr.No. 263A-Condition No.16). In this regard, the importer relied upon the judgment dated 26.03.2015 of Hon'ble Supreme Court of India in the case of M/s SRF Ltd. Vs. Commissioner

of Customs, Chennai.

11. I find that the importer has filed a refund application but has not challenged the original assessment order and has not got the re-assessment done for the B/E in terms excess duty paid by them at the time of assessment of the Bills of Entry.

12. I find that the instant refund claim is not maintainable in terms of reasons discussed in Para 6 at (A), (B) & (c) hereinabove.

13. I find that the importer has not approached concerned Appraising Group with a request of re-assessment of Bs/E in terms of Notification No. 12/2012-Ex.(Sr.No.263A), if at all they have the right to do so on the basis of original ruling.

14. I find that following principle of nature justice, the importer was given ample opportunity to come-up for Personal Hearing or produce the required documents in support of their refund claim. The importer was requested to produce the required particulars or avail of the personal hearing vide this office letters dated 18.09.2015, 04.12.2015 and 23.01.2016 & 10/02/2016 but the importer failed to appear or to produce the required documents in totality in support of their refund claim. The importer was well informed that in case of non-submission of the complete particulars or appear for personal hearing, their case will be decided ex-parte on the basis of records available at this office.

I find that the importer did not challenge the assessment order within stipulated time period as per provisions of Section 17(5) of the Customs Act, 1962,

Section 17- Assessment of duty:(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment is

done by the importer regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefore under this Act and in cases other than those where the importer 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.

15. I find that inspite of opportunity of Personal Hearing given to the importer, the importer did not avail of the opportunity.

16. In view of the above discussion, I pass the following order:

ORDER

17. I reject & return the refund claim of Rs.7,75,14,764/- (Rupees Seven Crores Seventy Five Lakhs Fourteen Thousand Seven Hundred Sixty Four only) filed by Micromax Informatics Ltd., New Delhi since these are pre-mature without re-assessment. They may file refund claim afresh after re-assessment of the subject Bills of entries. They are advised to collect back the original documents which they have submitted at the earliest.

18. This Order is being issued without prejudice to any other action that may be taken under the Customs Act, 1962 or any other Act or Law for the time being in force.”

14. In all 12 such separate orders were passed along the same line. The Petitioner has therefore, filed this petition challenging

the said orders and also prayed for direction to the authorities to refund the excess duty paid.

15. Learned counsel for the Petitioner submitted that the customs authorities have committed a serious error in rejecting the refund applications on the ground that the bill of entries were not reassessed. He submitted that there is no such requirement in law. Learned counsel pointed out that a decision of the Bombay Tribunal clearly laying down the said proposition was cited before the Competent Authority. He was bounded by the said decision. Without referring to the decision, the refund claims came to be rejected. He also pointed out that by the time the refund applications were decided, the decision of Delhi High Court in case of the present Petitioner itself on identical facts was available. Such decision was cited before the Competent Authority despite which the refund applications were dismissed on wholly incorrect ground. Learned counsel took us extensively through the statutory provisions contained in the said Act to contend that by virtue of certain amendments in the statute, the stand of the Department insisting on

reassessment of the bill of entries before granting refund is wholly invalid. He submitted that this is precisely what the Delhi High Court has held in case of **Micromax Informatics Limited**¹.

16. On the other had, counsel for the Department opposed the petition contending firstly that the petition is premature. She would interpret the operative portion of the order as to giving an opportunity to the Petitioner to re-present the refund applications after having the bill of entries reassessed. The counsel further submitted that the authority has passed a perfectly valid order. The Petitioner having filed the bill of entries, cannot seek refund of a tax voluntarily paid. She further submitted that there were several defects and deficiencies in the refund applications. The Petitioner without satisfying all such defects, in any case cannot claim refund.

17. Basic facts are not seriously in dispute which may be summarized thus. The Petitioner imported several consignments of mobile handsets during the period between July, 2014 to

¹ 335 ELT page 446

June, 2015. On such imports, the Petitioner paid full CVD at the applicable rate without availing benefit of exemption notification dated 17th March, 2012. The question of availability of the benefits under the said exemption notification came to be decided by the Supreme Court in favour of the importers under the judgment in case of **M/s SRF limited (supra)**. This decision was rendered on 26th March, 2015. After this judgment, the Petitioner desired to file bill of entries by availing exemption notification. However, the electronic system of the Department was not modified according to the decision of the Supreme Court. If the Petitioner, therefore, wanted to clear the imported goods, would have to file bill of entries without taking benefit of the exemption notification though otherwise available as per the law laid down by the Supreme Court. The Petitioner, therefore, after representing to the Department to make changes in its electronic system being left with no choice, cleared the goods by depositing full CVD without the benefit of the exemption notification.

18. The short question that calls for consideration is – Can the

Petitioner claim refund of the excess duty paid without either challenging the so called assessment or without reassessment of the bill of entries. The Department is heavily relying on the decision of the Supreme Court in case of **M/s Priya Blue Industries v. CC¹ and CC v. Flock India Ltd.²**. These decisions undoubtedly had held that in order to claim refund in terms of Section 27 of the Act, the importer would have to challenge the assessment and the refund claimed would have to be based on such Appellate order. In other words, the view propounded by the Supreme Court was that without having the assessment set aside, an importer cannot claim refund of the duty paid.

19. The Division Bench of Delhi High Court however examined the said decisions of the Supreme court in case of **M/s Priya Blue Industries and Flock India Limited (supra)** in the contest of certain significant amendments made in the Act with effect from 8th April, 2011 particularly in Section 27 thereof. Delhi High Court in case of **M/s Micromax Informatics Limited (supra)** held and observed as under:

¹ 2004 (172) ELT page 145(SC)

² reported in 120 ELT page 285

“12. An important change that has been made is 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. Secondly, 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. The proviso to Section 27(2) of the Act sets out the instances where refund should be paid to the claimant instead of being credited to the Consumer Welfare Fund. The only relevance as far as payment of duty under protest is concerned is indicated in the second proviso to sub-section (1) of Section 27 of the Act which states that the limitation of one year shall not apply in such event. In other words, whether or not the duty is paid under protest once an application for refund is made in the requisite manner and form as prescribed, it is incumbent on the authority to deal with such an application. Where there is an assessment order, the authority will take it into account in deciding the application for refund. If such assessment order has been reviewed or modified in appeal such further order will obviously be taken into account. In other words, under Section 27 of the Act, as it now stands, 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.

13. As far as the present case is concerned, there was indeed no assessment order as such passed by the customs authorities. Although under Section (2) (ii) of the Act, the word 'assessment' includes a self-assessment, the clearance of the goods upon filing of the B/E and payment of duty is not per se an

'assessment order' in the context of Section 27 (1) (i) as it stood prior to 8th April 2011, particularly if such duty has not been paid under protest. In any event, after 8th April 2011, as noticed hereinbefore, as long as customs duty or interest has been paid or borne by a person, a claim for refund made by such person under Section 27 (1) of the Act as it now stands, will have to be entertained and an order passed thereon by the authority concerned even where an order of assessment may not have reviewed or modified in appeal.

14. The Assistant Commissioner (Refund), in the present case, appears to have not noticed the decision of this Court in Aman Medical Products Limited (supra) which was rendered in the context of Section 27 of the Act as it stood prior to 8th April 2011. Further he failed to notice that the said provision has undergone a significant change with effect from 8th April 2011. The impugned order of the Assistant Commissioner (Refund) rejecting the refund claim of the Petitioner on the ground of maintainability was, for the aforementioned reasons, plainly erroneous.”

As pointed out by the counsel for the Petitioner, this decision of the Delhi High Court in case of Micromax Informatics Ltd.(supra) has been followed consistently in other cases by the said High Court. Learned Single Judge of Madras High Court in case of this very Petitioner i.e. Micromax Informatics Limited has also in a detailed judgment dated 18th April, 2018 adopted the said ratio.

20. Ordinarily, therefore, we would have accepted the Petitioner's request without any further discussion. However, since in so far as this Court is concerned, no earlier decision is available, we have also independently examined the position. We would like to give brief reasons for concurring with the view of the Delhi and Madras High Courts in case of **Micromax Informatics Limited (supra)**. Prior to the amendment brought into the statute with effect from 8th April, 2011 by virtue of Finance Act, 2011, Section 17 of the Act provided for filing of a bill of entry by an importer and examination and assessment thereof by the Competent Authority. Relevant portion of Section 17 prior to its amendment reads as under:

“Section 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.

(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 therefore 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.”

21. Likewise Section 27 of the Act also came to be amended with effect from 8th April, 2011. Relevant portion of Section 27 as is existed prior to the said amendment reads as under:

Section 27 Claim for refund of duty.—

(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.”

22. After the amendment with effect from 8th April, 2011 Section 17 was recast. Relevant portion of Section 17 post amendment reads as under:

Section 17 Assessment of duty.—

(1) After an importer entering any imported goods under section 46 or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any leviable on such goods.

(2) The proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

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

furnish such information.

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

(5) Where any re-assessment done under subsection (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 therefore 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 maybe.

23. Post amendment relevant portion of Section 27 as it exists now reads as under:

“Section 27 – Claim for refund of duty-(1) Any person claiming refund of any duty or interest, -

(a) paid by him or

(b) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry 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.”

24. Comparing the statutory provisions contained in Sections 17 and 27 before and after amendment, it can be seen that the entire statutory scheme of filing bill of entry and seeking refund of duty paid, if any, has undergone major changes. Previously, under sub-section (1) of Section 17 as stood at the relevant time an importer would enter imported goods and the proper officer without any undue delay examine and test the same. In terms of sub-section (2) of Section 17 after such examination and testing, the duty leviable on such goods would be assessed. Sub-section (5) of Section 17 inter-alia provided that where any assessment done under sub-section (2) is contrary to the claim of the importer regarding valuation, classification, examination or concession of duty, the proper officer would pass a speaking order within 15 days from the date of assessment of bill of

entry. Consonance with such statutory provisions contained in Section 17, Section 27, which pertains to the claim for refund of duty envisaged under Section (1) an application to be made by person claiming refund of duty or interest which is either paid by him pursuant to an order of assessment or borne by him, within the time prescribed alongwith prescribed documents to establish that the amount of duty and interest in relation to which the refund is claimed, has not been passed on to any other person.

25. In contrast to these unamended provisions, post amendment sub-section (1) of Section 17 envisages an importer entering any imported goods to self assessed duty if any leviable on such goods. Sub-section (2) of Section 17 authorizes the proper officer to verify such self assessment. Sub-section (4) of Section 17 provides that wherever it is found on verification, examination or testing of goods or otherwise that the self assessment is not done correctly, the proper officer may without prejudice to other action which he may undertake, reassess the duty leviable on such goods. Sub-section (5) of Section 17

provides that where any reassessment done under sub-section (4) is contrary to the self assessment, the proper officer shall pass a speaking order on reassessment within 15 days from the date of reassessment. Correspondingly, sub-section (1) of Section 27 in the amended form now provides that any person claiming refund of any duty or interest paid by him or borne by him may make an application in a prescribed format to the prescribed authority before expiry of one year from the date of payment of such duty or interest. Further, proviso to sub-section 1 provides that the limitation of one year shall not apply where any duty or interest has been paid under protest.

26. In consonance with these amendments, definition of term assessment conferred in Section 2(2) of the Act has also been suitably modified. Prior to amendments of 8th April, 2011 term “assessment” was defined as so include provisional assessment, reassessment and any order of assessment in which duty assessed is nil. Post amendments of 8th April, 2011 term assessment includes self assessment also.

27. It can thus be seen that there have been significant statutory amendments in Sections 17 and 27 by virtue of the Finance Act, 2011. Earlier procedure of filing of bill of entry by importer and its assessment by the competent authority has been replaced by the self-assessment to be made by the importer while filing the bill of entry and the competent authority only passing a speaking order of reassessment in case where he finds that the self assessment made by the importer is not correct. It is therefore, that even in Section 27 of the Act, the procedure for claiming refund has been suitably modified. Instead of referring to claim of refund of duty or interest paid in pursuance of the order of assessment or borne by him, the amended Section 27 merely refers to the claim of refund of duty or interest paid or borne by the refund claimant. Thus, earlier reference to the refund of duty or interest paid pursuant to an order of assessment is now deleted. This would be in consonance with the changed procedure for clearance of imported goods as contained in Section 17 of the Act.

28. These statutory changes were noticed, analyzed and

discussed by Delhi High Court and learned Single Judge of Madras High Court in case of **Micromax Informatics Limited (supra)**. We are in respectful agreement with such analysis, the view expressed by the Courts and the ratio laid down therein.

29. Learned counsel for the Department, as noted earlier, had argued that the petition is pre-mature since the competent authority has allowed the Petitioner to resubmit the refund claims after getting the bill of entries re-assessed. She had also argued that the concerned authority had not examined other aspects of the refund claim.

30. In our opinion, both the contentions are not valid. Firstly, in the impugned order the Competent Authority has rejected the refund claims on the ground that, the Petitioner had not challenged the assessment orders. In this context, he has relied on the decision of the Supreme Court in case of **Priya Blue (supra)**. In paragraph No.12 of the order he has recorded that the refund claim is not maintainable in terms of reasons discussed in paragraph No.6(A) (B) and (C) above and these

paragraph No.6(A)(B) and (C) are confined to the single objection of the Department namely that without having assessment orders set aside, no refund claim would be maintainable. The impugned order thus effectively dismisses the Petitioner's refund claim finally. The Petitioner has contended before us and which contention we have accepted that there is no question of challenging the self-assessed bill of entries. Equally, her contention that other issues are not examined is also not correct. As noted in the first deficiency memo, the Department has cited as many as 10 defects in the refund application. Once the Petitioner replied to such communication in detail, in subsequent communications the authority confined his objection only to the question of the assessment not having been revised or set aside. Thus, all other objections of not supplying documents or details were waived or can be seen to have been satisfied through correspondence. We may also record that the counsel for the Department had referred to Section 149 of the Act and contended that it was open for the Petitioner to have bill of entries amended. Section 149 of the Act provides that a proper officer may at his discretion authorize a document after it is

presented in the Custom House to be amended. Proviso to Section 149 clearly lays down that no amendment of bill of entry shall be authorized to be amended after imported goods have been cleared for home consumption. Thus, the opportunity to have the bill of entry amended in terms of Section 149 of the Act, was simply not available to the Petitioner.

31. Therefore, where the Petitioner through applications pointed out to the Department that by virtue of law laid down by the Supreme Court, the duty collected was in excess of what is otherwise legally payable, the Departmental authorities were duty bound to consider such applications subject ofcourse to fulfillment of other legal and statutory requirements. Infact, post 26th March, 2016 when the Supreme Court rendered its judgment in case of **M/s SRF limited** (supra), the Petitioner was compelled by the department to pay higher duty contrary to the law laid down by the Supreme Court. There is absolutely no reason why the Department, subject to fulfillment of other legal requirements not refund such duty. Any other view, would amount to allowing the Union of India to collect tax without authority of law. Before

the Petitioner can however claim full refund, the question of unjust enrichment may have to be examined. Counsel for the Petitioner had argued that all documents to establish that the duty element was not passed on to any other person were produced on record. Since the Competent Authority had not rejected the refund claim on this ground, he must have been satisfied with such documents. Counsel for the Department however contended that such question was not gone into by the authority while passing the impugned order.

32. It is true that the Competent Authority started with as many as 10 different objections in the nature of defects in the refund applications, but later on boiled down to only one of them noted above. However, when there is no clarity in the order itself, whether the Competent Authority has accepted the Petitioner's evidence as to establishing the fact that the duty element has not been passed to any other person, we would like to tread cautiously.

33. Under the circumstances, the sole objection contained in

the impugned orders for rejection of the Petitioner's refund claims is overruled. The refund applications are revived. The Competent Authority is directed to process the same and pass fresh order which shall be done not later than 31st January, 2019. We make it clear that while passing such order only scrutiny available to him would be whether the Petitioner had established that the excess duty collected has not been passed on to any other person. With these directions, Petition is disposed of.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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