IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 76027 of 2024

(Arising out of Order-in-Original No. KOL/CUS/A&A/Pr.COMMISSIONER/ADJN/12/2024 dated 14.03.2024 passed by Pr. Commissioner of Customs (Airport & ACC) Kolkata.

M/s Reach Infocom Tech Pvt. Ltd.
(9, Ideal Centre, AJC Bose Road, 1st Floor, Kolkata-17)

Appellant

VERSUS

Commr.ofCustoms (Airport & Admin), Kolkata
(Custom House, 15/1, Strand Road, Kolkata-700001)

Respondent

With

Customs Appeal No. 75199 of 2025

(Arising out of Order-in-Original No. KOL/CUS/A&A/Pr.COMMISSIONER/ADJN/12/2024 dated 14.03.2024 passed by Pr. Commissioner of Customs (Airport & ACC) Kolkata.

Ms Kinjal Desai
(9, Ideal Centre, AJC Bose Road, 1st Floor, Kolkata-17)

Appellant

VERSUS

Commr.of Customs (Airport & Admin), Kolkata
(Custom House, 15/1, Strand Road, Kolkata-700001)

Respondent

APPEARANCE:

Shri Rahul Dhanuka, Advocate & Shri Niraj Baheti, Advocate for the Appellant
Shri S. Chitkara & Shri S. Debnath, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77600-77601/2025

Date of Hearing :16th October 2025
Date of Pronouncement :31.10.2025

ORDER [PER R. MURALIDHAR]

The appellant Reach Infocom Technology Pvt. Ltd. (RITPL) is engaged in import and sales of mobiles and laptops under the brand name "REACH"**.** During the relevant period, the Appellant imported the goods [Mobiles and Laptops] from China and cleared the same for home consumption discharging appropriate duties of customs including CVD computed with reference to the Retail Sale Price (RSP) of such goods. During the search conducted at premises of the group companies in March 2019, certain goods, hard disks, documents, MRP stickers, etc. were seized by DRI, Delhi Zonal Unit and statements of several persons including directors, employees, ex-employees, etc. were recorded during the investigation in this regard. The said investigation culminated into two show cause notices, viz. Show Cause Notice No. 39/2019 dated 13.09.2019 in respect of goods which were seized during the search and Show Cause Notice No. 04/2020 dated 03.02.2020 in respect of goods which had been imported in past and already sold in the domestic market. The allegation in the SCNs are to the effect that the appellant has short paid the CVD, since the MRP [RSP] found during the search operations was higher than the RSP declared at the time of imports. Vide Order-in-Original No. KOL/CUS/A&A/Pr.COMMISSIONER/ADJN/12/2024 dated 14.03.2024, the Adjudicating authority has confirmed the demand of Rs. Rs.2,92,54,340 u/s 28(4) / of the Customs Act 1962 along with interest and penalty. He confiscated the goods giving an option to redeem the same on payment of Redemption Fine of Rs.3,50,00,000 u/s 125 of the Act. He also imposed penalty of Rs.3,00,000 u/s 112(a)(ii) and

Rs.4,00,000 u/s 114AA on the Director. Being aggrieved, the appellants have filed the present appeal before the Tribunal.

2. The Ld Advocate appearing on behalf of the appellants, makes the following submissions:

2.1 The Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, framed under Section 14 of the Customs Act are confined to the valuation of goods for the purposes of levy of basic customs duty (BCD) under Section 12, and cannot be extended to cover assessment of additional duty of customs under Section 3(2) of the Customs Tariff Act (CVD), where the measure of levy is statutorily linked to declared RSP. Hence, in absence of any statutory machinery enabling such re-determination, the demand of differential CVD in isolation is beyond jurisdiction and liable to be set aside. Reference in this regard is invited to the judgement of Hon'ble Tribunal in the case of:

i. **M/s. Acer India (Pvt.) Ltd. Vs.Commr. of Customs (Audit), Chennai [2024 (5) TMI 478 - CESTAT CHENNAI] (Para 19 to 23 – Pg.52**

ii. **DS Chandok& Sons Vs. Commr. of Customs (Export Promotion), Mumbai [2021 (9) TMI 417 - CESTAT MUMBAI] (Para 6 to 8 – Pg.34/C)**

iii. **M/s. Ocean Ceramics Limited Vs. Commr. ofCus. & CX (Appeals), Rajkot [2024 (1) TMI 1280 – Tri. Ahmedabad – LB] (Para 90 – Pg.86/C)**

2.2 At the outset, the Appellant submits that the demand raised by the Customs authorities for differential CVD is wholly without jurisdiction. The goods in question were assessed at the time of import and duties of customs including CVD was duly discharged with reference to the RSP/MRP declared on the packages. The jurisdiction of Customs authorities extends only to the levy and collection of duties till the point of importation under the Customs Act read with Section 3(2) of the Customs Tariff Act, 1975. Any subsequent activity carried out after clearance of the goods falls outside the scope of Customs law.The goods being mobiles and laptops imported by the Appellant falls under Sl. No. 89 (Tariff Heading 8517 or 8525 60) and Sl. No. 74A (Tariff Heading 8471 30) of Third Schedule respectively **(Pg. No. 21-22/C)**. In terms of Section 2(f)(iii) of the Central Excise Act, 1944 **("Central Excise Act")**, the term *"manufacture"* includes alteration of retail sale price in relation to goods specified in Third Schedule of Central Excise Act. Thus, once the goods imported were cleared by the Appellant, the subsequent act of affixing fresh MRP stickers on such goods amounts to "manufacture" within the meaning of 2(f)(iii) of the Central Excise Act. Hence, once an activity is deemed "manufacture" under Central Excise law, the resultant duty liability, if any, can only be under the Central Excise Act, 1944 and not under the Customs Law. Accordingly, the jurisdiction to demand duty on the activity of re-labelling, if at all, lies exclusively with the Central Excise authorities. Customs officers, being appointed under the Customs Act, 1962, cannot assume the powers of Central Excise officers to raise a demand on an activity which the statute itself classifies as "manufacture" under the Excise law. Therefore, the impugned demand of differential CVD by the Customs

authorities is beyond their jurisdiction, unsustainable in law, and liable to be quashed. Reliance in this regard is placed on the following judgements:

i. **M/s Mitashi Edutainment (P) Ltd. Vs. Commr. ofCus. (Import), Mumbai-II, CC, JNCH, Nhavasheva [2018 (12) TMI 390 - CESTAT MUMBAI]** ***(Para 14 to 16 – Pg.92/C)***

ii. **L'oreal India Pvt. Ltd. Vs. Commr. of C.Ex., Raigad/ Thane [2014 (308) E.L.T. 746 (Tri. - Mumbai)]** ***(Paras 8.3 and 8.5 – Pg. 96/C)***

iii. **Titan Industries Ltd. Vs. Commissioner of Central Excise, Chennai [2007 (217) E.L.T. 423 (Tri. - Chennai)]**

2.3 It is submitted that the entire case of the Department proceeds on unfounded assumptions rather than on concrete evidence. The demand has been primarily built on the basis of seizure of goods in 2019 from the premises of the Appellant's group Company, on the presumption that goods cleared in earlier years also carried the same inflated RSP/MRPs on the purported premise that such practice was consistently followed by the Company. The Appellant submits that such sweeping generalizations, without even adducing any single evidence on record of even a single transaction of sale of mobile phones and laptops imported in the past to any buyer at a price higher than MRP, is wholly impermissible in law. It is a settled principle of law that the onus to establish mis-declaration rests squarely on the Revenue and cannot be discharged by mere presumptions or generalizations.

2.4 The Ld. Adjudicating Authority has assumed that the MRPs affixed on goods cleared between 2015 and 2017 were identical to those found on goods seized in 2019. Such an assumption is manifestly untenable in so far as a time gap of two to four years inevitably entails changes in market conditions, consumer demand, and pricing, and hence it is not necessary that the MRP/RSP of the goods cleared in past would be identical to the MRP/RSP affixed on the goods lying in stock in 2019. No efforts whatsoever have been made to record the statements of distributors, dealers, warehouse keepers or manpower supply agency to ascertain the facts pertaining to change in MRP for the imports under consideration. Besides, the Department also did not undertake any efforts to verify the RSP/MRPs of the relevant period through distributors, dealers,or prevailing market records.

2.5 The Department has relied upon the MRP/RSP as displayed on e-commerce websites to allege that Appellant has manipulated/inflated the MRP. However, such reliance is equally misconceived in light of the fact that many of the screenshots of such websites explicitly show that the importer/seller/manufacturer listed for such goods on such website are entities named as, "NSA TradexPvt. Ltd."**(Pg. 267, 269/C)** and "North India Top Company Pvt Ltd" **(Pg. 268,276/C)**,which are not related to the Appellant in any manner whatsoever, while for rest of the goods, no seller/importer/manufacturer details are mentioned. The Appellant submits that any dealer or trader can list goods on such e-commerce platform and the Department has failed to establish that the goods supplied to such e-commerce platforms were by the Appellant. Moreover, the screenshots pertain solely to 2019, whereas the sales in

question occurred much earlier. Given the natural variations in pricing over time and the absence of any objective benchmark, these screenshots cannot serve as a reliable basis to determine the MRPs applicable at the relevant period.

2.6 The Department has further relied on the statements of employees, ex-employees, Customs House Agents (CHA) and printers to build their case. However, the Appellant submits that a bare perusal of such statements shows that they are riddled with uncertainty, couched in vague terms, and in several instances, the deponents themselves have admitted to lack of knowledge. Their repetitive and formulaic nature also casts serious doubt on their reliability. In the absence of corroborative evidence, such statements cannot form the sole basis of demand. Hence, the entire demand being raised solely on assumption and presumption without any corroborative evidence is bad in law and liable to be set aside. Reference in this regard is invited to the case of **M/s. Quantum Hi-Tech Merchandising Pvt. Ltd. Vs. Commr. of Customs, New Delhi [2024 (11) TMI 844 - CESTAT NEW DELHI]*(Paras 10 and 11 – Pg.104/C)***

2.7 The impugned Order places heavy reliance on various statements recorded under Section 108 of the Customs Act to frame the entire case against the Appellant. The Appellant submits that it is a settled legal position that the statement of witness recorded under Section 108 of Customs Act before the gazetted Customs Officer during the course of investigation cannot be relied upon, unless procedure prescribed under Section 138B of the said Act is strictly followed.

2.8 A careful reading of Section 138B makes it abundantly clear that no reliance can be placed on any statement recorded under Section 108 of the said Act unless the person who made the statement is first examined as a witness before the adjudicating authority. Such a statement may be admitted in evidence only after the witness has been subjected to examination-in-chief and cross-examination, thereby affording both sides a fair opportunity to test the veracity and reliability of the statement. The use of the word "shall" in Section 138B(1), makes it clear that the procedural requirements under Section 138B are not merely directory but mandatory in nature. Compliance with this procedure is a precondition for the admissibility of any statement recorded during inquiry or investigation under Section 108 of the Act. Reliance in this regard is placed on the judgement of this Hon'ble Tribunal in the following cases:

i. **M/s Surya Wires Pvt. Ltd. and Shri Harsh Agrawal Versus Principal Commissioner, CGST, Raipur [2025 (4) TMI 441]**
ii. **M/s Esson Furnishing Pvt Ltd. vs. Principal Commissioner, Customs ICD, Tughlakabad New Delhi [2025 (8) TMI 510 - CESTAT NEW DELHI]**

2.9 In light of the above, it is evident that the mandatory procedure prescribed under Section 138B cannot be circumvented by the Ld. Adjudicating Authority if it seeks to rely on statements recorded during investigation. In the absence of cross examination of the person, as

required under Section 138B of the Customs Act, such a statement does not constitute relevant or admissible evidence. Thus, in light of this, the Appellant humbly submits that the impugned order should be set aside on this ground alone.

2.10 The impugned order alleging misdeclaration is primarily based on the printouts of emails and whatsappchats.The Appellant submits that such print puts has no evidentiary value on its own and can be admitted as evidence only when it strictly fulfils the conditions specified in Section 138C of the Act.

2.11 Section 138C of the Act states that the statement contained in a computer printout shall be deemed to be a document for the purposes of the Act and the rules made thereunder and shall be admissible as evidence of the contents of its original, if the conditions mentioned in sub-section (2) and other provisions of the Section are satisfied in relation to the statement and the computer in question. The very admissibility of such a document, i.e., electronic record, depends on the satisfaction of the four conditions under Section 138C(2). Further, Section 138C(4) of the Act mandates that any computer printout sought to be relied upon as evidence must be accompanied by a certificate issued by a person occupying a responsible official position in relation to the operation of the relevant computer system. This certificate must attest to the authenticity and ownership of the data retrieved from the device.

2.12 In the present case, the requirements of Section 138C (2) & (4) of Customs Act were not complied with. The printouts were obtained from hard disks, which are merely storage devices and not original computers used by the Appellant for maintaining business records. These hard disks were neither proved to belong to the Appellant nor were they demonstrated to contain authentic business records. Further, the Adjudicating Authority has not obtained any certificate as required under Section 138C of the said Act. It has been observed time and again that computer printouts resumed from the hard disks are not admissible evidence, unless the mandatory procedure prescribed in Section 138C of the Customs Act is followed. Reliance in this regard is placed on **Sandeep Kumar Dikshit Versus Principal Commissioner of Customs (Port), Kolkata [2025 (7) TMI 1086 - CESTAT KOLKATA]** ***(Para 21.4 – Pg.151/C and Para 22.6 – Pg.154/C)***

2.13 The Appellant submits that once the goods are cleared for home consumption, they cease to be imported goods as defined under Section 2(25) of the said Act. In the instant case, goods are not available for confiscation because they have ceased to be imported goods and were not cleared under bond but finally assessed**.** Hence, the question of imposition of redemption fine does not arise when the goods itself are not liable for confiscation unless cleared under bond, which is not the case here. Reference in this regard is invited to the following judgements:

i. **Bussa Overseas & Properties vs. C.L. Mahar, Ass. Commissioner of Customs, Bombay[2004 (163) ELT 304**

(Bom.)] [Maintained by Hon'ble Supreme Court in 2004 (163) ELT A160]*(Para 7 – Pg. 194/C)*

ii. **Commissioner of Customs (Import), Mumbai Versus Finesse Creation Inc. [2009 (248) E.L.T. 122 (Bom.)] [Maintained in 2010 (255) ELT A120 (S.C.)]**

2.14 Without prejudice to the submissions made hereinabove, the Appellant submits that the underlying self-assessed bills of entry vide which the said goods were imported by the Appellanthas not been appealed against/challenged by the Department and hence attained finality. It is a settled law that the Department cannot reassess the original assessments by way of demand of differential duty unless the said assessments have been appealed against in accordance with Section 128 of the Customs Act.

2.15 However, in the instant case, the Ld. Adjudicating Authority has sought to circumvent the settled assessment by demanding CVD under Section 28 of the said Act. The Appellant submits that such an attempt is clearly impermissible in law and amounts to an indirect challenge to the finality of the original import assessments, which cannot be sustained in the eyes of law. Hence, the impugned Order is liable to be set aside. Reliance in this regard is placed on the following judgements:

i. **ITC Limited Vs. Commissioner of Central Excise, Kolkata -IV [2019 (9) TMI 802 - Supreme Court (LB)]**

ii. **ShriRajibSahaVs. Commr. ofCus. (Preventive), Shillong [2023 (8) TMI 1162 -CESTAT KOLKATA]*(Paras 9 to 12 – Pg.218B)***

2.16 The Entire proceedings are barred by limitation in as much as extended period of limitation alleging suppression cannot be invoked in subsequent show cause notice when on the self-same set of facts and materials, a show cause notice has been issued earlier and the facts of the case were within the knowledge of the Department.

2.17 The Appellant submits that the facts of the case were already within the knowledge of the Department when the first show cause notice was issued on 13th September 2019. In the said circumstances, issuance of a second show cause notice invoking extended period of limitation is bad in law and liable to be set aside in so far as it is a settled position in law that when on the self-same set of facts and materials, a show cause notice has been issued earlier, there cannot be allegation of suppression of any material fact or contravention of the provisions of the Act or the rules framed thereunder by an assessee to evade payment of tax and consequently there can be no invocation of the extended period of limitation in subsequent show cause notice(s). Reference in this regard, is invited to the following decisions:

i. **Nizam Sugar Factory v. Collector of Central Excise, A.P. [2006 (197) ELT 465 (S.C.)]**

ii. **ECE Industries Limited Versus Commissioner of Central Excise, New Delhi [2003 (3) TMI 136 - SUPREME COURT]**

iii. **M/s. M.K. Enterprises Versus Commissioner of CGST & CX, Patna-II Commissionerate [2023 (6) TMI 372 - CESTAT KOLKATA]**

2.18 In respect of the penalties imposed on the second appellant [the Director], it is submitted that since the contravention allegations against the appellant company itself is not sustainable, the question of imposing the penalty on the Director would not arise. He relies on the detailed grounds taken in the Appeal for this submission.

3. In view of the above submissions, the Ld Consultant prays that the appeals may be allowed both on merits as well as on account of time bar.

4. The Ld AR representing the Revenue submits that the appellant's premises were searched. Extensive documents have been recovered evidencing changing of the RSP from the RSP shown at the time of imports. This has resulted in undervaluation, resulting in lower payment of CVD at the time of imports. As detailed investigation had to be conducted for collecting the data relating to the past period, whereupon the quantum of evasion has come to light, he justifies the extended period provisions invoked in the proceedings. The Director [the second appellant] has played active role in taking the decision to change the RSP subsequent to the clearance of the consignments from the Customs Warehouse. He prays that the appeals may be dismissed.

5. Heard both the sides. Perused the appeal papers, documents placed before us the statutory provisions and case laws cited before us.

6. The appellant company has taken the stand that in the absence of machinery provision under Customs Law, CVD cannot be demanded in isolation when the imports have been finally assessed.

7. Admittedly, the imported goods in question are subjected to valuation under Section 4 A of the CEA 1944, which requires the Excise Duty to be paid based on the RSP declared less the abatement granted vide the specific notification. The goods are also placed under Third Schedule of the Central Excise Act 1944, because of which packing, repacking, labelling and relabelling would amount to manufacture in terms of Section 2(f) of the CEA 1944.

8. As to whether the CVD under Section 3 (2) of Customs Tariff Act can be demanded, when the CVD is payable in terms of Section 4 A arose in the case of **Mitashi Edutainment Pvt Ltd Vs CC (Imports) – 2018 (12) TMI 390 - CESTAT Mumbai.** The Bench [Comprising of the Two Members and One Member given the task of taking up the Difference of Opinion] held as under :

> 11. I have given careful consideration to the facts on record, submissions made by both side, both oral and Written and I have also carefully perused the order of the Division Bench, setting out the difference of opinion. Section 3 (2) of the Customs Tariff Act, is reproduced below.
>
> *(2) For the purpose of calculating under sub- sections (l) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section14 of the Customs Act,1962 (52 of 1962), be the aggregate of -*
>
> *(i) the value of the imported article determined under sub-section (l) o section 14 of the Customs Act,1962(52of1962) or the tariff value of such article fixed under sub-section(2) of that section, as the case may be; and*
>
> *(ii) any duty of customs chargeable on that article under section 12 of*

the Customs Act, 1962(52of962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include-

(a)the dutyreferred to in sub-section(1),(3),(5),(7)and(9);]

(b) the safeguard duty referred to in sections 8B and 8C;

(c) the countervailing duty referred to in section 9;and

(d) the anti-dumping duty referred to in section 9A:

Provided that in case of an article imported into India,-

(a) in relation to which it is required, under the provisions of the [Legal Metrology Act, 2009 (I of 2010)] or the rules made there under or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and

(b) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is-

(i) the goods specified by notification in the Official Gazette under sub-section (I) of section 4A of the Central Excise Act,1944(1of1944), the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article under sub-section (2) of section 4A of that Act; or

*[(ii)*****]*

Explanation. - *Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price or the purposes of this section.]*

[Provided *further that in the case of an article imported into India,where the Central Government has fixed a tariff value or the like article produced or manufactured in India under sub-section 2 of section 3 of the Central Excise Act, 1944 (1 of 1944), the value of the imported article shall be deemed to be such tariff value.]*

Explanation. - *Where on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section.*

12. It may be observed from the above, that the requirement of payment of CVD on the basis of MRP would arise, if the two conditions are satisfied, viz, (i) There shall be

a requirement under Standards of Weights and Measures Act / Rules (later renamed as Legal Metrology Act) to declare RSP (Retail Sale Price) on such goods; and (ii) Such goods must be included under Third schedule to the Central Excise Act and attract duty of excise under Section 4 A of the CE Act. It may be noted that while the "requirement" to affix MRP is cast under SWM Act / Rules, what is relevant for the purposes of assessment of Customs duties is the MRP “declared” on such goods. This is clear from the language of Section 3(2) which reads as,

> *the value of the imported article shall be deemed to be the retail sale price* ***declared*** *on the imported article less such amount of abatement, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article under sub-section (2) of section 4A of that Act*

14. With regard to the plea that even if a higher MRP was affixed on the goods after their import, such activity would amount to manufacture, as defined under Section 2 (f) (iii) of the CE Act, as the subject goods are under third schedule to the Act. Once the activity amounts to manufacture, it is only excise duty that can be demanded. In this connection, the Member Technical has observed that it is a separate issue and CVD is also payable as per the revised MRP.

15. If we look at the legal background of the issue, CVD is levied on imported goods, to create a level playing field between domestically manufactured goods and imported goods and CVD is always equal to excise duty leviable on like goods manufactured in India. If like goods manufactured in India are liable to excise duty on the basis of MRP, CVD is also payable on MRP. In respect of consumer goods, enormous value addition is made by processes like packing, repacking, labelling, re-labelling etc., though the price at which the goods were assessed to excise duty in the hands of manufacturer was very low. In order to plug leakage of excise revenue, the concept of deemed manufacture has been introduced under Section 2 (f) (iii) of the CE Act, whereby even such processes are considered as manufacture. In such case, the imported goods would become the raw materials for carrying out such deemed manufacture and after such deemed manufacture, appropriate Excise duty would be payable. As declaration / alteration of MRP is also declared as a manufacturing process for the subject goods, excise duty would again be payable. Hence, the entire gamut of the provisions have to be seen in its totality and no isolated view can be taken. It is in this context that it has been held in the case of Starlite Components Ltd. case, supra that in such cases wherever subsequent manufacturing activities (deemed manufacturing activities) are carried out, there is even no need to pay CVD on the basis of MRP.

9. The Mumbai Bench of the Tribunal in the case of **DS Chandok & Sons Vs CC (Export Promotion] – 2021 (9) TMI 417 – CESTAT Mumbai,** has held as under:

> 6. The assessment of duties of central excise on the basis of 'retail selling price' was intended to dovetail enforcement of the levy with the statutory oversight contemplated by the Standards of Weights and Measures Act, 1976 and Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (and the substituting Legal Metrology Act, 2009 and Legal Metrology (Packaged Commodities) Rules, 2011) and its adoption, for parity, in assessment of 'additional duties of customs' was ineluctable. The declaration of value on the packaging was considered to be sacrosanct enough for the two purposes at the initial stage. Though Central Excise Act, 1944 did empower re-valuation with effect from 1st March 2008 in the specifically enumerated circumstances, there has been no corresponding empowerment under either Customs Act, 1962 or Customs Tariff Act, 1975. The exercise of such power in the proceedings leading to the impugned order is, thus, without authority of law.
>
> 7. Furthermore, the mandate by which an assessing authority was enabled, under Customs Valuation (Determination of Price of Imported Goods) Rules, 1988, to revisit the value declared in the entry under section 46 of Customs Act, 1962 is limited to assessment of 'basic customs duty' under section 12 of Customs Act, 1962. Any revision in the assessable value for determination of 'basic customs duty' would correspondingly impact 'additional duties of customs' too. That inheres in the legislative intent couched in section 3(2) of Customs Tariff Act, 1975. However, while inserting the proviso to section 3(2) of Customs Tariff Act, 1975, carving out an exception to the general scheme for valuation where rates of 'additional duty of customs' are ad valorem, that reference to value under Customs Act, 1962 had, necessarily, to be dispensed with for parity with domestic manufacture as stipulated in section 3(1) of Customs Tariff Act, 1975. Recourse to rules of valuation framed under the authority of section 14 of Customs Act, 1962 was, thus, precluded and the sanctity of 'declared' 'retail selling price' protected from being re-determined.

10. In **Acer India (Pvt.) Ltd. Vs. Commr. of Customs (Audit), Chennai [2024 (5) TMI 478 - CESTAT CHENNAI],** the Tribunal has held as under :

> 19. The Ld. Counsel appearing for appellant has vehemently argued that such redetermination of MRP is not sustainable as there is no machinery in Section 3 (2) of Customs Tariff Act, 1975 to redetermine the MRP of imported article.
>
> 20. The above provision states that for payment of CVD on imported goods notified under subsection (1) of Section 4A, the value of the imported article shall be deemed to be the RSP declared on the imported article less such amount of abatement. The proviso to Section (3) itself stipulates how the value has to be determined for imported goods to which Legal Metrology Act, 2009 and Rules thereunder apply. There is no provision envisaged herein for redetermination of the MRP. The proviso to subsection (2) of Section 3 merely refers to subsection (1) of Section 4A to indicate the class or description of goods notified. Subsection (2) of Section 4A is referred for allowing abatement on the declared MRP to determine the value for payment of CVD. This proviso to subsection (2) of Section 3 does not use the words that 'the entire provision of Section 4A would be applicable'.
>
> 21. Though Section 4A was introduced w.e.f. 14.5.1977, there was no provision for ascertaining (or redetermining) the price (RSP) in situation of violation of the provisions. Subsection (4) to Section 4A for ascertaining or redetermining the RSP came to be introduced only w.e.f. 14.5.2003. Subsection (4) then merely said that the RSP of the goods shall be ascertained in prescribed manner. The Rules 2008 putting forth the prescribed manner or the method of ascertaining was introduced by Notification 13/2008 (NT) dt. 1.3.2008 only.
>
> 23. It can be seen that even though a methodology to ascertain the RSP is laid down, the same will apply only in situations of (a) and (b) of subsection (4) of Section 4A. On examining the facts, the appellant has adopted a new RSP for the combined goods of laptop computer + carry bag + booklet + Instruction guide. The department has redetermined the RSP of the imported laptop computer alleging misdeclaration of MRP . As there is no methodology or machinery for redetermining the MRP of goods imported for the purpose of payment of CVD, we hold that such re-determination of MRP is against the provisions of law.

11. In the case of **L'Oreal India Pvt Ltd Vs CCE Raigad – 2014(308) ELT 748 (Tri-Mum),** the Revenue itself has taken the stand that affixing

of Label on the imported goods, would amount to manufacture in terms of Section 2 (f) of CEA 1944. The Tribunal held as under :

> *5. The appellant, M/s. L'Oreal India Pvt. Ltd., is a manufacturer of cosmetics and toilet products. They also import these materials from abroad and market the same in India. Before undertaking the marketing in India, the appellant undertakes the process of affixing labels and MRPs on the individual packages. The department is of the view that the activity of affixing labels and declaring MRPs amounts to 'manufacture' as the products are notified under the 3rd Schedule to the Central Excise Tariff Act and therefore, the activity of labelling and affixing MRP amounts to manufacture under Section2(f)(iii) of the Central Excise Act,1944. Hence, the appellants are required to discharge excise duty liability of these goods.*
>
> *6. The learned Counsel for the appellant submits that the activity of affixing labels and declaring MRP on the imported goods are mandatory vide DGFT Notification No. 44(RE-2000)/1997-2002, dated 24-11-2000 and these activities ought to be undertaken by every importer before effecting clearance for home consumption. Inasmuch as the activity has been undertaken before clearance for home consumption, the goods remain imported goods and there cannot be any question of 'manufacture' so as to attract excise levy. He further submits that there are two types of goods imported by the appellant. The majority of the goods imported by the appellant are in packages of above 10 grams or 10 ml. and in respect of these goods, countervailing duty (CVD) is leviable and is discharged on the basis of the MRP declared. The MRP remains the same when the goods are marketed in the Domestic Tariff Area (DTA) and the basis for levy of excise duty isalso MRP. Therefore, in respect of the goods contained in packages of above 10 grams or 10 ml. the entire exercise is revenue neutral and there is no additional duty liability accruing and therefore, the demands in this regard are not sustainable in law at all. It is his further contention that with effect from 26-2-2010, the appellant had cleared the goods by filing an into bond bill of entry and the activity of labelling, affixing MRP, etc. was done under Customs bond and after discharging the customs duty liability, the goods were cleared into domestic tariff area. Therefore, for the period on or after 26-2-2010, since the goods remained in Customs Control, no manufacture has taken place in India and hence, excise duty demand for the period after 26-2-2010 is clearly unsustainable in law. Prior to 26-2-2010, the appellant was clearing the goods into private godowns at Bhiwandi, Dronagiri, etc. and the activities of affixing labels/declaring MRPs, etc. were undertaken at these godowns and the Customs had granted permission to the appellant for the activities to be undertaken outside the*

Customs area on execution of bond and bank guarantee. For the period prior to 26-2-2010, since there was no procedure prescribed by the Customs authorities, they had cleared the goods on execution of bond and bank guarantee for undertaking the activities of re-packing and re-labelling, etc. and the customs duty (CVD) liabilities were discharged on the basis of the revised MRPs. Alternatively, it is pleaded that if excise duty is to be paid on the activity of labelling, declaration of MRP, etc. the appellant would be eligible for the Cenvat credit of CVD paid on the goods which has not been granted to the appellant. Since the entire activity was undertaken with the knowledge of the department, invocation of extended period of time cannot be sustained in law. Accordingly, it is pleaded that the impugned demands are not sustainable and needs to be set aside.

8.6 *As regards the goods contained in packages of 10 grams or 10 ml. or less, there is no statutory requirement of affixing MRP or labeling both under the Packaged Commodity Rules, 1977 or the Drugs and Cosmetics Rules, 1945. Under Rule 34 of the Packaged Commodities Rules, the provisions of the said Rules do not apply to any packages containing a commodity if the net weight or measure of the commodity is ten grams or ten ml. or less, if sold by weight or measure. Similarly exemption from certain labeling requirements is available in respect of cosmetics and toilet preparations in packages of 10 grams or 10 ml. or less under Rule 148 of the Drugs & Cosmetics Rules, 1945. Therefore, in respect of such goods, the labeling/re-labelling etc. or adoption of any other treatment to render the goods marketable to the consumer in India would amount to manufacture and therefore, excise duty liability would be attracted, even if they are undertaken in a bonded warehouse, as there is no statutory requirement of undertaking such activities before import is complete and clearance for home consumption is permitted. However, the appellant would be eligible to take Cenvat credit of the CVD paid on such goods while discharging excise duty liability. Further, in the present case, we note that the appellant had declared all their activities to the Customs authorities at the time of importation and the activities have been undertaken with the knowledge and permission of the customs authorities. In this factual scenario, the appellant could not be said to have indulged in suppression of facts and hence, the invocation of extended period of time for demand of duty is clearly not sustainable in law and the duty demand would sustain only for the normal period of limitation.*

12. Similarly in the case of **Titan Industries Ltd Vs CCE Chennai – 2007 (217) ELT 423 (Tri-Chennai)**, the Revenue demanded Excise Duty

on the imported watches wherein the MRP was affixed by way of labelling. The Tribunal held as under :

> *The Commissioner, in the impugned order, demanded duty of over Rs. 58.00 lakhs from the appellants in respect of watches for the period 1-3-2003 to 10-12-2003 and imposed on them equal amount of penalty. These watches were imported and cleared on payment of duties of customs (including CVD) on MRP basis and, subsequently, they were repacked and sold to customers after affixing MRP sticker. The above demand of duty of excise is based on the finding that the activity of repacking followed by affixture of MRP sticker amounted to 'manufacture'. In the impugned order, however, learned Commissioner allowed the assessee to avail CENVAT credit of CVD amounting to Rs. 58,23,251/-. Learned counsel submits that the CENVAT credit is more than enough to satisfy the demand of duty and that, in such a revenue-neutral situation, any duty of excise should not have been demanded on MRP basis particularly where the imported watches were cleared on payment of duty on the same basis. In this connection, learned counsel relies on the Tribunal's decision in P.T.C. Industries Ltd. v. CCE, Jaipur-I - 2003 (159) E.L.T. 1046 (Tri.-Del.), wherein a demand of central excise duty was set aside by the Tribunal upon finding that Modvat credit of such duty would be available to the assessee's sister unit to which the goods were cleared. Learned SDR, on the other hand, submits that the substantive question to be settled is whether the activity of repacking followed by affixture of MRP sticker on the imported watches amounted to 'manufacture' and, if so, what would be the correct classification of the goods so manufactured. It is urged that this question needs to be addressed. In his rejoinder, learned counsel submits that it may not be necessary to look into the above question on the facts of this case inasmuch as admittedly watches were imported and cleared on payment of duty on MRP basis and duty of excise on the same basis is demanded on the same goods from the same party.*
>
> ***2.*** *After giving careful consideration to the submissions, we note that there is no serious contest in this appeal against the Commissioner's finding that the goods in question are chargeable to duty of excise on account of the fact that the post-import activity undertaken by the assessee on the goods amounted to 'manufacture'. This finding of learned Commissioner is based on Section 2(f)(iii) of the Central Excise Act and the same is beyond question. However, learned Commissioner ought to have enabled the assessee to honour the demand of duty by way of debit in Cenvat account. The impugned order itself has noted that Cenvat credit of CVD paid on the imported watches is admissible to the assessee. It appears from the records that this credit exceeds the amount of*

duty of excise demanded. In the circumstances, we are of the view that the assessee shall pay the duty of excise by availing the CVD credit and utilizing the same. We, further, are of the view that, in the peculiar facts and circumstances of this case, any intent to evade payment of duty cannot be attributed to the assessee inasmuch as Cenvat credit of an amount higher than what is demanded by the Commissioner in the impugned order was lying with them, which could be utilized in the event of the demand of excise duty being enforced against them. Therefore, we think this is a fit case or vacating the penalty. Accordingly, the penalty is set aside and the appeal is disposed of. The impugned order is sustained with the above modification.

13. The above decisions help us to conclude as under :

(i) There is no direct mechanism available under Section 3 (2) of CTA to demand the CVD when the same is not based on *ad valorem* basis. When the CVD is levied based on the RSP less abatement, recourse to Rules of Valuation framed under the authority of Section 14 of Customs Act 1962 is precluded and the sanctity of the declared Retail Sale Price is protected from being re-determined.

(ii) Once the goods fall under Third Schedule of CEA 1944 liable for Excise Duty payment under Section 4A, when the labelling / re-labelling is done towards the RSP, the Excise Duty is required to be demanded and not the CVD, i.e, the Additional Duty of Customs, even in the case of import of such goods.

(iii) The case laws of **L'Oreal** and **Titan** discussed above, show that even Revenue has taken the stand that when the imported goods are affixed with MRP label, the same would

amount to manufacture in terms of Section 2 (f) of the CEA 1944.

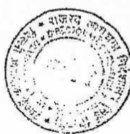
14. Therefore, we hold that the demand of Customs Duty in the form of differential duty of CVD is without jurisdiction and hence legally not sustainable.

15. Now coming to the factual details, it seen from the Annexure-I to Annexure III of the SCN, the demand has been made for the period 2015 to 2017, by way of the SCN issued on 03.02.2020, by invoking the extended period provisions. One page of Annexure III is extracted below :

120

Annexure-III to the Show Cause Notice No. 04/2020 dated 03.02.2020

S. No.	Port Name	BE No.	BE Date	Description of Goods declared	Non Seized Qty (in Pcs)	Non Seized Qty Assessable Value (In Rs.)	RSP declared to the Customs (in Rs.)	NCD paid (In Rs.)	CVD Paid (In Rs.)	Educational Cess on CVD paid (In Rs.)	Sec. & Higher Edu. Cess on CVD Payable (In Rs.)	Total Duty Paid (In Rs.)	Changed RSP/RSP found on Goods (In Rs.)	NCD Payable (In Rs.)	CVD Payable (In Rs.)	Educational Cess on CVD payable (In Rs.)	Sec. & Higher Edu. Cess on CVD Payable (In Rs.)	Toal Duty Payable (In Rs.)	Total Differential Duty Payable (In Rs.)
								CUSTOMS DUTY PAID						CUSTOMS DUTY PAYABLE					
1	INCCU1	8228296	06-02-2015	MODEL NO. IN MOBILE 3.5 PDA RT15I(BRAND : REACH, MODEL NO.RT	20000	15580888.80	1449.00	188370.00	1130220.00	26371.80	13185.90	1358147.70	2249.00	292370.00	1754220.00	40931.80	20465.90	2107987.70	749840.00
2	INCCU1	9011581	23-04-2015	MODEL NO.IN MOBILE 1.8 INCHES RE187 (BRAND:REACH,MODEL RE187	13000	6094364.43	749.00	63290.50	791131.25	0.00	0.00	854421.75	1049.00	88640.50	1108006.25	0.00	0.00	1196646.75	342225.00
3	INCCU1	9079247	29-04-2015	MODEL NO.IN MOBILE READY SUPER-STAR 1.8 INCHES RE187 (BRAND:	25648	12094908.15	749.00	124867.29	1560841.10	0.00	0.00	1685708.39	1049.00	174880.89	2186011.10	0.00	0.00	2360891.99	675183.60
4	INCCU1	9679929	24-06-2015	MODEL NO.JAZZ 280 IN MOBIL 2.8 INCHES WITH 1.3 MP CAMERA,150	9448	5649727.71	975.00	59876.70	748458.75	0.00	0.00	808335.45	1499.00	92056.59	1150707.35	0.00	0.00	1242763.94	434428.49
5	INCCU1	9834524	08-07-2015	MODEL NO.STAR R2402 IN MOBILE 2.4 INCHES WITH 1.3MP CAMERA,1	19826	8506951.26	799.00	102966.33	1287079.14	0.00	0.00	1390045.47	1100.00	141755.90	1771948.75	0.00	0.00	1913704.65	523659.18
TOTAL						47926840						6096659						8821995	2725336



16. In order to demand the differential CVD, the Revenue is required to show the take the RSP adopted by the appellant subsequently [for their final clearance] [say A] and take the MRP adopted for Customs clearance [say B]. The demand is to be quantified as [A] – [B]. In this

case, since the SCN is issued in 2020, the purported RSP for the period 2015 to 2017 has been taken from some websites like NSA TradexPvt Ltd., and North India Top Company Pvt Ltd. There is nothing to indicate as to whether the quantity, country of export etc are nearer to the imports made by the present appellant. Further, the Tribunals / High Courts have also been consistently holding even the price adopted as per the NIDB website cannot be directly applied by Revenue, unless it is shown that the country of origin, quantity imported, date of import etc are nearly matching. In the present case, no such data has been made available by the Revenue, while they have arrived at the differential duty. Further, the goods in question are Mobile phones and Laptops. It is a common knowledge that the rates keep varying from time to time. Once the model becomes outdated by the introduction of the next model, the value generally falls. We are not made aware as to whether this factor was taken in to consideration while quantifying the differential duty. No enquiries have been from the distributors, dealers of the appellant's product. The e-commerce sites cannot be relied upon to arrive at the RSP. In order to attract the customers, it is seen that they inflate the RSP, give a massive discount to complete the sale. Unless their RSP given in the e commerce site is corroborated with the documentary evidence towards the RSP given in the packaged goods, the RSP given by them in their website cannot be taken on face value. Therefore, we hold that on this ground, the quantification of the differential duty arrived at by Revenue is erroneous.

17. The appellant has taken the pleading that the persons recording the Statements in terms of Section 108, have not been subjected to the

procedure prescribed under Section 138B. Even their request for cross-examination has been denied. We find that the issue in terms of Section 9D of the CEA 1944 [*paramateria* with Section 138B of the Customs Act 162] was before the Principal Bench, New Delhi in the case of **Surya Wires Pvt Ltd Vs Principal Commissioner CGST Raipur – 2025 (4) TMI 441**, wherein the Bench has held as under :

> *12. A perusal of the impugned order shows that it is based primarily on the statements of Harsh Agrawal, Director of the appellant, Narendra Kumar Rathod, security guard of the appellant, SatyanandSoi, security-in-charge of the appellant and Ishwar Prasad Verma, loading-in-charge of the appellant. These statements were recorded by the Officer under section 14 of the Central Excise Act.*
>
> *13. The first and foremost issue that arises for consideration is whether such statements could have been considered as relevant and relied upon without following the procedure contemplated in section 9D of the Central Excise Act relating to relevancy of statements under certain circumstances.*
>
> *14. The statement of witnesses are recorded under section 14 of the Central Excise Act and section 9D of the Central Excise Act deals with relevancy of these statements under certain circumstances.*
>
> *15. The statement of witnesses are recorded under section 108 of the Customs Act, 196223 and section 138B of the Customs Act deals with relevancy of statements under certain circumstances.*
>
> *21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the*

circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain.

22. It would now be appropriate to examine certain decisions interpretating section 9D of the Central Excise Act and section 138B of the Customs Act. 23. In Ambika International vs. Union of India24 decided on 17.06.2016, the Punjab and Haryana High Court examined the provisions of section 9D of the Central Excise Act. The show cause notices that had been issued primarily relied upon statements made under section 14 of the Central Excise Act. It was sought to be contended by the Writ Petitioners that the demand had been confirmed in flagrant violation of the mandatory provisions of section 9D of the Central Excise Act. The High Court held that ifnone of the circumstances contemplated by clause (a) of section 9D(1) exist, then clause (b) of section 9D(1) comes into operation and this provides for two steps to be followed. The first is that the person who made the statement has to be examined as a witness before the adjudicating authority. In the second stage, the adjudicating authority has to form an opinion, having regard to the circumstances of the case, whether the statement should be admitted in evidence in the interests of justice. The judgment further holds that in adjudication proceedings, the stage of relevance of a statement recorded before Officers would arise only after the statement is admitted in evidence by the adjudicating authority in accordance with the procedure contemplated in section 9D(1)(b) of the Central Excise Act. The judgment also highlights the reason why such an elaborative procedure has been provided in section 9D(1) of the Central Excise Act. It notes that a statement recorded during inquiry/investigation by an Officer of the department has a possibility of having been recorded under coercion or compulsion and it is in order to

neutralize this possibility that the statement of the witness has to be recorded before the adjudicating authority.

*24. The **Punjab and Haryana High Court in Jindal Drugs** that was decided on 21.06.2016 also held that unless and until one of the circumstances contemplated by clause (a) of section 138B(1) of the Customs Act applies, the adjudicating authority is bound to strictly follow the procedure contained in clause (b) of section 138B(1) of the Customs Act, before treating a statement recorded under section 108 of the Customs Act as relevant.*

*25. In **Hi Tech Abrasives Ltd. vs. Commissioner of C. Ex. &Cus., Raipur** decided on 04.07.2018, the Chhattisgarh High Court also examined the provisions of section 9D of the Central Excise Act. The allegation against the appellant was regarding clandestine removal of goods without payment of duty and for this purpose reliance was placed on the statement of the Director of the Company who is said to have admitted clandestine removal of goods. The contention of the appellant before the High Court was that the statement of the Director could be admitted in evidence only in accordance with the provisions of section 9D of the Central Excise Act. After examining the provisions of sub-sections (1) and (2) of section 9D of the Central Excise Act, and after placing reliance on the judgment of the Punjab and Haryana High Court in Ambika International.*

*26. **In Additional Director General (Adjudication) vs. Its My Name Pvt. Ltd**. decided on 01.06.2020, the Delhi High Court examined the provisions of sections 108 and 138B of the Customs Act. The department placed reliance upon the statements recorded under section 108 of the Customs Act. The Delhi High Court held that the procedure contemplated under section 138B(1)(b) has to be followed before the statements recorded under section 108 of the Customs Act can be considered as relevant.*

28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and

failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence.

34. The confirmation of demand of central excise duty to the extent of Rs. 3,04,24,623/- is based on the statements of persons who were not examined by the department before the adjudicating authority. This examination was absolutely necessary in terms of the provisions of section 9D of the Central Excise Act. In the absence of examination of such persons before the adjudicating authority and in the absence of admission of such statements in evidence, such statements would not be relevant. For the reasons stated above, the said demand would have to be set aside.

18. In the above case, the Tribunal has relied on several decisions of Punjab & Haryana High Court, Chattisgarh High Court and Delhi High Court and has concluded that the non following of Section 9D procedure would be fatal to the Revenue's case. We find that in the present case, the Revenue has relied on various recorded statements, without subjecting the concerned persons to the Section 138B procedure. Hence, following the ratio of the Surya Wire case, we hold that the present demand is legally not sustainable.

19. The appellant has also taken the ground that the self-assessed Bills of Entry have not been challenged by way of any appeal under Section 128 by the Revenue. Therefore, they are precluded from directly demanding the differential duty under Section 28 (4). They have placed the reliance on Supreme Court's judgement in the case of

ITC Ltd Vs CCE Kolkata-IV – 2019 (9) TMI 802 Supreme Court and ShriRajibSahaVs CC (Prev) 0 2023 (8) TMI 1162 – CESTAT Kolkata.

20. We find that in the case of **Shri Rajib Saha Vs CC (Prev) 0 2023 (8) TMI 1162 – CESTAT Kolkata**, this Bench has relied on the ITC judgement of the Supreme Court and held as under :

> *10. We observe that the self-assessment of the Bills of Entry by the importer was not challenged by the department. The Hon'ble Supreme Court in the case of ITC Ltd, has held as under:*
>
> > *47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.*
>
> *11. We observe that the ratio of the above said decision is squarely applicable in this case. We find that the impugned order passed demanding differential duty without challenging the original assessment of the Bills of entry is not sustainable. Hence, the demand is not sustainable on this count also.*

21. Viewed from another angle, as per the cited case laws discussed above, changing / relabelling of the goods with revised RSP would amount to manufacture in terms of Section 2 (f). In that case, while the Excise Duty would be recoverable, the CVD paid at the time of import would be eligible for Cenvat Credit, as has been held in the case of **L'Oreal case – 2014 (308) ELT 746 (Tri-Mum**), affirmed by the Bombay High Court. Therefore, even the Excise Duty could have been demanded only for the difference between the CVD paid and the alleged

higher RSP based Excise Duty, which anyway is not the issue in the present case, wherein the Additional Duty of Customs has been demanded.

22. The appellant has submitted that the goods in question were not available physically and hence, the same could not have been confiscated. We find that in the case of **Commissioner of Customs (Import), Mumbai Versus Finesse Creation Inc. – 2009 (248) ELT 142 (Bom), the High Cour**t has held as under :

> 5. *In our opinion, the concept of redemption fine arises in the event the goods are available and are to be redeemed. If the goods are not available, there is no question of redemption of the goods. Under Section 125 a power is conferred on the Customs Authorities in case import of goods becoming prohibited on account of breach of the provisions of the Act, rules or notification, to order confiscation of the goods with a discretion in the authorities on passing the order of confiscation, to release the goods on payment of redemption fine. Such an order can only be passed if the goods are available, for redemption. The question of confiscating the goods would not arise if there are no goods available for confiscation nor consequently redemption. Once goods cannot be redeemed no fine can be imposed. The fine is in the nature of computation to the state for the wrong done by the importer/exporter.*
>
> 6. *In these circumstances, in our opinion, the tribunal was right in holding that in the absence of the goods being available no fine in lieu of confiscation could have been imposed. The goods in fact had been cleared earlier. The judgment in Weston (supra) is clearly distinguishable. In our opinion, therefore, there is no merit in the questions as framed. Consequently, appeal stands dismissed.*

23. In the present case, the goods were cleared in the normal course, after filing the self-assessed Bill of Entry after getting the out of charge issued by the Customs officials. No Bond has been executed at the time of clearance, nor is this a case of provisional release of any seized

goods. Therefore, the ratio of the cited Bombay High Court decision is squarely applicable. We set aside the Confiscation order and the Redemption Fine imposed in the impugned order.

24. The appellant has also argued on the time-bar aspect, on the ground that the earlier SCN for 2019 was issued on 13th September 2019, by invoking the extended period provisions. The present SCN has been issued on 3.2.2020, for the period 2015 to 2017 by invoking the extended period provisions. They have relied on **Nizam Sugar Factory Vs Collector of Central Excise A P [2006 (197) ELT 465**. We find that the Revenue has undertaken investigation subsequent to issue of the first SCN. Therefore, on its own the second SCN does not get affected by the cited **Nizam Sugar** decision. We find that the entire demand is made under the wrong interpretation by demanding the Additional Duty of Customs Duty [CVD], whereas, the Duty if any, should have been demanded as Excise Duty as can be observed from the cited case laws. Further there is no factual evidence coming out as to actually it was the appellant only who had changed the labels and had changed the RSP. Since there is a gap of 3 to 5 years from the date of clearance of the imported goods and period of investigation and issue of SCN on the allegation of changing of RSP labels, no clarity comes as to when this activity of changing of labels with revised RSP was carried out or by whom, since the goods would have moved throughout India to various distributors. If the recorded statements are relied on to fasten the responsibility of changing of the RSP labels, it is observed that the persons recording the statements have not been subjected to Section 138 B procedure. Therefore, they have lost the evidentiary value. No

corroborative evidence has been brought in by the Revenue. Hence, the Revenue has not been able to prove that this is a case of suppression with an intent to evade Duty. on the part of the appellant. Therefore, we hold that the demand for the extended is liable to be set aside on account of time-bar also.

25. In view of the foregoing, we set aside the impugned order in toto both on merits as well as on account of time-bar and allow the appeal filed by the appellant company.

26. Since the impugned order is found to be not sustainable against the appellant company, the penalties against the Director appellant herein also do not survive.

27. To Summarize :

(a) We hold that the Section 3 (2) of the Custom Tariff Act, read with Section 4A of CEA 1944 provisions, do not contain any provision enabling re-determination of the Additional Duty of Customs [CVD], when the CVD is paid in terms of Section 4A at the time of imports.

(b) In terms of Section 4A, in respect of Third Schedule goods of the CEA 1944, packing, repacking, labelling, relabelling of imported goods would amount to manufacture in terms of Section 2 (f), wherein the Excise Duty would become payable. Even in such cases, the CVD paid initially at the time of import

would be eligible as Cenvat credit. The present proceedings have been initiated to recover Addl Duty of Customs, which is erroneous.

(c) The persons recording the statements, relied upon heavily by the Revenue, have not been subjected to Section 138B procedure. Therefore, their statements lose the evidentiary value.

(d) The goods have been cleared under self-assessed Bill of Entry during the period 2015 to 2017. The assessments were required to be challenged by the Revenue by way of Appeals, as has been held by the Hon'ble Supreme Court in the case of ITC, which has not been done in this case.

(e) In view of (a) to (d) above, the Appeals are allowed on merits.

(f) The imported goods have been cleared after the self-assessment, without any Bond, in the normal course. Therefore, in the absence of any Bond and in the absence of the goods available physically, the Confiscation order is legally not sustainable.

(g) No proper documentary evidence has been brought in towards willful suppression with an intent to evade against the appellants. Hence, the confirmed demand for the extended period is set aside.

28. In view of the foregoing, the impugned order is set aside both on merits and on account of time bar for the confirmed demand for the extended period and the appeals are allowed. The Appellants would be eligible for consequential relief, if any, as per law.

(Order pronounced in the open court on 31.10.2025.)

Sd/-
(K. Anpazhakan)
Member (Technical)

Sd/-
(R. Muralidhar)
Member (Judicial)

Pooja