CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 4

SINGLE MEMBER BENCH

SERVICE TAX APPEAL NO. 50853 OF 2024

[Arising out of order in appeal no. 62/ST/DLH/2024 dated 02.04.2024 passed by the Commissioner (Appeals-I) Central Tax, Goods and Service Tax and Central Excise, New Delhi]

M/s ESSJAY TELECOM AND IT SERVICES PRIVATE LIMITED ......**APPELLANT**
(formerly known as ESSJAY Ericsson Pvt Ltd.)
S-18 E, School Block, Shakarpur,
New Delhi-110092,
(Near Baba Balaknath Mandir)

Vs.

COMMISSIONER OF CENTRAL TAX & CGST-, CENTRAL EXICSE-DELHI .....**RESPONDENT**
Room No. 134, Central Revenue Building,
Indraprastha Estate, New Delhi

<u>Appearance:</u>
Present for the Appellant : Shri Pawan Arora, Advocate
Present for the Respondent: Shri V. J. Saharan, Authorised Representative

CORAM:
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50398 /2025

Date of Hearing : 20/01/2025
Date of Decision : 12/03/2025

P. V. SUBBA RAO:

M/s Essjay Telecommunications and IT Services Private Ltd.[1] filed this appeal to assail Order in Appeal dated 2.4.2024[2] passed by the Commissioner (Appeals) rejecting the appellant's prayer for higher rate of interest of 12% instead of the notified rate of 6% for deposits under section 35FF.

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[1] Appellant
[2] Impugned order

2. I have heard learned counsel for the appellant and the learned authorised representative for the Revenue and perused the records. The appellant's case is that what was deposited by it was not a pre-deposit under section 35F nor was it a service tax but it was only a revenue deposit because it had deposited the amount during the investigation and finally CESTAT decided in favour of the appellant and no service tax was payable. Therefore, the rates of interest notified for refunds under section 35FF do not apply to it's case and it is entitled to interest @ 12% per annum. The case of the Revenue is that the amounts deposited by the appellant were considered towards the pre-deposit under section 35F while admitting the appeal and therefore, the rate of interest of 6% notified by Notification no. 24/2014-CE (NT) dated 12.8.2014 would apply to the appellant as they would apply to any other assessee. The appellant cannot claim a higher rate of interest than what was notified.

3. The issues which fall for consideration in this appeal is whether the appellant are:

A) What is the nature of the amount deposited by the appellant during investigation towards service tax, which was appropriated by the adjudicating authority towards confirmed demand of service tax, which was, on appeal, set aside by the tribunal?

B) Will the appellant be entitled to interest on refund of the above amount as prescribed under section 11 BB under section 35FF of the Central Excise Act, 1944 as made

applicable to Service Tax by virtue of section 80 of the Finance Act, 1994 or at 12% per annum as claimed by the appellant?

4. The undisputed facts which lead to the issue of the impugned order are that the Revenue initiated an investigation against the appellant for suspected non-payment of service tax. During the course of investigation itself, the appellant had deposited some amount towards service tax. Thereafter, a Show Cause Notice[3] was issued which culminated in an order by the adjudicating authority confirming the demand and appropriating the amount deposited during the investigation towards this confirmed demand. Aggrieved by the order, the appellant filed an appeal which was allowed by this tribunal and the demand of service tax by the lower authorities was set aside.

5. Thereafter, the appellant sent a letter requesting for refund of the amount paid during the investigation which was appropriated by the lower authorities along with interest. The Assistant commissioner sanctioned the refund treating the amount deposited by the appellant as a pre-deposit under section 35F. He also paid interest at the rate of 6% per annum as per payable on such deposits under section 35FF. The appellant filed an appeal before the Commissioner(Appeals) seeking a higher rate of interest at 12% per annum. This appeal was rejected by the Commissioner(Appeals) through the impugned order. Aggrieved, the appellant filed this appeal.

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[3] **SCN**

6. The case of the appellant is that it was never required to pay the amount as Service Tax because there was no liability at all and therefore, the amount which it had deposited during investigation must be treated as 'Revenue deposit' and neither as Service Tax nor as Pre-deposit under section 35F and the Revenue could not have retained the amount and therefore, it must be refunded with interest. According to the appellants, the statutory provisions for interest under section 11BB (on refunds of service tax) or under section 35FF (on amounts made as pre-deposit) do not apply to its case and on the principle of equity, interest should have been paid to it at 12% per annum. Since it was paid only interest @6% per annum, the balance of interest must be paid to it.

7. The fundamental question, which raises in this case is how should an amount which has been deposited as service tax, but which subsequently became refundable, consequent upon an order of the tribunal or courts be treated. Will it be a service tax, pre-deposit or just a revenue deposit?

8. There are no separate provisions for refund of service tax under Chapter V of the Finance act 1994[4]. The provisions of sections 11B, 11BB, 35F, 35FF have been made applicable to service tax by section 83 of the Finance act, 1994. Section 11B deals with refund of excise duty and when applied to service tax, it deals with refund of service tax. Section 11BB deals with

[4] Finance Act

interest on refund under section 11B.The relevant portions of these sections are below:

> **"Section 11B. Claim for refund of duty and interest, if any, paid on such duty** . -
> (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :
> **Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :
> **Provided** further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.
> (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :
> **Provided** that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -
> (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
> (b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;
> (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
(e) the duty of excise 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;
(f) the duty of excise 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.

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.
(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).
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Explanation. - For the purposes of this section, -
(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
(B) "relevant date" means, -
(a) *****
(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;
(f) ****."

9. Evidently, section 11B covers situations where the duty becomes refundable as a consequence of an order or judgment by the Tribunal or any Court which is precisely the case here. The submission of the appellant is that what it had paid was not duty at all because no duty was payable. To examine this submission, what needs to be examined what is the situation under which a duty becomes refundable. If the amount which is paid as duty is

due, it will not be refundable at all. If it is not payable as duty, then it becomes refundable under section 11B.

10. This leads to the next question as to who and what factors will determine if the amount paid as duty was payable or not. This question was dealt with at length by the larger bench of the Supreme Court in **ITC LTD. Vs. Commissioner Of Central Excise, Kolkata-Iv[5].** In this judgment, the Supreme Court dealt with a batch of appeals dealing with the question as to whether refund can be sanctioned so as to modify the assessment including self-assessment. The Supreme Court held that refund proceedings are in the nature of execution proceedings and refund cannot be sanctioned so as to modify the assessment including self-assessment. The person seeking modification of the assessment has to assail it in an appeal and refund can be sanctioned only after the assessment is modified. Relevant portions of this judgment are reproduced below:

> **"41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.**
> **42.** It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder :
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> > **"128. Appeals to [Commissioner (Appeals)].** — (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order :

[5] 2019 (368) E.L.T. 216 (S.C.)

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

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

44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In *Hero Cycles Ltd.* v. *Union of India* - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund

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

11. In this case, the SCN issued by the department proposing demand of service tax effectively modifying the assessment. This proposal was confirmed by the lower authorities. The amounts paid by the appellant during investigation were appropriated towards the service tax. Had there been no appeal or further orders by this Tribunal, the amount paid by the appellant would have been Service tax.

12. On appeal, this Tribunal allowed the appeal and set aside the demand, i.e., the modification of the assessment as per the orders of the lower authorities was reversed by this Tribunal. As a consequence, the appellant became entitled to get refund as per section 11B. It applied for and got the refund.

13. Therefore, on the facts of this case and the law laid down by Supreme Court in **ITC Ltd.,** the amount paid by the appellant was Service Tax which became refundable consequent upon the order of this Tribunal. Such refunds are payable as per section 11B and the relevant date for applying for such refunds as per Explanation B (ec) to section 11B is the date of the order of the Tribunal or the judgment of the Court.

14. Section 35F request a certain percentage of duty, fine or penalty to be deposited as a precondition to filing an appeal. Before 2006, the entire amount of duty fine or penalty had to be deposited before filing an appeal, but the tribunal had the power

to waive part or hole of the deposit and stay the recovery proceedings. After 2006, the law was amended, and the percentage of the amount confirmed as duty fine or penalty to be deposited as a precondition for appeal has been fixed by law. Section 35FF provides payment of interest on the amount deposited under section 35F. Section 35F was amended, section 35FF which deals with interest was also amended. The relevant portions of Section 35F is below:

> **"35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal**.— The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal—
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> (i) under sub-section (1) of Section 35, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the 2[Principal Commissioner of Central Excise or Commissioner of Central Excise;
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> (ii) against the decision or order referred to in clause (a) of sub-section (1) of Section 35-B, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;
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> (iii) against the decision or order referred to in clause (b) of sub-section (1) of Section 35-B, unless the appellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:
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> Provided that the amount required to be deposited under this section shall not exceed Rupees Ten crores:
> Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.
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> Explanation.—For the purposes of this section "duty demanded" shall include,—
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> (i) amount determined under Section 11D;
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> (ii) amount of erroneous CENVAT credit taken;
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> (iii) amount payable under Rule 6 of the CENVAT Credit Rules, 2001 or the CENVAT Credit Rules, 2002 or the CENVAT Credit Rules, 2004.

15. The distinction between refund of pre-deposit made under section 35F and duty or service tax paid under section 11B is that the pre-deposit under section 35F can be a percentage of duty, fine or penalty. It must be deposited as a pre-condition for filing an appeal. If the pre-deposit is not made, there will be no right of appeal to the person aggrieved by the order. Section 11B, on the other hand, provides for refund of duty or service tax. If an amount is already paid as duty or service tax, it is reckoned while computing if any further amount needs to be paid to meet the mandatory requirement of pre-deposit under section 35F. Merely because such adjustment is made, the amount paid as service tax or fine or penalty does not become pre-deposit under section 35F.

16. Therefore, what was paid by the appellant was service tax as determined by the lower authorities in the adjudication proceedings. If there was no further order, nothing would have been refundable. However, the order of the adjudicating authority was modified by this Tribunal setting aside the demand. Therefore, the service tax became refundable as per section 11B and the relevant date for the purpose was the date of the order of the Tribunal. If there was any delay in sanctioning of the refund, interest must be paid as per section 11BB.

17. In view of the above, I remand the matter to the Assistant Commissioner to examine and sanction refund under section 11B along with interest under section 11BB. I make it clear that the appellant had already made an application in the form of a letter which was processed and no new application is required. Only the amount of interest may be recalculated as per section 11BB instead of as per section 35FF.

18. The impugned order is set aside and the matter is remanded to the Assistant Commissioner as above.

(Order pronounced on **12.03.2025**)

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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