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

Service Tax Appeal No. 52455 of 2018

[Arising out of Order-in-Appeal No.248(AG)/CE/JDR/2018 dated 03.05.2018 passed by the Commissioner (Audit), CGST (Audit) Commissionerate, Jodhpur]

Shri R.C. Gupta, **Appellant**
593,Shastri Nagar,Dadabari,
Kota-324 009.

VERSUS

Commissioner of Central Excise **Respondent**
NCR Building, 142-B, Sector-11,
Udaipur, Rajasthan.

APPEARANCE:

Shri Vijay Kumar, Advocate for the appellant.
Ms.Jaya Kumari, Authorised Representative for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50442/2025

DATE OF HEARING:05.03.2025
DATE OF DECISION:26.03.2025

BINU TAMTA:

1. The challenge in the present appeal is to the impugned order [1] rejecting the refund claim filed by the appellant.

2. The appellant is engaged in providing of renting of motor vehicle services, which is covered as 'declared services' as per clause(f) of Section 66E of the Finance Act, 1994 [2] and the same is not covered under the Negative List provided under Section 66D of the Act and is also not

[1] Order-in-Appeal No.248(AG)/CE/JDR/2018 dated 03.05.2018
[2] The Finance Act

otherwise exempted under the Mega Exemption Notification No.25/2012 dated 20.06.2012. The appellant entered into a contract with Nuclear Power Corporation of India (Ltd)[3] for renting of certain buses and motor vehicles to NPCIL. In the work order, it was mentioned that the contract value was inclusive of service tax but due to RCM for payment of service tax viz. tax on abated value (40%) would be deducted by the NPCIL from the bills of contractor and remitted to Service Tax Department directly.

3. Notification No. 26/2012-ST dated 20.06.2012 provided for recovery of Service Tax on 40% commuted value in case of 'Renting of any motor vehicle designed to carry passengers.' Notification No. 26/2012-ST dated 20.06.2012 was amended by Notification No. 8/2014-ST dated 11.07.2014. Vide amendment, the abatement in value available to "Renting of any motor vehicle designed to carry passengers" was changed to –

> 9 - "motor cab" .
>
> 9A- Transport of passengers, with or without accompanied belongings, by a contract carriage other than motor cab.

4. NPCIL paid Service Tax on 40% commuted value and asked their contractors (service providers) to deposit the balance amount on 60% of the value and NPCIL would pay reimburse the tax to the contractors on submission of copies of challans. Accordingly, appellant deposited the tax on 60% of value of services so rendered and thereafter, requested NPCIL to reimburse the amount. NPCIL after consultation with the department observed that service tax is payable on 40% commuted value, which was deposited by them, they asked their contractors (service providers) to claim refund of service tax on 60% of the value deposited by them.

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[3] NPCIL

5. The appellant, accordingly filed refund claim under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 amounting to Rs.8,43,105/- on 5.4.2016 paid by them on renting of motor vehicle under reverse charge. As per Entry No.7(b) of Notification No.30/2012, show cause notice dated 01.07.2016 was issued calling upon to explain as to why refund claim should not be rejected. The Adjudicatiing Authoirty vide order dated 13.07.2016 rejected the entire refund claim of Rs.8,43,105/- on merits. The appeal filed by the appellant was partly allowed to the extent that refund for 'motor cabs' given on rent to NPCIL was allowed and the remaining claim regarding the bigger vehicles was rejected. Being aggrieved, the appellant has preferred this appeal.

6. Heard Shri Vijay Kumar, Advocate for the appellant and Ms. Jaya Kumari, Authorised Representative for the Department.

7. Since the issue in the present appeal relates to the refund claim, the same has to be considered in the light of the decision of the Apex Court in the case of **ITC Ltd. Vs. CCE, Kolkata-IV**[4] where the law has been settled that the refund proceedings being in the nature of execution proceedings, the refund cannot be sanctioned and allowed without modifying the assessment. The observations of the Apex Court in the case of **ITC Ltd.** is quoted below:-

> 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

[4] 2019 (368) ELT 216 (SC)

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. Reassessment 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).

8. Subsequently, the Delhi High Court in the case of **BT (India) Pvt. Ltd.**[5] applied the law laid down in the case of **ITC Ltd.** to the service tax refund also, *inter alia,* observing as under:-

[5] W.P (C) 13968/2021 dated 6.11.2023

57. It becomes pertinent to note that both the Customs as well as the Excise Acts follow an identical procedure of self assessment. While Section 17 of the Customs Act enables an importer or an exporter, as the case may be, to self-assess and pay the duty leviable on goods, the said provision further empowers the proper officer to verify the self assessed return that may be 7 ST/53046/2018 submitted. In terms of Section 17(4) of the said enactment, if the proper officer on verification, examination or testing of the goods comes to the conclusion that the self assessment is incorrect, it becomes entitled to reassess the duty leviable on goods. It is in extension of the aforesaid power that sub-section (5) of Section 17 speaks of reassessment and the obligation of the proper officer to pass a speaking order in support of the exercise of reassessment.

58. Section 27 enables a person to claim refund of duty or interest which may have been either paid or borne by it. Section 27(2) of the Customs Act, in terms identical to Section 11B (2) of the Excise Act, speaks of refunds being effected upon the proper officer being satisfied that the whole or any part of the duty paid is refundable. Section 27(2) is thus a provision which is pari materia with Section 11B (2) of the Excise Act.

59. The Supreme Court in ITC Limited, notwithstanding Section 27(2) employing the expression "satisfied" held that unless a self assessed return is revised or doubted in exercise of powers of reassessment, best judgment assessment or where it be alleged that duty had been short levied, short paid or erroneously refunded, those powers would not be available to be exercised at the stage of considering an application for refund. Having noticed the statutory position which prevails, we turn then to the decisions which would have a bearing on the question which stands posited.

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63. Their Lordships in ITC Limited categorically held that notwithstanding a self-assessed Bill of Entry having been merely endorsed by the competent authority, the same would nonetheless amount to an „assessment". It was in that backdrop that it was held that once a selfassessed return had been duly accepted, the same could not be modified or varied by an authority while considering an application for refund.

64. It becomes pertinent to note that the appellant before the Supreme Court in that case, had sought to press the claim for refund asserting that it had due to 8 ST/53046/2018 inadvertence failed to submit a self assessment return taking into consideration an exemption notification. It was this claim which came to be ultimately negatived by the Supreme Court and which held that a

claim for refund cannot be entertained unless the order of assessment, and which would include a self-assessment return, is modified in accordance with the procedure prescribed in the statute. In our considered opinion, it is these principles enunciated in Flock (India), Priya Blue Industries and ITC Limited, which compel and convince us to observe that the impugned order is clearly rendered unsustainable.

65. Undisputedly, the petitioner had submitted self-assessment returns proceeding on the basis that the output services rendered by it would qualify as an "export of service" and thus it being not exigible to service tax. The aforesaid self-assessment returns remained untouched and had not been questioned by the respondents either in terms of Sections 72 or 73 of the Act. The application for refund of CENVAT credit was founded on the petitioner assessing that it was not liable to pay service tax on services so exported. The accumulation of CENVAT credit came about in light of the various input services received by the petitioner and it having availed credit of service tax paid thereon in terms of Rule 3 of the CCR Rules. It was in respect of the accumulated CENVAT credit that the application for refund came to be made.

66. In our considered view, unless the self-assessed return, as submitted had been questioned, re-opened or re-assessed and the assertion of the petitioner of the services rendered by it qualifying as an "export of service" questioned or negatived in accordance with the procedure prescribed under the Act, its claim for refund could not have been negated. As was observed by the Supreme Court in ITC Limited, a self-assessed return also amounts to an „assessment" and unless it is varied or modified in accordance with the procedure prescribed under the relevant statute, the same cannot possibly be questioned in refund proceedings. As the Supreme Court had held in the decisions aforenoted, the authority while considering an application for grant of ST/53046/2018 of refund neither sits in appeal nor is it entitled to review an assessment deemed to have been made. In fact, the Supreme Court in ITC Limited had described refund proceedings to be akin to execution proceeding……."

9. In the present case, the appellant had paid the service tax on 60% of the value of the service so rendered and made the refund claim on 5.4.2016. The refund application was decided by the Adjudicating Authority on merits that the refund claim was filed incorrectly as the assessee themselves were liable to pay service tax on 50% of the total value of the billing amount. As

the assessee was held to be himself liable to pay duty for which the refund is claimed, the refund claim was held to be unsustainable. On the same analogy, the impugned order has been passed on 3.5.2018. After the said two orders, the decision of the Apex Court in **ITC Ltd.** was pronounced on 18.09.2019. The law settled by the Apex Court in **ITC Ltd.** is law of the land and is applicable/binding on all the forums in the country. In view thereof, the refund claim filed by the appellant cannot be entertained unless and until the assessment is challenged by way of appeal. The law has been further clarified by the Delhi High Court in **BT (India) Pvt. Ltd.** to be applicable to the cases of refund claims under the Service Tax Regime. Following the decision in **BT (India) Pvt. Ltd.**, the Tribunal in the case of **M/s. Jagdamba Phosphate vs. Commissioner of CGST, Udaipur**[6] held that since the appellant had not assailed the self-assessments and as per assessments, the appellant is not entitled to any refund, the refund claim was rejected.

10. We, therefore, uphold the impugned order for a different reason, in view of the decisions of the Apex Court and the Delhi High Court as discussed above. The appeal is, accordingly dismissed.

[Order pronounced on 26th March, 2025]

(Binu Tamta)
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)

Ckp.

[6] Final Order No.59378/2024 dated 28.10.2024