CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. III

SERVICE TAX APPEAL NO. 51625 OF 2018

[Arising out of the Order-in-Appeal No.IND-EXCUS-000-APP-750-17-18 dated 21.3.2018 passed by Commissioner (Appeals), CGST & Central Excise, Indore]

M/s. Kalyan Toll Infrastructure Ltd. **...Appellant**
Vidhya Deep, 15/3, Manoramaganj
Geeta Bhawan,
Indore

versus

Commissioner Central Excise and CGST ....Respondent
Manik Bagh Plae
Indore

APPEARANCE:

Shri Arvind Singh Chawla, Advocate for the appellant
Shri Rajeev Kapoor and Shri Harshvardhan, authorised representatives for the Respondent

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

FINAL ORDER NO. 55710 /2024

DATE OF HEARING : 25.01.2024
DATE OF DECISION: 29.04.2024

P.V. SUBBA RAO

1. M/s. Kalyan Toll Infrastructure Ltd.[1] filed this appeal to assail the Order in Appeal[2] dated 21.3.2018 passed by the Commissioner (Appeals), Indore whereby he rejected the

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[1] **Appellant**
[2] **Impugned order**

appeal filed by the appellant and upheld the Order in Original[3] dated 18.5.2017 passed by the Assistant Commissioner.

2. The appellant provided services to Madhya Pradesh Power Generating Company Ltd.[4]. It was entitled to exemption notification no. 25/2012-ST for these services. However, it self assessed and paid service tax and filed ST 3 returns accordingly.

3. On 6.3.2017, it filed a refund application of the service tax paid amounting to Rs. 5,07,76,894/- under section 11B of the Central Excise Act, 1994[5] which is made applicable to service tax matters by section 83 of the Finance Act, 1994[6]. This application was rejected by the original authority as the application was not filed within one year from the payment of the service tax as laid down in section 11B. There is no dispute that the application was made after one year from the payment of service tax.

4. Aggrieved, the appellant filed an appeal before the Commissioner (Appeals) Indore, who, by the impugned order upheld the order of the Assistant Commissioner.

Submissions of the appellant

5. The impugned order is arbitrary and devoid of merit and has been passed without appreciating the facts of the case.

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[3] **OIO**
[4] **MPPGCL**
[5] **Excise Act**
[6] **Finance Act**

6. Since no tax was payable, what was deposited was not tax at all and should be considered as deposit and the Government has no right to retain it as per Article 265 of the Constitution.

7. Although the amount was paid as service tax and although the refund application was filed under section 11B of the Excise Act as made applicable to service tax matters, the time limit under section 11B should not apply to its case.

8. Reliance is placed on the following decisions:

a) **Shri Balaji Warehouse Larger bench decision**[7] in which it was held that self-assessment by an assessee under service tax cannot be equated with an 'order of assessment' against which an appeal can be filed.

b) **Credible Engineering Construction Projects Ltd. vs Commissioner**[8]

c) **Commissioner of service tax vs M/s. Afflatus International**[9]

Submissions on behalf of Revenue

9. Learned authorised representatives for the Revenue support the impugned order. They assert that this is not a case of rendering a non-taxable service. The service was taxable and the appellant was entitled to an exemption notification which it had not claimed. Therefore, it squarely

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[7] **(2023) 11 CENTAX 184 (Tri-Chandigarh)**
[8] **2022(9) TMI 844-CESTAT Hyderabad**
[9] **2023(5) TMI 975**

falls within the scope of service tax and section 11B applies in its full force.

10. Insofar as the reliance of the appellant on the decision of the Larger bench in **Balaji Warehouse** is concerned, learned authorised representatives point out that this view of the Larger bench of the Tribunal has been overruled by the judgment of the High Court of Delhi in **BT (India) Pvt. Ltd.[10].**

Findings

11. We have considered the submissions on both sides and perused the records. The facts of the case are not in dispute. The appellant rendered a taxable service, self-assessed service tax, paid it, and filed ST-3 returns. While self-assessing, it could have claimed the benefit of an exemption notification which it had not claimed. Neither has the Central Excise officer modified the assessment invoking section 72 of the Finance Act nor has the self-assessment been appealed against before the Commissioner (Appeals).

12. The appellant has directly filed a refund claim after over one year from the payment of service tax and this claim was made under section 11B of Excise Act as made applicable to the Finance Act.

13. The nature of assessment and refunds were examined by the Supreme Court in **Priya Blue Industries vs Commissioner of Customs (Prev)[11]** which was a Customs

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[10] (2023) 13 CENTAX 89 (Del.)
[11] 2004(172) ELT 145 (SC)

case and **Collector of Central Excise vs Flock (India) Pvt. Ltd.** which was a central excise case. In both judgments, the Supreme Court held that refund can only be sanctioned in pursuance of the assessment not such as to have the effect of changing the assessment.

14. After these judgments, there have been changes in the law and self-assessments were introduced. The question which arose is if there was only self-assessment and no re-assessment by the officer, if the refund could be sanctioned contrary to the self assessment. This was answered by a larger bench of Supreme Court in negative in **ITC Ltd. vs Commissioner of Central Excise, Kolkata IV[12].** It has been held that all assessments, including self-assessments are appealable and unless the assessment is modified, no refund could be sanctioned so as to change the assessment. The reason for this is the refund proceedings are in the nature of execution proceedings and they cannot be used to re-determine the liabilities. Paragraph 44 of this judgment is reproduced below:

> **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

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[12] **2019 (368) E.L.T. 216 (S.C.)**

> 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).
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> **(emphasis supplied)**

15. Thus, it was held that through refund proceedings, the assessment (including self-assessment) cannot be modified. Through **ITC Ltd.,** a batch of matters were disposed of. The discussion in this judgment was largely based on the provisions of Customs Act but the principle laid down was clear that refund proceedings are only in the nature of execution proceedings and cannot change the assessment.

16. However, there were conflicting orders of different benches of this Tribunal on whether **ITC Ltd** would apply to refund applications of service tax where there was only self-assessment. The matter was therefore, referred to the larger bench in **Balalji Warehouse.** Through a majority decision of two to one, the larger bench decided that **ITC Ltd.** will not apply to service tax matters. **This decision has been relied upon by the appellant before us.**

17. The same question was before the High Court of Delhi in **BT(India) Pvt. Ltd. which decision is relied upon by the Revenue before us.** The appellant claimed refund under Rule 5 of Cenvat Credit Rules on the ground that it had exported some services and had self-assessed its service tax accordingly and had filed returns. The department rejected the refund holding that the services did not qualify as export

of services. Through a detailed order and judgment, the High Court of Delhi held that **ITC Ltd.** applies to service tax refunds also and the refunds are in the nature of execution proceedings and they have to be as per the assessment (even if it is self-assessment). The relevant portions of this judgment are as follows:

> 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 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 proceedings.**

18. Thus, the legal position is loud and clear. Refund proceedings are in the nature of execution proceedings and they cannot modify an assessment including self-assessment. Refund can only be sanctioned or denied as per the assessment- be it self-assessment by the assessee or the best judgment assessment by the officer. This legal position will not and cannot vary depending on which side it favours. The law laid down in **ITC Ltd.** and **BT (India) Pvt. Ltd.** applies whether the claimant will get refund as a result or will be denied refund as a result. In neither case can the refund, which is in the nature of an execution proceeding be used to alter the assessment. Thus, the order of the Larger bench of this Tribunal in **Balaji Warehouse** interpreting the

applicability of **ITC Ltd.** to service tax matters relied upon by the appellant has been clearly overturned by the High Court of Delhi in **BT (India) Pvt. Ltd. Clearly, ITC Ltd. applies to service tax matters also.**

19. Since the appellant had self-assessed service tax without applying the notification and the assessment has not been modified, it cannot be modified now in the refund proceedings. As per the self-assessment, the appellant was not entitled to the refund. In view of the above, the appeal is rejected and the impugned order is upheld.

(Order pronounced in open court on **29/04/2024**.)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

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

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