CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 85055 OF 2019

[Arising out of Order-in-Appeal No: NA/GST&CX/A-III/MUM/154/18-19 dated 27th July 2018 passed by the Commissioner (Appeals) – III, GST & CX, Mumbai.]

Pfizer Ltd …***Appellant***
1802/1901, The Capital, Plot No. C-70, G Block
Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051

versus

Commissioner of CGST & CX ***…Respondent***
Mumbai East
12th Floor, Lotus Info Centre, Station Road, Parel (E)
Mumbai – 400 012

WITH

SERVICE TAX APPEAL NO: 86187 TO 86189 OF 2020

[Arising out of Order-in-Appeal No: NA-GST-A-III/MUM/64 to 66/2020-21 dated 23rd July 2020 passed by the Commissioner GST and CX, (Appeals – III), Mumbai.]

Pfizer Ltd …***Appellant***
1802/1901, The Capital, Plot No. C-70, G Block
Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051

versus

Commissioner of CGST & CX ***…Respondent***
Mumbai East
12th Floor, Lotus Info Centre, Station Road, Parel (E)
Mumbai – 400 012

APPEARANCE:

Shri Sanjeev Nair, Advocate for the appellant

Shri Nitin Ranjan, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR S K MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A/ 85493-85496/ 2023

DATE OF HEARING: 24/11/2022
DATE OF DECISION: 24/03/2023

PER: C J MATHEW

The rejection of four separate claims, filed by M/s Pfizer Ltd and by M/s Wyeth Ltd (since merged with M/s Pfizer Ltd) for refund of ₹ 7,32,07,683 and ₹ 76,66,164 discharged as tax liability under Finance Act, 1994 between April 2013 and December 2013 and of ₹ 7,83,72,568 and ₹ 30,13,679 between January and September 2014, by the original authority in four orders and confirmed thereon in one order[1]of Commissioner of CGST & Central Excise (Appeals-III), Mumbai disposing off one appeal and in another order[2] of the same authority disposing off three appeals upon remand by the Tribunal for consideration on merit, are before us as four separate appeals.

2. Considering the manner in which the tax liability, discharged by two providers of service to each other for the same period, is sought to be returned to one of them in appeal before us, marshalling

[1] [order-in-appeal no. NA/GST&CX/A-III/MUM/154/18-19 dated 27th July 2018]
[2] [order-in-appeal no. NA/GST/A-III/MUM/64 to 66/2020-21 dated 23rd July 2020]

of facts would not be out of place. M/s Pfizer Ltd and M/s Wyeth Ltd had been rendering service to each other in pursuance of which tax liability under section 66B of Finance Act, 1994 on the consideration received thereupon was regularly being deposited in the Consolidated Fund of India as prescribed in Service Tax Rules, 1994. Following the acquisition of the overseas parent group of the latter by the overseas parent of the former, the amalgamation of the two entities in India was commercially inevitable and the Board of Directors of the appellant company approved resolution for such merger on 23rd November 2013. For reasons that are patent, the ‘appointed date’ under company law was retrospectively placed as 1st April 2013 and statutory approval of the scheme of amalgamation, sought *vide* petition dated 1st February 2014 from the Hon’ble High Court of Bombay, was accorded on 31st October 2014 without alteration of the ‘appointed date’ as proposed. With the reasoning, that the recipient of some ‘taxable service’ had, with retrospective effect from 1st April 2013, been subsumed in the provider of some ‘taxable service’ and, thereby, immunized, as service rendered to itself is, from liability to tax, refund of the amounts discharged was claimed in applications of 29th April 2014 and 20th May 2015. The endorsements of other monitorial agencies in the *interregnum* notwithstanding, that shareholder approval was accorded only on 16th April 2014 has been put forth as note-worthy by Learned Authorized Representative along with the fact that both taxpayers made the first set of claims before the scheme of amalgamation had received final statutory approval.

3. In the first of the appeals, we take note that the original authority had sought clarifications, including the cause for filing of claim before scheme of amalgamation had obtained statutory approval, and, consequent upon grant of personal hearing, held that the claim was substantially barred by limitation with reference to the date on which the application could have been filed following the approval of the scheme. It was further held that the tax liability, pertaining, as it did, to the period before the date of petition to the Hon'ble High Court, had been discharged when the two entities were separate and could not, therefore, be adjudged as having been levied without authority of law. Finally, it was held that, even if the claim of the service being outside the scope of taxation was accepted, section 73A of Finance Act, 1994 operated to govern disposition of the amounts deposited with the exchequer.

4. Before the first appellate authority, it was contended by the appellant that the notice issued to them was restricted only to the objection that claim was premature and that, by rejection for non-eligibility, under section 73A of Finance Act, 1994, for return of excess deposit, the original authority had traversed beyond the scope of show cause notice. In the claim for refund of tax of ₹ 76,66,164,

paid by M/s Wyeth Ltd for the period from April 2013 to December 2013 and filed before the scheme of amalgamation had been approved by the Hon'ble High Court, which the original authority rejected on identical grounds as the claim of M/s Pfizer Ltd same period, the challenge before the first appellate authority was met with the same response.

5. The other two claims for refund of tax of ₹ 7,83,72,568 paid by M/s Pfizer Ltd and ₹ 30,13,679 paid by M/s Wyeth Ltd for the period from January 2014 to September 2015 were rejected, notwithstanding the filing after scheme of amalgamation had obtained approval of the statutory authority, on a ground common to the other two, *viz.*, that the obligation under section 73A of Finance Act, 1994 precluded grant of refund besides holding that failure to challenge the assessment was fatal to entitlement for refund and that ₹ 2,34,67,461 and ₹ 7,78,073 respectively were barred by limitation of period prescribed in section 11B of Central Excise Act, 1944.

6. *Ex facie,* the lower authorities do not appear to have rendered finding on the liability to tax for the period covered by the scheme of amalgamation preceding the approval granted by the Hon'ble High Court though the decision of the Tribunal in *Usha International Ltd v. Commissioner of Service Tax, New Delhi [2016(43)STR 552(Tri-Del)]*, with particular emphasis on

> *'6. We have considered the contentions of both sides. We find that as per the scheme of arrangement between JEW and Usha International and Shiv Industries, appointed date or transfer date with regard to agreement/merger was stipulated in para 1 part 1.3 of the said scheme of arrangement. It stated as under:*
>
> > *"1.3 Appointed date or Transfer Date" means first day of April, 2007 or such other date(s) as the Hon'ble High Court may direct:*
>
> *We find from the order of the Hon'ble High Court that it did not direct appointed date or transfer date to be any different date from 1st April, 2007. We find that para 8.1 of the said scheme of arrangement states as under:*
>
> > *"8.1 "The Transferor Companies shall carry on and be deemed to carry on all its business and activities and stand possessed of its properties and assets for and on account of and in trust for the Transferee Company and all the profits accruing to the Transferor Companies or losses arising or incurred by it shall, for all purposes be treated as the profits or losses of the Transferee Company, as the case may be."*
>
> *As per the above quoted paras, it is clear that pending the approval and sanction of the scheme by the Hon'ble High Court, transferor company carried on its business and activities for and on account of and in trust for transferee company. In these circumstances the only inescapable conclusion which emerges is that the amalgamation was effective from 1-4-2007 even if its approval by the Hon'ble High Court and the letter of Registrar of Companies approving change of name of JEW to Usha International.'*

which relied upon the decision of the Hon'ble Supreme Court in *Marshal Sons & Co (I) Ltd v. Income Tax Officer [1997 (2) SCC 302]* and of the Hon'ble High Court of Andhra Pradesh in *State of Andhra*

Pradesh v. Jindal Strips Ltd [(2007) 10 VST 777], had been cast as binding on the present facts. That judicial determination has been cited in this appeal, too, to challenge the confirmation of rejection of the claim in the absence of explicit finding in the impugned order that claim would have to be considered as premature till the scheme of amalgamation is well and truly closed. As this decision is at the core of the benefit sought by the appellant, we intend deal with it at the appropriate stage.

7. The elephant in the room is the arrogation of empowerment under section 73A of Finance Act, 1994 as impeding sanction of claim, premature or otherwise, for refund of tax not liable to be paid by operation of law or by transformation from circumstances permitting levy. Additionally, for the tax discharged after the approval of the Hon'ble High Court, bar of limitation and failure to have the self-assessment set aside, justified as necessary precedent as held by the Hon'ble Supreme Court in *ITC Ltd v. Commissioner of Central Excise, Kolkata-IV [2019-TIOL-418-SC-CUS -LB]*, were also invoked.

8. While the inapplicability of section 73A of Finance Act, 1994 is built upon the proposition of erasure of 'any other person' receiving service by deeming of the provider and recipient to be the same through retrospective legislation or, as in the present instance, through

retrospective effect of law placing it, thereby, beyond even the pale of that taxation which, by specific deeming in law reverses the flow of commercial engagement, there is an incidental argument of Learned Counsel that appellant had not been placed on notice before the provision was invoked to their detriment. We find that though the original authority had not proposed rejection of eligibility to sanction of refund on such ground in the notice and, at the same time, take note that the contest thereto in appeal has been ignored in the impugned order. According to Learned Authorized Representative, the Tribunal, in *Oil & Natural Gas Corporation Ltd v. Commissioner of Service Tax, Mumbai [2011 (24) STR 212 (Tri-Mum)]*, had held that the refund provision in Central Excise Act, 1944, as applied to Finance Act, 1994, did not mandate the issue of notice as pre-requisite for rejection of claims.

9. There is no doubt that the observation of the Tribunal therein does seem to suggest as much but, in our view, that merely appears to be intended, in a particular context, as exposition for laying the groundwork for the substantive finding that disallowance of the claim for refund therein by discarding the very submissions made by the claimant would overwhelm any representation that procedural infirmity is fatal to the proceedings when such notice is superfluous to the entire exercise. That view may be summarized thus: as, even without taking into account the issues decided without proposal in the

notice, the claim for refund would have been rejected, contention that absence of notice on other grounds, that may have also contributed to rejection, should set aside the rejection is not tenable. Consequently, that ruling of the Tribunal would be binding precedent only if ascertainment of circumstances determines that lack of notice is fatal to withholding of refund.

10. Section 73A of Finance Act, 1994 is a special provision to forestall undue deprivation of recipient of service at the hands of provider of service by contriving of tax measure but, essentially, it places burden of compliance on the person who, *vis-à-vis* the recipient, is proxy for the State and empowers recovery in the event of non-compliance. It is surely not intended as enablement for transforming tax revenue received in the Consolidated Fund of India to that of deposit for disposition in any manner detailed therein. Even if such enablement is conjectured, and probably owing to it, the mechanics of tax administration mandate prior notice of intent with lack thereof foreclosing recourse to section 73A of Finance Act, 1994.

11. Furthermore, a careful perusal of section 11B of Central Excise Act, 1944 elicits the conclusion that option for rejection of claim for refund of tax that was not payable at all is not contemplated therein; the only substantive alternatives before the competent authority are to credit the Consumer Welfare Fund by default unless, subject to

compliance with the specified circumstances, return of the amount to the claimant is justified. Rejection is contingent only upon satisfaction on the part of the statutory authority that tax liability is mandated by law and, that too, preceded by notice of intent not to sanction refund. Even the saving grace of adherence to the letter of the law, by recourse to section 73A of Finance Act, 1994 after sanction of refund, is glaringly absent. Hence, we do not find any reason to venture upon confirming the legality of recourse to that special provision in Finance Act, 1994.

12. On the contention of Learned Authorized Representative that the decision of the Hon’ble Supreme Court in *ITC Ltd v. Commissioner of Central Excise, Kolkata-IV [2019 (368) ELT 216 (SC)]* precluded entertaining of refund claim unless preceded by recourse to challenge of assessment, and, indeed, of self-assessment, there is no doubt that the Tribunal in *JK Industries Ltd v. Commissioner of Central Excise, Indore [2006 (3) STR 14 (Tri-Del)]* endorsed the legality of tax deposited upon self-assessment but the peculiar circumstances of the appeal herein, premised on the law declared by the Hon’ble Supreme Court in *re Marshal Sons & Co (I) Ltd*, calls for disposal on its own factual matrix and uninfluenced by the decision in *re JK Industries Ltd* in which the plea of the appellant was, primarily, that

> *'2.1….. since the amendments brought by Finance Act, 2000 merely justify the levy but did not make any provision for recovery of service tax in the Act in relation to the services provided by goods transport operators during 16-11-1997 to 2-6-1998, no recovery could be made and therefore the amended provisions justifying chargeability with, retrospective effect remained ultra vires. It was pleaded that Section 116 of the Finance Act, 2000 did not amend any of the provisions of recovery of service tax that was not deposited for the period from 16-11-1997 to 2-6-1998. Moreover, the appellant could not have foreseen that there would be a retrospective amendment, and that, by the time it was introduced more than six months had elapsed. The amendment without the machinery provisions of recovery could not empower the revenue authorities to recover service tax by resorting to the provisions of Section 73 of the Act.…'*

prompting the Tribunal to hold that

> *'9. The service tax paid on the basis of self-assessment as per the statutory provision was a valid collection of tax by the government and therefore, it was in no way refundable to the appellant was liable to pay the same under amended provisions.….'*

13. Insofar as the case of Learned Authorized Representative, by relying upon the decision of the Hon'ble Supreme Court in *re ITC Ltd*, that self-assessment attains finality in the absence of challenge, the Tribunal has, as pointed out by Learned Counsel, held in *Cadila Healthcare Ltd v. Commissioner of Service Tax, Ahmedabad* that

> *'4.6… On careful reading of the said judgement, we find that*

the issue involved in the ITC case is that whether non-filing of appeal against assessed Bills of Entry will deprive the importer is right to file a refund claim under Section 27 of the Customs Act, 1962. In the Customs matter, the appellant needs to file appeal against any decision or order passed by the officer of Custom clover in the rank than the Principal Commissioner of Customs or Commissioner of Customs. An appeal can be filed before the Commissioner (Appeals) in terms of Section 128 of the Customs Act. Unlike Service Tax, in customs even though self-assessment is done by the assessee, but the same is verified and allowed the clearances by the Custom officer on the Bills of Entry. It is that Bills of entry which is treated as order of assessment and any aggrieved person can file appeal against such as order of Bill of Entry. In the Service Tax matter, the assessee simply filed the ST-3 return and no order was passed by the departmental officer which can be challenged by way of filing appeal before the Commissioner (Appeals)….

4.7. As per the plain reading of the above Section 85 (1), it provides for filing an appeal before the Commissioner (Appeals) only in case an order is passed by an officer below the rank of Principal Commissioner or Commissioner of Central Excise. In the case of self-assessment of Service Tax there is no order of assessment passed by any officer below the rank of Principal Commissioner or Commissioner of Central Excise. Therefore, there is no provision corresponding to Section 47(2) of Customs Act, 1962 in the Finance Act, 1994. Therefore, there is a clear distinction between the assessment under Customs and Service tax. Therefore, the ratio of ITC Ltd. ease cannot be applied in the matter of Service Tax.…'

14. To counter the finding in the impugned order of the bar of

limitation operating owing to elapse of more than one year in filing the claim for refund from the date of invoice/date of payment, Learned Counsel argued that the decision of the Tribunal in *Indian Oil Corporation Ltd v. Commissioner of Service Tax, Mumbai-I [2015 (37) STR 575 (Tri-Mumbai)]* had, in such cases of absorption, determined the relevant date to be the date of amalgamation. It was also contended that the impugned order had failed to examine this aspect and, in the light of the decision *supra*, to be held as having accepted the contention of the appellant on that score. We do not agree that the lack of finding is tantamount to approval of the claim referred in the grounds placed before the first appellate authority. The applicability of 'relevant date', determined by the decision in *re Indian Oil Corporation Ltd,* will arise only if the claim of the appellant that retrospective effect accorded to amalgamation does erase taxability, too, by the same breath.

15. For the tax paid between April 2013 and December 2013, amounting to ₹ 7,32,07,683 and ₹ 76,66,164, we merely need to examine the validity of rejection on ground of the application being premature and the submission of the appellant that it was with the process of amalgamation having been set in motion, and not with the final order, that the existence of the merged entity was erased for the purpose of taxing under Finance Act, 1994. We find that the decision in *re Usha International Ltd* and its impact on the matrix of the

disputed refund claim has been ignored by the lower authorities. In the matter before us, the impugned transactions certainly occurred before the stamp of statutory finality was affixed to the scheme but, undoubtedly, after the ‘appointed date’ confirmed therein. This appears to have been the issue in *re Usha International Ltd* and, while the decisions cited, *viz. Commissioner of Service Tax, Delhi–I v. ITC Hotels Ltd [2012 (27) STR 145 (Tri-Del)]* and *Indian Oil Corporation Ltd v. Commissioner of Service Tax, Mumbai-I [2014-TIOL-2849-CESTAT-MUM]*, are not dissimilar except for tax authorities placing emphasis on the several approvals effectuating the merger or amalgamation, the thread of continuity leading back from the approval of the appointed date by the jurisdictional High Court to the decision of the Board of Directors for setting out on the path to amalgamation is the underlying rationale for acknowledgement that the transferor has ceased to exist.

16. However, an aspect that is not on record in *re Usha International Ltd*, and other decisions rendered by the Tribunal, is the nature, and extent, of transactions that were in dispute before the decision to merge was formulated. Undoubtedly, a plethora of procedures precede the petitioning before the jurisdictional High Court and the elapse of time taken for grant of approval cannot impinge upon the contractually agreed date of effect of merger or amalgamation save in circumstances of express declaration by the

High Court. In the present dispute, the scheme of merger incorporates an ‘appointed date’ that is antecedent to the placement of the scheme before the competent statutory authority under company law. Or, for that matter, even before the Board of Directors resolved to proceed with the amalgamation. Hence, the sanctity of the ‘appointed date’, except for matters appurtenant to relevant determination under such other relevant laws, is not universally applicable.

17. The appellant sought to impose a date of effect well before the elapse, contemplated in the several decisions *supra*, to obviate the potential for disruption of the intended timetable. We have no doubt that that amalgamation is effective from 1st April 2013 but, in our view, the retrospective effect will impact only such aspects as are incorporated in the scheme of amalgamation. The decisions of the Hon’ble Supreme Court in *re Marshal Sons & Company (I) Ltd* and of the Hon’ble High Court of Andhra Pradesh in *re Jindal Strips Ltd* were in the context of proceedings under Income Tax Act, 1961 and the Central Sales Tax Act, 1956 that are predicated on annual assessment to tax. Under Finance Act, 1994, the levy, which has been judicially described as ‘destination based consumption tax’, was governed, during the period of dispute, by the Point of Taxation Rules, 2011. In that circumstance, the fictional erasure of service transactions, completed in the period prior to seeking the approval of such amalgamation, is not covered by the decisions in *re Marshal*

Sons & Company (I) Ltd and in *re Jindal Strips Ltd*. The application of those decisions to the facts in dispute in *re Usha International Ltd* does not extend to the present dispute where the chronology of events precludes retrospectivity beyond that particularised in the scheme.

18. The scheme involves transfer of undertakings from transferor to the transferee while obliterating the former and the statutory process is envisaged to provide life to the 'cutting', *i.e.*, the undertaking, while it is yet under graft on another artificial person, *viz*., transferee. In the process, any aspect of the undertaking that has an existence beyond the date of placement before the jurisdictional High Court is connected to the 'life support' and hence the imperative of retrospective acknowledgement of such. Thus, any transaction that creates liability or generates an asset in the books of the transferor is afforded the privilege of artificial life. Transactions that are completed, and without a trace of liability or accrual, cannot be revived for subjecting to the test of existence in the new entity. The scheme of amalgamation does not even pretend to resurrect such completed performance of service. Accordingly, the principle of retrospectivity from the 'appointed date' is limited to assets and liabilities that subsist as on date of statutory approval. Consequently, tax liability discharged before the actual date of approval of amalgamation under Finance Act, 1994 pertains to existence as separate persons and, therefore, not immunized therefrom.

19. The assessed liability under Finance Act, 1994, duly discharged and being neither provisional nor tentative, is beyond the scope of re-determination of levy merely because of a scheme of amalgamation.

20. The appeals are without merit and are dismissed.

(Order pronounced in the open court on 24/03/2023)

(S K MOHANTY)	**(C J MATHEW)**
Member (Judicial)	***Member (Technical)***

**/as*