CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Service Tax Appeal No. 86998 of 2019

(Arising out of Order-in-Appeal No. NSK-EXCUS-000-APPL-008-19-20 dated 11.04.2019 passed by the Commissioner of Central Excise & GST (Appeals), Nashik)

M/s. East West Seeds India Pvt. Ltd. **Appellant**
Gut No.66, Village Narayanpur Bk,
Post-Waluj, Taluka-Gangapur,
Dist. Aurangabad 431 133.

Vs.

Commissioner of C.E. & ST, Aurangabad **Respondent**
N-5, Town Centre, CIDCO, Aurangabad 431 030.

Appearance:

Shri Sachin Mishra, Advocate, for the Appellant
Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 06.12.2022
Date of Decision:03.03.2023

FINAL ORDER NO. A/85317/2023

This appeal is directed against the Order in Appeal No NSK-EXCUS-000-APPL-008-19-20 dated 11.04.2019 of the Commissioner of Goods & Service Tax and Central Excise (Appeals), Nasik. By the impugned order, Commissioner (Appeals) upheld the Order in Original No. R-84/ST/RFD/AC/RURAL/18-19 dated 17.12.2018 passed by the Assistant Commissioner, Goods and Service Tax, Aurangabad Rural Division rejecting the refund claim for refund of service tax filed by the appellant under provisions of Sub-Section 9(b) of Section 142 of the CGST Act, 2017.

2.1 Appellant was having Service Tax registration no. AABCE1237FST001 for providing various services, and for payment of service tax on reverse charge mechanism, in respect of the services imported by them The appellant is paying trademark fee for usage of the trademark of its group company namely, East West Seed International Ltd, Thailand (EWSILT).

2.2 Appellant had entered into contract for trademark fees with its associated enterprise EWSILT for use of trademark wef. 01.01.2017. As on 30.06.2017, the appellant had made provision of Rs.2,28,27,342/- for the contract based on the initial communication from EWŞILT. Accordingly, the appellant paid the service tax @15% on Rs.2,28,27,342/- amounting to Rs.34,24,102/-. Subsequently the period of the agreement got revised to 01.04.2017 to 30.06.2017 and the amount of fee also was reduced to Rs.59,39,180/-. The service tax liability of the reduced fee amount was Rs.8,89,574/-, thus the service tax paid in excess amounting to Rs.25,34,528/- (Rs.34,24,102 - Rs.8,89,574) is claimed as refund.

2.3 On verification of the subject Refund Claim, it was observed that

- The claimant has not submitted any document on which basis the Invoice No. T-17/003 dated 31.05.2017 for USD $ 241000 and Invoice No. T-17/008 dated 30.06.2017 for $ 112000 has been issued by their associate unit viz. East West Seed International Ltd, Thailand.
- The claimant has not submitted any document evidencing that they were not using the trademark of their associated unit situated at Thailand prior to 01.06.2017.
- The claimant has submitted revised Invoice No. T-17/017 dated 20.10.2017 raised by their associate unit Viz. East West Seed International Ltd, Thailand which is not signed by the issuing person.
- The Claimant appears to be filed ST-3 return for the period 01.04.2017 to 30.06.2017 on 14.08.2017 wherein the claimant has shown value of 'Intellectual Property Services other than copyright' in the month of June, 2017 as Rs.2,28,27,342/-. The claimant themselves assessed the Service Tax liability and accordingly paid vide Challan No. 02701 dated 06.07.2017 amounting to Rs. 34,24,102/-.
- Sub-Rule (1) of Rule 7B of Service Tax Rules, 1994 which provides an assessee to submit a revised return, in Form ST-3, in triplicate, to correct a mistake or omission, within a period of [Forty Five days] from the date of submission of the return under rule 7. The claimant has appears to be

not filed revised ST-3 return for the period April-June, 2017.

- As per Sub-Section 9(b) of Section 142 of the CGST Act, 2017 where any return, furnished under the existing law, is revised after the appointed day but within the time limit specified for such revision under the existing law and if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person, the same shall be refunded to him in cash under the existing law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.
- Since claimant has not filed the revised return within a period of 45 days from the date of original return filed, hence it appears that the refund is not admissible to the claimant.
- The amount of service tax paid by the claimant through TR-6 challan is based on their own self-assessment. The said amount has been deposited by them vide challan without any request or direction from the department. It appears that, this amount, which has been paid by the claimant, would get covered under the self-assessment and discharge of service tax liability by the claimant appears to be not refundable to the claimant.

2.4 Therefore, a Show Cause Notice bearing Sr. No. R-09/ST/DC/RURAL/2018-19 dated 09.07.2018 asking them to show cause as to why, the refund claim of 25,34,574/- should not be rejected under Section 11B of Central Excise Act, 1944 for the reasons stated above

2.4 The show cause notice was adjudicated as per the order in original referred in para 1 above and the appeal filed by the appellant before Commissioner (Appeal) has been rejected as per the impugned order.

2.5 Aggrieved appellant have filed this appeal.

3.1 I have heard Shri Sachin Mishra, Advocate for the Appellant and Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:-

- When the excess payment of service tax is not in dispute, the appellant is very much eligible for refund of excess service tax under section 11B of the central excise act, 1944
- Issue is squarely covered by decision of Hon'ble CESTAT in Piramal Enterprises Ltd. [2016 (42) STR 17 (T)]
- Without prejudice, the appellant is eligible for refund in cash under rule 6(3)/6(4a) of service tax rules, 1994 read with section 142(3) and 142(5) of CGST Act, 2017.
- Since, after 01.07.2017, neither credit can be taken nor adjustment can be done under Rule 6 (3)/ (4A) of Service Tax Rules, 1994, cash refund under Section 142(3) / 142(5) of CGST Act, 2017 should be granted to the Appellant
- Without prejudice to the above submission, the government cannot retain any amount, without any authority of law. Article 265 of the constitution of India, bars to collect any tax without any authority of law. The relevant extract is reproduced hereunder:
- "265. Taxes not to be imposed save by authority of law No tax shall be levied or collected except by authority of law."
- The finding of the ld. Commissioner (appeals) that self-assessed tax is not refundable, is erroneous. The Appellant also rely upon the decision of Cadila Healthcare Limited v. CST Service Tax, 2021 (4) TMI 1157 CESTAT Ahmedabad in the context of Section 70 of the Finance Act, 1994.
- Without prejudice, the appellant could not have filed revised return for the period in dispute and therefore, non-filing of revised form st-3 return cannot be a ground to reject the refund under section 142(9)(b) of CGST Act, 2017
- Section 142(9)(b) of the CGST Act contains transnational provisions for refund of the tax paid under the existing law with the Ld. Commissioner (Appeals) has been wrongly interpreted. In the present case, the Appellant has not

filed the revised ST-3 and therefore Section 142(9)(b) of the CGST Act shall not apply. Additionally, the non-filing of such return is a procedural lapse and the refund cannot be denied on account of procedural lapses.

- In the present case, the credit note was issued by EWSIL on 31.08.2017 and the revised invoice on 20.10.2017 making the filing of ST-3 within the prescribed time limit impossible. Thus, non-filing of ST-3 is a procedural lapse, hence, refund cannot be denied on this ground.

3.3 Arguing for the revenue learned authorized representative submits:-

- This is basically a case of filing of refund application having been pre-maturely filed before the order of assessment (i.e. order of self assessment} being varied, therefore, the refund claim appears to be legally barred in as much as the assessment made by them was not varied on its merit by any authority.
    - Priya Blue Industries Ltd. [2004 (172) ELT 145 (S.C.)]
    - Maharashtra Cylinders Pvt. Ltd. [2010 (259) ELT 369 (BOM)]
    - Flock India Pvt Ltd [2000 (120) ELT 285 (SC)]
    - ITC Ltd [2019 (368) ELT 216 (SC)]
- As per Para 10 of the O-in-A the lower authority have already considered the above contentions of the appellant in the impugned order and has held that refund was not eligible to the appellant in view of the provisions of Sub-section 9(b) of Section 142 of CGST Act, 2071.
- As per Para 11 of the O-in-A, the Sub-section 9(b) of Section 142 of Act, Ibid, requires the revision of return furnished under the existing law after the appointed day to be made within the time limit specified for such revision. In the instant case there is no such possibility as already stated by the appellant. Thus is the above circumstances, the refund claim does not qualify the relevant provisions of the CGST Act, 2017 and hence their rejection by the lower authority deserve to be upheld.
- As per Para 12 of the O-in-A "The transitional provisions regarding the dates of filing returns and recording of

transactions of payment of tax dues by the persons making such declaration is explicit and therefore there is not scope for any other interpretation. It is settled law that salutary principle in the law is that anything prescribed to be done in particular manner, has to be done in that manner only. This authority being creature of the statue is therefore bound by the restriction prescribed in the law. The contention of the appellant that such non-filing of ST-3 is a procedural lapse is not acceptable.

- As per Para 13 of the O-in-A unless the assessment germane to an issue is varied or altered, the question of refunding the duty paid as self-assessment cannot be permitted.
- The appellant have not transferred the said amount to TRAN-1 filed under GST regime. The availment of cenvat credit is governed by the provisions of Cenvat Credit Rules, 2004, as they existed. It was open for the appellant to avail the cenvat credit after satisfying the required conditions governing availment of cenvat credit. There could be no estoppel to the appellant to avail the cenvat credit if it is legally available and within the parameters of Cenvat Credit Rules, 2004. The mere fact that they did not avail such cenvat credit would not entitle them for refund of purported service tax.
- Appellant paid such service tax of Rs. 34,24,102/-, voluntarily on its own volition and assessment. It is also not the appellant's case that they made payment of such service tax under protest or at any stage they lodged any protest formally by way of any letter addressed to the departmental officers.
- In accordance with the ratio of the following judgments, both the orders of assessment as well as refund order cannot co-exist simultaneously and therefore before claim of refund is filed and processed the original order of self-assessment is required to be varied.
- Statutory limit has been intended by the legislature under Sub-Rule (1) of Rule 7B of the Service Tax Rules, 1994. This is a special provision which has been introduced into the statue for a particular purpose. The special provision

would thus override the other general provisions in the Act.

- Statutory limit has been intended by the legislature under Sub-section 9(b) of Section 142 of CGST Act. 2017. This is a special provision under, which has been introduced into the statue for a particular purpose. The special provision would thus override the other general provisions.
- the exemption and conditions provided under the Finance Act are required to be strictly complied with for availing its benefit and therefore exemption denied for non-observance of said conditions as provided under the Finance Act, keeping in mind ratio of following judgments (including the ratio of above judgment of Hon'ble Supreme in the case of ITC LTD, wherein it was held that - "Refund claim cannot be entertained unless the order of assessment or self assessment is modified in accordance with law by taking recourse to the appropriate proceedings")*;* -
    - JSW Dharamtar Port Pvt Ltd [2019 (20) GSTL 721 (Bom)]
    - Mafatlal Industries Ltd. [1997 (89) ELT 247 (SC)]
    - Ald Automotive Ltd. [2018 (364) ELT 3 (SC)]
    - Willowood Chemicals Pvt Ltd. [2018 (19) GSTL 228 (Guj)]
    - Doaba Cooperative Sugar Mills [1988 (37) ELT 478 (SC)]
    - Eagle Flask Industries Limited [2004 (171) ELT 296 (SC)]
    - Essar Bulk Terminal Salaya Ltd. [2019 (25) ELT 521 (Guj)]
    - Laxmi Solvex [2017 (3) GSTL 435 (T-Del)]
    - Malaysian Airlines [2010 (262) ELT 192 (Bom)]
    - R R Global Enterprises Pvt Ltd [2016 (45) STR 5 (AP)]
- The excess payment has arisen during the period after the appointed date, which is 01.07.2017, and all refund what so ever, be covered under the provisions of Section 142 of the CGST Act, Input Tax Credit under GST is purely a provision of CGST Act and CESTAT has no role in

interpreting or applying such provision taking into account the following judgments:-

- United Seamless Tubular Pvt Ltd. [2019 (28) GSTL 244 (T-HYD)]
- Bosch Electrical Drive India Pvt Ltd [Interim Order No 40019/2021 dated 22.10.2021, in Service Tax Appeal No 40010/2020]
- Aditya Steel Rolling Mills Pvt Ltd. [2020 (41) GSTL 323 (T-Hyd)]

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records the following findings for rejecting the appeal filed by the appellant:-

"9. It is the contention of the appellant that they had filed the original ST-3 return for the period 01.04.2017 to 30.06.2017 on 14.08.2017 wherein they disclosed the invoices for trademark received from EWSILT. However, the agreement was signed and executed on 1.06.2017 followed with the issuance of credit note on 31.08.2017 and revised invoice was issued on 20.10.2017 by EWSILT. Therefore, the last date for filing the revised return in the present case was 45 days from 14.08.2017 viz 28.09.2017. Since, they issued the credit note on 31.08.2017 and the revised invoice was issued on 20.10.2017, the appellant could not revise the return in time provided for revision of return.

10. The lower authority have already considered the above contentions of the appellant in the impugned order and has held that refund was not eligible to the appellant in view of the provision of Sub-section 9(b) of Section 142 of CGST Act,

2017. The sub section is extract below:

"142(9)(b) where any return, furnished under the existing law, is revised after the appointed day but within the time limit specified for such revision under the existing law and if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person, the same shall be refunded to him in cash under the existing law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section

11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act,"

11. On examining the facts of the case, it is observed that the appellant had paid service tax of Rs.34,24,102/- on 06.07.2017 on the basis of provision made in their books. They filed the ST-3 return for the period from 01.04.2017 to 30.06.2017 on 14.08.2017 showing transaction value of 2,28,27,342/- and payment of service tax amounting to Rs.34,24,102/-. They signed the Trademark Agreement on 01.06.2017, which was effective from 01.04.2017 whereas they had paid service tax on the provisions made from 01.01.2017 to 30.06.2017. This resulted is payment of excess service tax amounting to Rs.25,34,528/-. Credit note was issued to them by EWSILT on 31.08.2017 and the revised invoice was issued on 20.10.2017. The last date for filing revised return in the instant case was 28.09.2017 ie. 45 days from the date of filing original return. In the instant case the credit notes are raised on 31.08.2017 which is almost 2 months after the appointed day, whereas the provisions of Section 142 (5) of the Act, ibid, requires such taxpaying document to be recorded in the books of account of the person within a period of thirty days from the appointed day further extendable by another thirty days subject to sufficient cause being shown to the Commissioner. Thus, the transaction is beyond the purview of the said Section.

Further, the Sub-Section 9(b) of Section 142 of the Act, ibid, requires the revision of return furnished under the existing law after the appointed day to be made within the time limit specified for such revision. In the instant case there is no such possibility as already stated by the appellant. Thus in the above circumstances, the refund claim does not qualify the relevant provisions of the CGST Act, 2017 and hence their rejection by the lower authority deserve to be upheld.

12. The transitional provisions regarding the dates of filing returns and recording of transactions of payment of the tax dues by the persons making such declaration is explicit and, therefore, there is no scope for any other interpretation. It is a settled law that salutary principle in the law is that anything prescribed to be done in particular manner, has to be done in that manner only. This authority being creature of the statute is

therefore bound by the restriction prescribed in the law. The contention of the appellant that such non-filing of ST- 3 is a procedural lapse is not acceptable. As the appellant has cited no relaxatory provisions, their arguments lack any force.

13. One of the contentions raised by the appellant to assail the impugned order is that service tax paid on self assessment, as per the statutory provisions is valid collection of tax and that there is nothing in the said provisions to bar entitlement for refund in the case of excess tax paid; & have inter alia relied upon the case law of Joshi Technologies International vs UOI (Supra), and also on two other case laws of Ceat Tyres of India Ltd and KJV alloys Conductors P.Ltd (Supra). They have failed to appreciate that they having paid the amount of tax on a presumptive basis, had sufficient time to revise the return which opportunity was lost only on account of laches to follow the prescribed procedure for such revision, that could have permitted them for entitlement to refund. It is also not the appellant's case that the assessment carried out by them, purportedly on erroneous assumption, has been revised/reviewed/ annulled by any other means. By now it is settled law that a Refund Claim proceeding is not a Appeal proceeding to prevail upon any assessment including self assessment. The Hon'ble Bombay High Court, in the case law of Maharastra Cylinders Pvt Ltd [2010 (259) ELT 0369(Bom)] has laid down as under -

"8. Where the goods are cleared under the self removal procedure basis on approved classification list and approved price list, the clearances are on self assessment and unless such self assessment is varied or altered, the question of refunding the duty paid on self assessment does not arise at all. The Apex Court in the case of M/s. Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) [AIR 2004 S.C. 5115 - 2004 (172) E.L.T. 145 (S.C.)] has held that validity of an assessment cannot be considered while dealing with the refund claim. The said ratio would apply to the self assessment as well."

Therefore, unless the assessment germane to an issue is varied or altered, the question of refunding the duty paid as self-assessment cannot be permitted..

14. The other contentions of the appellant revolve around the premise, they had paid tax, which was not due, and hence the same should be refunded to them outright. However, it is to be understood that the excess payment has arisen during the period after the appointed date, which is 01.07.2017, and all refund whatsoever, be covered under the provisions of Section 142 of the CGST Act, which is discussed above. Thus, the refund sanctioning cannot go beyond the aforesaid provisions and therefore, the cannot consider any other form of scheme under which such refunds can be sanctioned.

15. Another aspect that is relevant here is that the ld. lower authority has not reckoned the issue with respect to the doctrine of unjust enrichment. It is observed that the appellant has also not submitted any grounds and evidences to rebut the presumption of having passed on the incidence of such duty to the customers or to any other person. Even then, if it is admitted that they have not passed the duty on further, it will not be possible to determine the same in any objective manner. In order to understand the doctrine of unjust enrichment, one needs to understand the concept of tax incidence, the shifting of the tax incidence and analyses of the same. In this regard, it would also be relevant to refer to such text reference from Encyclopedia Britannica cited in clause (iv) hereunder under the heading 'shifting and incidence'.

"What is a 'Tax Incidence'

A tax incidence is an economic term for the division of a tax burden between buyers and sellers. Tax incidence is related to the price elasticity of supply and demand, and when supply is more elastic than demand, the tax burden falls on the buyers. If demand is more elastic than supply, producers will bear the cost of the tax.

Analysis of Tax Incidence

Tax Incidence reveals which group, the consumers or producers, will pay the price of a new tax. For example, the demand for cigarettes is fairly inelastic, which means that despite changes in price, the demand for cigarettes will remain relatively constant. Let's imagine the government decided to impose an increased tax on cigarettes. In this case, the producers may increase the

sale price by the full amount of the tax. If consumers still purchased cigarettes in the same amount after the increase in price, it would be said that the tax incidence fell entirely on the buyers.

Source: https://www.investopedia.com/terms/t/taxincidence.asp

In economics, tax incidence or tax burden is the analysis of the effect of a particular tax on the distribution of economic …. welfare. …….. Tax incidence is said to "fall" upon the group that ultimately bears the burden of, or ultimately has to pay, the tax. The key concept is that the tax incidence or tax burden does not depend on where the revenue is collected, but on the price elasticity of demand and price elasticity of supply.

The theory of tax incidence has a number of practical results. For example, United States Social Security payroll taxes are paid half by the employee and half by the employer. However, some economists think that the worker bears almost the entire burden of the tax because the employer passes the tax on in the form of lower wages. The tax incidence is thus said to fall on the employee.[well be argued that in some cases the incidence of the tax falls on the employer. This is because both However, it could equally the price elasticity of demand and price elasticity of supply affect on whom the incidence of the tax falls. Price controls such as the minimum wage which sets a price floor and market distortions such as subsidies or welfare payments also complicate the analysis.

Source: https://en.wikipedia.org/wiki/Tax incidence

Definition of Incidence of Tax:

One of the very important subject of taxation is the problem of incidence of a tax. By incidence of taxation is meant final money burden of a tax or final resting place of a tax. It is the desire of every government that it should secure justice in taxation, but if it does not know as to who ultimately bears money burden of a tax or out of whose packet money is received, it cannot achieve equality in taxation.

Source: https://economicsconcepts.com/impact and incidence_of_tax.htm

TAXATION: Shifting and incidence

The incidence of a tax rests on the person(s) whose real net income is reduced by the tax. It is fundamental that the real burden of taxation does not necessarily rest upon the person who is legally responsible for payment of the tax. General sales taxes are paid by business firms, but most of the cost of the tax is actually passed on to those who buy the goods that are being taxed. In other words, the tax is shifted from the business to the consumer. Taxes may be shifted in several directions. Forward shifting takes place if the burden falls entirely on the user, rather than the supplier, of the commodity or service in question-e.g., an excise tax on luxuries that increases their price to the purchaser. Backward shifting occurs when the price of the article taxed remains the same but the cost of the tax is borne by those engaged in producing it-e.g., through lower wages and salaries, lower prices for raw materials, or a lower return on borrowed capital. Finally, a tax may not be shifted at all-e.g., a tax on business profits may reduce the net income of the business owner.

Source: https://www.britannica.com/topic/taxation/Shifting-and-incidence"

In the instant, case the appellant claims to have received the credit notes from M/s.EWSILT. However, they have not brought anything on record to establish the effect of such credit notes in their accounts. In the absence of any evidence in this regard, their claim for refund of such service tax cannot be accepted as from the definition of Incidence of Tax it becomes clear that what is meant by such incidence is a final money burden of tax or final resting place of tax. In this regard, it would be relevant to refer to the text reference cited in sub clause (iv) in the preceding para hereinabove which states that the incidence of tax may shift in any direction, forward, backward or to depress even the wages of the employees. Nevertheless, ultimate incidences of all taxes shift from business to the consumers. Mere reflection of such amounts in any account book does not reflect the status of actual shifting of incidence. I therefore, am of the considered view that the appellant has not brought forth any evidence to establish that they have not passed on the incidence of tax to any other person and have thus failed to

cross the bar of unjust enrichment in the instant case. The appeal therefore fails on this count too.

4.3 Assistant Commissioner has in order in original recorded as follows:

"4.4 I further find that the Claimant has filed ST-3 return for the period 01.04.2017 to 30.06.2017 on 14.08.2017 wherein the claimant has shown value of Intellectual Property Services other than copyright' in the month of June, 2017 as Rs.2,28,27,342/-. The claimant themselves assessed the Service Tax liability and accordingly paid vide Challan No. 02701 dated 06.07.2017 amounting to Rs. 34,24,102/-. The said amount has been deposited by them vide challan without any request or direction from the department. I also find that, this amount, which has been paid by the claimant, get covered under the self-assessment and discharge of service tax liability by the claimant.

4.5 I have gone through the provisions related to payment of tax under self assessment and filing of return as detailed in Section 70 of the Finance Act which is reproduced as under;-

"70. Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed."

Therefore, I find that the return filed under section 70 is conclusive and it is not open for the department to call the documents or other information to verify the return, unless the department has some reasonable grounds to believe that assessee has not paid service tax properly. The service tax paid on the basis of self-assessment as per the statutory provision is a valid collection of tax by the government and therefore, it is in no way refundable to the claimant who was liable to pay the same.

4.6 I also find that as per Sub-Rule (1) of Rule 7B of Service Tax Rules, 1994 which provides an assessee to submit a revised return, in Form ST-3, in triplicate, to correct a mistake or omission, within a period of [Forty Five days] from the date of submission of the return under rule 7. The claimant has not filed revised ST-3 return for the period April-June, 2017.

4.7 I also find that as per Sub-Section 9(b) of Section 142 of the CGST Act, 2017 where any return, furnished under the existing law, is revised after the appointed day but within the time limit specified for such revision under the existing law and if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person, the same shall be refunded to him in cash under the existing law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act. Since claimant has not filed the revised return within a period of 45 days from the date of original return filed, hence I find that the refund is not admissible to the claimant.

4.8 Further I find that where the claimant for any reason is not able to correctly estimate his service tax liability for any particular quarter or month, then he may request in writing to the AC / DC of Service Tax, as the case may be, giving reasons for payment of service tax on provisional basis and the AC / DC on receipt of such application may allow the assessee for payment of service tax on provisional basis on such value of taxable service as may be specified by him. I also find that after finalization of assessment he/she may either pay the differential Service Tax or file a refund claim, if Service Tax has been paid more during provisional assessment. I find that the claimant has failed to apply provisional assessment and hence they lost the opportunity. In view of this I do not find that the said amount is refundable to the claimant at this stage."

4.4 Undisputedly and admittedly appellant has paid certain amounts under reverse charge mechanism by making self assessment of service tax payable under the reverse charge mechanism, on the basis of the *"Trade License Agreement"* entered into with their principals at Thailand for the use of their trade name/ brand name. Subsequently the value of the taxable service got revised downwards as after negotiations the period of the agreement was revised and also the consideration to be paid. Accordingly the principals issued the credit note on 31.08.2017 for the period 01.01.2017 to 31.03.2017 and revised invoice 20.10.2017 for the period 01.04.2017 to 30.06.2017. For

the period 01.04.2017 to 30.06.2017 appellant had filed the return as prescribed under ST-3 format on 14.08.2017. The present claim for the refund of excess service tax paid has been made by the appellant on 03.04.2018. Appellant submit that as per Article 265 of the Constitution of India, Government cannot retain the excess of tax paid and the same needs to be refunded. There is no dispute about the preposition made, however it has to be noted that after examining the provisions of Central Excise Act, 1944 vis a vis article 265 of the Constitution of India a nine judges bench of Hon'ble Supreme Court has in case of Mafatlal Industries [1997 (89) ELT 247 (SC)], held as follows:

"18. Second situation is where the tax is collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts, i.e., an erroneous finding of fact. This class of cases may be called, for the sake of convenience, as illegal levy. In this class of cases, the claim for refund arises under the provisions of the Act. In other words, these are situations contemplated by, and provided for by, the Act and the Rules.

19. The above distinction is not only accepted in all jurisdictions but is also not disputed before us.

20. So far as the first category (unconstitutional levy) is concerned, there is no dispute before us that it is open to the person claiming refund to either file a suit for recovery of the tax collected from him or to file a writ petition under Article 226 of the Constitution for an appropriate direction of refund. The only controversy on this score is whether the manufacturer/payer is entitled to such refund where he has already passed on the burden of the duty to others.

21. With respect to the second category of cases, there is a good amount of controversy. While the Union of India says that such claims of refund should be put forward and determined only under and in accordance with the provisions of the Act and the Rules, the contention of the appellants-petitioners is that even in such cases a suit or writ is maintainable on the ground that the tax has been collected without the authority of law, i.e., contrary to Article 265 of the Constitution. In other words, while

according to the Union of India, such claims of refund should be filed within the time prescribed by the Act and the Rules and should and can be dealt with only under the provisions of the Act and the Rules, the appellants-petitioners say that such claims can be made in suits and writ petitions as well and that too without reference to the period of limitation prescribed in Rule 11 or Section 11B, as the case may be.

70. Re : (II) : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasise that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the ease may be, in the case of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? Kanhaiyalal is understood as saying that such a course is permissible. Later decisions commencing from Bhailal Bhai have

held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law.

So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. It is necessary to point out in this behalf that for filing an appeal or for adopting a remedy provided by the Act, the limitation generally prescribed is about three months (little more or less does not matter). But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law : The incongruity of the situation needs no emphasis. And all this because another manufacturer or assessee has obtained a decision favourable to him. What has indeed been happening all these years is that just because one or a few of the assessees succeed in having their interpretation or contention accepted by a High Court or the Supreme Court, all the manufacturers/Assessees all over the country are filing refund claims within three years of such decision, irrespective of the fact that they may have paid the duty, say thirty years back, under similar provisions - and their claims are being allowed by courts. All this is said to be flowing from Article 265 which basis, as we have explained hereinbefore, is totally unsustainable for

the reason that the Central Excise Act and the Rules made thereunder including Section 11B/Rule 11 too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature - no claim for refund is maintainable except under and in accordance therewith. The second basic concept of law which is violated by permitting the above situation is the sanctity of the provisions of the Central Excises and Salt Act itself. The Act provides for levy, assessment, recovery, refund, appeals and all incidental/ancillary matters. Rule 11 and Section 11B, in particular, provide for refund of taxes which have been collected contrary to law, i.e., on account of a mis-interpretation or mis-construction of a provision of law, rule, notification or regulation. The Act provides for both the situations represented by Sections 11A and 11B. As held by a seven - Judge Bench in Kamala Mills, following the principles enunciated in Firm & Illuri Subbaiya Chetty, the words "any assessment made under this Act" are wide enough to cover all assessments made by the appropriate authorities under the Act whether the assessments are correct or not and that the words "an assessment made" cannot mean an assessment properly and correctly made. It was also pointed out in the said decision that the provisions of the Bombay Sales Tax Act clearly indicate that all questions pertaining to the liability of the dealer to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct and whether a transaction is exigible to tax or not are all matters to be determined by the authorities under the Act. The argument that the finding of the authority that a particular transaction is taxable under the Act is a finding on a collateral fact and, therefore, resort to civil court is open, was expressly rejected and it was affirmed that the whole activity of assessment beginning with the filing of the return and ending with the order of assessment falls within the jurisdiction of the authorities under the Act and no part of it can be said to constitute a collateral activity not specifically or expressly included in the jurisdiction of the authorities under the Act. It was clarified that even if the authority under the Act holds erroneously, while exercising its jurisdiction and powers under

the Act that a transaction is taxable, it cannot be said that the decision of the authority is without jurisdiction. We respectfully agree with the above propositions and hold that the said principles apply with equal force in the case of both the Central Excises and Salt Act and the Customs Act. Once this is so, it is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article.

In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or

fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."

4.4 The principles as stated by the Hon'ble Apex Court as above have been subsequently re-iterated by them again and again and in the case of ITC Ltd. [2019 (368) ELT 216 (SC)] wherein the all the decisions of the Hon'ble Supreme Court has been referred.

"19. On behalf of the Union of India/Department, it is contended that self-assessment is an assessment. It is not open to the proper officer after accepting the self-assessment to entertain a claim for refund in the absence of the self-assessment being questioned in the appeal. The direction to reassess the bill of entry after the expiry of more than a year cannot be ordered. Reliance has been placed on Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd., 2000 (120) E.L.T. 285 (S.C.). In the instant case, the bills of entry were filed and they were self-assessed. It is an assessment under the Act and in case benefit of notification has not been claimed, in the absence of challenge to assessment of bills of entry by way of filing the appeal, the benefit of notification cannot be claimed. An application for refund is not maintainable in view of the law laid down by this Court in Flock (India) Pvt. Ltd. (supra) and Priya Blue Industries (supra). Once the self-assessment/assessment attains finality and has not been questioned, it cannot be reopened at any point of time. The refund claim is not an appellate proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order. Even after the amendment is made in 2011, the conditionality of payment having been made pursuant to an order of assessment continue to exist. As the self-assessment of bills of entry is an order of assessment per se, unless the order of assessment

passed under Section 2(2) of the Act is appealed before Commissioner of Appeals for modification no claim for refund can be entertained. The provision of Section 128 cannot be rendered otiose. The amendment has been made in order to simplify the procedure but the legal effect of the self-assessment is that of assessment. While processing self-assessment some exercise has to be done. Once it is accepted, it becomes an order of assessment.

20. Right to appeal is available to any person i.e. to the department as well as to importer/exporter against an order of self-assessment. Until and unless assessment order is modified and a fresh order of assessment is passed and duty redetermined, the refund cannot be granted by way of refund application. The refund authorities cannot take over the role of Assessing Officer. The officer considering refund claim cannot reassess an assessment order. An assessment order has to be questioned within the stipulated period of limitation. The refund application cannot be entertained directly under Section 27 unless the order of assessment is appealed against and is modified.

38. No doubt about it that the expression which was earlier used in Section 27(1)(i) that "in pursuance of an order of assessment" has been deleted from the amended provision of Section 27 due to introduction of provision as to self-assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of aforesaid expression as no separate reasoned assessment order is required to be passed in the case of self-assessment as observed by this Court in Escorts Ltd. v. Union of India & Ors. (supra).

39. In Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd. - 2000 (120) E.L.T. 285 (S.C.) = (2000) 6 SCC 650, the question which came up for consideration before this Court was non-challenge of an appealable order where the adjudicating authority had passed an order which is appealable under the statute, and the party aggrieved did not choose to file an appeal. This Court held that it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the

adjudicating authority had committed an error in passing the order. The provisions of the Central Excise Act, 1944 came up for consideration. The Court has observed :

"10. Coming to the question that is raised, there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing its order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position, in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot be countenanced. The view was taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that whereas a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act. Therefore, if an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for the refund which, if we may term it so, is in the nature of execution of a decree/order. In the case at hand, it was specifically mentioned in the order of the Assistant Collector that the assessee may file an appeal against the order before the Collector (Appeals) if so advised."

(emphasis supplied)

40. In Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) - 2004 (172) E.L.T. 145 (S.C.) = (2005) 10 SCC 433, the Court considered unamended provision of Section 27 of the Customs Act and a similar submission was raised which was rejected by this Court observing that so long as the order of

assessment stands, the duty would be payable as per that order of assessment. This Court has observed thus :

"6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India) case (2000) 6 SCC 650. Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order.

7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an appeal having been filed no refund claim could be made.

8. The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained." (emphasis supplied)

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 :

"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 :

[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.]

[(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 :

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).

4.4 Hon'ble High Court of Rajasthan in case of Central Office Mewar palace Org [2008 (12) STR 545 (Raj)] in matters relating to Service tax, observed as follows:

"6. *The matter was carried in further appeal before the learned Tribunal, and surprisingly, the Tribunal dismissed the appeal by adopting yet different reasoning, viz. that since the assessee had not challenged the assessment order, the claim of refund cannot be entertained, so as to indirectly challenge the assessment order, without filing statutory appeal, against the assessment*

order. It was also found, that in the case in hand, the order is appealable and no appeal having been filed, the claim of refund has no merit, and the appeal was dismissed.

7. *We have heard learned counsel for the parties, and have gone through the relevant provisions of the Finance Act, 1994, enacting provisions for levy of service tax, so also the relevant provisions of Central Excise Act, as well.*

8. *At the outset, it may be observed, that under the scheme of things, starting from Section 73 onwards it is clear, that the assessee himself is to deposit service tax in form ST-3, there is no provision for assessment. Passing of assessment order is contemplated only in cases where the notice is issued under Section 73, and it is found, that service tax is not levied or paid, or has been short levied or short paid etc. In that view of the matter, the very basis/reasonings given by the learned Tribunal, simply have no legs to stand. Admittedly, the appeal under Section 85 lies against a specific order of the concerned authority in Form ST-4, which requires to disclose, designation and address of the officer passing the decision or order appealed against, and the date of decision or order, so also the date of communication of the decision or order appealed against to the appellant. Admittedly, when no order capable of being appealed against, had ever been passed, it cannot be said that the assessee could file appeal against the assessment order, and not having so filed appeal he cannot lay the claim of refund. Thus, the order of the Tribunal cannot sustain."*

4.5 In the case of Maharastra Cylinder [2010 (259) ELT 369 (Bom)], Hon'ble Bombay High Court expressed disagreement with the view expressed by the Hon'ble Rajasthan High Court, stating as follows:

"6. It is contended by learned Counsel for the appellant that the decision of the Tribunal suffers from serious infirmity mainly on the ground that the clearances effected by the appellant were subject to revision of prices that were to take place subsequent to the clearances. He submitted that although the clearances effected by the appellant could not be said to be provisional clearances, in the light of the decision of the Division Bench of this Court, dated 31-8-2007 in Central Excise Appeal No. 22/2006 (The Commissioner of Central Excise v. M/s. Orient

Explosives (P) Ltd.), the appellant was entitled to refund of the excise duty paid. Relying upon the decision of the Rajasthan High Court in the case of ***Central Office Mewar Palace Organization v. Union of India [2008 (12) S.T.R. 545 (Raj.)]****, learned Counsel for the appellant submitted that since the goods in question were cleared under self removal scheme, there was no question of filing an appeal and, therefore, the appellant was justified in seeking refund under Section 11-B of the Central Excise Act, 1944.*

7. We do not find any merit in the above contentions. Admittedly, while clearing the goods on payment of excise duty, the procedure for removal of goods on provisional basis has not been followed. The Apex Court in the case of Metal Forgings v. Union of India [2002 (146) E.L.T. 241 (S.C.)] has held that in the absence of order of provisional assessment, the clearance cannot be said to be on provisional assessment basis.

8. Where the goods are cleared under the self removal procedure basis on approved classification list and approved price list, the clearances are on self assessment and unless such self assessment is varied or altered, the question of refunding the duty paid on self assessment does not arise at all. The Apex Court in the case of M/s. Priya Blue Industries Ltd. v. Commissioner of Customs (Preventive) [AIR 2004 S.C. 5115 = 2004 (172) E.L.T. 145 (S.C.)] has held that validity of an assessment cannot be considered while dealing with the refund claim. The said ratio would apply to the self assessment as well.*"*

4.6 The decision of Hon'ble Rajasthan High Court has been over-ruled by the three judges bench of Hon'ble Supreme Court in case of ITC Ltd., referred above, observing as follows:

"45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India - 2008 (12) S.T.R. 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act."

4.7 Appellant has relied upon the decision of the Ahmedabad Bench in case of Cadila Healthcare [2021 (50) ELT 205 (T-Ahmd)], wherein tribunal has observed as follows:

"5.*We also observed that the judgment of Hon'ble Rajasthan High Court in the case of Central Office of Mewar Palace Org. v. Union of India (supra) has been expressly approved by the Hon'ble Supreme Court in the case of ITC Ltd. (supra) as the Hon'ble Supreme Court stated that High Court judgment is not under provisions of the Customs Act. Therefore, unlike Customs, there is no express provision to file appeal against the self-assessment of service tax by filing ST-3 return. Therefore, on the ground that appeal against the self-assessment was not filed, the refund claim cannot be rejected."*

The observations made do not take into account the provisions of Section 70 and 72 of the Chapter V of Finance Act, 1994, Rule 2 (b) of the Service Tax Rules, 1994 and Self Assessment Memorandum appended to ST-3 return stating as follows:

SECTION 70. Furnishing of returns. —

(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed.

Section 72 Best judgment assessment. —

If any person, liable to pay service tax, —

(a) fails to furnish the return under section 70;

(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,

the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best

of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

SECTION 85. Appeals to the Commissioner of Central Excise (Appeals).—

(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

The Service Tax Rules, 1994:-

Rule 2 (b)

(b) *"assessment" includes self-assessment of service tax by the assessee, reassessment, provisional assessment, best judgment assessment and any order of assessment in which the tax assessed is nil; determination of the interest on the tax assessed or reassessed;*

7. Returns

(1)Every assessee shall submit a half yearly return in From 'ST-3' or 'ST-3A'or ST3C,(Inserted vide Notification 48/2016 – Service tax) as the case may be, along with a copy of the Form TR-6, in triplicate for the months covered in the half-yearly return.

(2)Every assessee shall submit the half yearly return by the 25th of the month following the particular half-year.

Provided ….

[Provided further ….

(3)Every assessee shall submit the half-yearly return electronically.

Format of ST-3 Return provides as under:

"FORM ST-3"

(Return under section 70 of the Finance Act, 1994 read with rule 7 of Service Tax Rules, 1994)

…..

PART K

SELF ASSESSMENT MEMORANDUM:

(a) *I/We declare that the above particulars are in accordance with the records and books maintained by me/us and are correctly stated.*

(b) ***I/We have assessed and paid the service tax and/or availed and distributed CENVAT credit correctly as per the provisions of the Finance Act, 1994 and the rules made thereunder.***

(c) *I/We have paid duty within the specified time limit and in case of delay, I/We have deposited the interest leviable thereon.*

(d) *I have been authorised as the person to file the return on behalf of the person providing the taxable service/recipient of service, as the case may be.*

Place:

Date: (Name and Signature of Assessee or Authorised Signatory)

The above provisions are pari materia with the provisions of the Customs Act, 1962 as have been reproduced by the Hon'ble Supreme Court in the case of ITC Ltd, supra. The relevant paragraphs of the Hon'ble Supreme Court decision are reproduced below:

22. After the amendment of Section 2(2) made by the Finance Act, 2011 the definition of 'assessment' reads thus :

"2(2) "assessment" includes provisional assessment, self-assessment, re-assessment and any assessment in which the duty assessed is nil;"

25. *Section 17 as amended by Finance Act, 2011 is extracted hereunder :*

"17. Assessment of duty. *- (1) An importer entering any imported goods under Section 46, or an exporter entering any export goods under Section 50, shall save as otherwise provided in Section 85, self-assess the duty, if any, leviable on such goods.*

(2) The proper officer may verify the self-assessment of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

[(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any

other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.]

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

(6) Where re-assessment has not been done or a speaking order has not been passed on re-assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.

Explanation. - For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under Section 46 or an exporter has entered any export goods under Section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of Section 17 as it stood immediately before the date on which such assent is received.

31. *It is apparent from the aforesaid discussion that the endorsement made on the bill of entry is an order of assessment. It cannot be said that there is no order of assessment passed in such a case. When there is no lis,*

speaking order is not required to be passed in "across the counter affair".

33. *Under the provisions of Section 17 as amended by Finance Act of 2011, Section 17(1) has provided to self-assess the duty if any leviable on such goods by importer or exporter as the case may be. Self-assessment is an assessment as per the amended definition of Section 2(2). It is further provided that proper officer may verify the self-assessment of such goods, and for this purpose, examine or test any imported goods or exported goods or such part thereof as may be necessary. The power to verify self-assessment lies with the proper officer and for that purpose under Section 17(3), he may require the importer, exporter or any other person to produce such document and furnish such information, etc. If the proper officer on verification has found on examination or testing of the goods or as part thereof or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under the Act, may proceed to re-assess the duty leviable on such goods. Section 17(5) of the Act as amended provides that where re-assessment done under sub-section 17(4) is contrary to the assessment done by the importer or exporter regarding the matters specified therein, the proper officer has to pass a speaking order on the re-assessment, within 15 days from the date of reassessment of the bill of entry or the shipping bill, as the case may be. The explanation to amended Section 17 has clarified that import or export before the amendment by Finance Act, 2011 shall be governed by unamended provisions of Section 17.*

Since I find the provisions under the Customs Act,1962 as considered by the Hon'ble Apex Court in the case of ITC Ltd, to be pari materia with the provisions contained in the Finance Act, 1994 hence the observations made by the Hon'ble Supreme Court in case of the ITC Ltd., though by referring to the provisions of the Customs Act, 1962 will be applicable in the case of Service tax.

4.8 Thus I do not find any merits in the submissions of the appellant to the effect that the refund application can be considered without revision of the return of the self assessment made by them while filing the ST-3 return. It is worth noting the

provisions in Service tax law provide for the revision of the return by the assessee himself. Rule 7B of the Service Tax Rules, 1994 reads as follows:

7B. Revision of Return–

(1) An assessee may submit a revised return, in Form ST-3, in triplicate, to correct a mistake or omission, within a period of ninety days from the date of submission of the return under rule 7.

The scheme of Service Tax Return was carried forward in the CGST Act, 2017, wherein Section 142 (9) provided as follows:

"(9) (a) where any return, furnished under the existing law, is revised after the appointed day and if, pursuant to such revision, any amount is found to be recoverable or any amount of CENVAT credit is found to be inadmissible, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;

(b) where any return, furnished under the existing law, is revised after the appointed day but within the time limit specified for such revision under the existing law and if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person, the same shall be refunded to him in cash under the existing law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944) and the amount rejected, if any, shall not be admissible as input tax credit under this Act."

4.9 Admittedly no revised return as provided for in terms of Rule 7B of the Service Tax Rules, 1994 or under provisions of the Section 142 (9) of the CGST Act has been filed by the appellant. In para 4.6 and 4.7 of the order in original, Assistant Commissioner has recorded specific finding to this effect and impugned order upholds the same in para 11 and 12. It is settled provision in law that the when the statute provides a manner of doing the thing, then the thing has to be done in the prescribed manner only and all other manner are necessarily barred. The authorities performing under the provisions of

statute being creature of statute cannot relax the procedural requirements or the obligations cast by the statute.

a. Devendra Kumar [(2013) 9 SCC 363]

23. More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. "Subla Fundamento cedit opus"- a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. In such a case the legal maxim Nullus Commodum Capere Potest De Injuria Sua Propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide: Union of India v. Maj. Gen. Madan Lal Yadav, AIR 1996 SC 1340; and Lily Thomas v. Union of India & Ors., AIR 2000 SC 1650).

Nor can a person claim any right arising out of his own wrong doing. (Juri Ex Injuria Non Oritur)."

b. Mahender Singh [2022 SCC OnLine SC 909]

15. A three Judge Bench of this Court in a judgment reported as Chandra Kishore Jha v. Mahavir Prasad & Ors. [(1999) 8 SCC 266], held as under:

"17.....It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage: Nazir Ahmad v. King Emperor [(1935- 36) 63 IA 372 : AIR 1936 PC 253 (II)] , Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098] , State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57] .) An election petition under the rules could only have been presented in the open court up to 16-5- 1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done....."

16. The said principle has been followed by this Court in Cherukuri Mani v. Chief Secretary, Government of Andhra Pradesh & Ors. [(2015) 13 SCC 722] wherein this Court held as under:

"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure....."

17. Similarly, this Court in Municipal Corporation of Greater Mumbai (MCGM) v. Abhilash Lal & Ors. [(2020) 13 SCC 234] and OPTO Circuit India Limited v. Axis Bank & Ors. [(2021) 6 SCC 707] has followed the said principle. …".

4.10 Appellant relied upon the decision of the tribunal in the case of Piramal Enterprises Ltd. [2016 (42) STR 17 (T)], wherein following has been held:

"7. *The short point for consideration by us is whether there has been excess payment of tax and whether the bar of unjust enrichment will arise in relation to such excess payment of tax.*

8. *It is now well settled in law that adjustment between commercial enterprises who are in constant interface can occur and that such occurrence is recorded through the medium of credit and debit notes. It is apparent from the records of the instant case that the two entities are part of the same group and hence adoption of this mode of settlement is acceptable as sufficient evidence of compensation for services rendered. The charges levied from M/s. Nicholas Piramal India Ltd. by the appellant are amply evident in the debit notes pertaining to the quarter April, 2007 and September, 2007. It cannot but be accepted that the credit note issued in October, 2007 is intended to reduce the amounts payable by the client to the appellant to the extent of ` 2,93,50,000/-. The contention of the learned Chartered Accountant that any payment can be released only after withholding of tax deducted at source is borne out by the lesser amounts entered in the ledger and the bank statements. We find no flaw in this contention and there is no counter by Revenue that can contest this."*

I would only observe that the issue of unjust enrichment comes into picture only if the refund is otherwise found admissible. In the case under consideration if the refund is not found admissible, application of the principles of unjust enrichment need not be considered.

4.11 Appellant have relied upon the provisions of Section 142 (3), 142 (5) and 174 of CGST Act, 1994 to argue that there claim under section 11 B is justified. However the arguments advanced by the appellants have been considered and rejected by the Hon'ble High Court of Jharkhand in case of Rungta Mines [Order dated 15.02.2022 in WP No 2245/2020, (2022 (2) TMI 934 Jharkhand High Court)] holding as follows:

"Interpretation of section 142(3) read with section 140(1), 140(5) and section 174 of CGST Act vis-a vis the facts of this case.

39. The relevant portions of the aforesaid sections as relied upon by the learned counsel for the petitioner during the course of arguments are as under.

Section 140 (1) and (5) of the CGST, Act reads as under:-

140. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT Credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed:

PROVIDED that the registered person shall not be allowed to take credit in the following circumstances, namely: —

- *(i) where the said amount of credit is not admissible as input tax credit under this Act; or*
- *(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or*
- *(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.*

140 (5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, within such time and in such manner as may be prescribed, subject to the

condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

PROVIDED that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

PROVIDED FURTHER that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

Section 142(3) of the CGST Act reads as under:-

142(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT Credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944):

PROVIDED that where any claim for refund of CENVAT Credit is fully or partially rejected, the amount so rejected shall lapse:

PROVIDED FURTHER that no refund shall be allowed of any amount of CENVAT Credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

The Sections 173 and 174 of CGST Act are quoted as under :-

173. Amendment of Act 32 of 1994 Save as otherwise provided in this Act, Chapter V of the Finance Act, 1994 shall be omitted. 1

74. Repeal and saving

(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (1 of 1944) (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the

Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Additional Duties of Excise (Textiles and Textile Articles) 26 Act, 1978 (40 of 1978), and the Central Excise Tariff Act, 1985 (5 of 1986) (hereafter referred to as the repealed Acts) are hereby repealed.

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (32 of 1994) (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not—

i. *revive anything not in force or existing at the time of such amendment or repeal; or*
ii. *affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or*
iii. *affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:*
    i. *PROVIDED that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or*
iv. *affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or*
v. *affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such*

investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;

vi. affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.

(3) The mention of the particular matters referred to in subsections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

40. Section 142 of the CGST Act, 2017 provide for Miscellaneous Transitional Provisions. The following are the pre-conditions of refund in cash under section 142(3) : -

a. *Sub Section-(3) deals with claim for refund filed before, on or after the appointed day. Thus it, interalia, deals with applications for refund filed before the appointed date and pending on the appointed 27 date apart from the refund applications filed on or after the appointed date.*
b. *Further the refund application should be for refund of any amount of CENVAT Credit, duty, tax, interest or any other amount paid under the existing law.*
c. *Such application filed before, on or after the appointed day is to be disposed of in accordance with the provisions of existing law.*
d. *If any amount eventually accrues the same is to be refunded in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11-B of the Central Excise Act, 1944.*

e. *It also provides that where any claim for refund of CENVAT Credit is fully or even partially rejected, the amount so rejected shall lapse.*

f. *The second proviso provides that no refund shall be allowed of any amount of CENVAT Credit where the balance of the said amount as on the appointed day has been carried forward under the CGST Act.*

41. Thus, section 142(3) of CGST, Act clearly provides that refund application with respect of any amount relating to CENVAT Credit, duty, tax, interest or any other amount paid under the existing law is to be disposed of in accordance with the provisions of existing law and if any such amount accrues the same shall be paid in cash. Such right to refund in cash has been conferred notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11-B of the Central Excise Act, 1944.

42. It is not in dispute that the refunds under the existing law of Service Tax as well as Central Excise Act, 1944 are governed by section 11B of the Central Excise Act, 1944 and subsection 2 of section 11 B also refers to application for refund made under section 11 B(1) of Central Excise Act, 1944. Further section 11B(3) of Central Excise Act, 1944 clearly provides that all kinds of refunds including those arising out of judgement , decree or orders of court or tribunal are to be dealt with in accordance with the provisions of section 11B (2) of Central Excise Act, 1944 . It is also important to note that section 11B(2) of Central Excise Act, 1944 deals with the manner in which applications for refund under section 11B (1) are to be dealt with as it uses the word "such application" which is clearly referrable to section 11B (1) of 28 Central Excise Act, 1944. Further, the proviso to section 11B(2) deals with situations of rebate of duty; unspent advance deposits; principles of unjust enrichment in cases where duty of excise is paid by manufacturer or borne by buyer and who have not passed on the incidence of such duty to any other person; and also where duty of excise is borne by any other class of applicant as the central government may notify in official gazette with a further proviso regarding unjust enrichment.

43. The entire section 11B of Central Excise Act, 1944, as it stood immediately before the appointed date, does not sanction any refund where the assessee has failed to claim CENVAT Credit as per CENVAT Credit Rules, 2004 and has lost its right to claim such credit by not claiming it within the time prescribed. Further section 11B also has its own strict time lines for claiming refund. Rule 5 of the CENVAT Credit Rules provides for refund only when the inputs are used in relation to export, which is not the case here. These aspects of the matter have been rightly considered and decided against the petitioner while passing the impugned orders whose details have already been stated above.

44. Under the provisions of section 11B the right to claim refund was conferred not only to the assessee but also to such classes of applicants as notified by the central government and also covers situations arising out of judgements of courts and tribunals. On the appointed date there could be claims of refund of any amount of CENVAT Credit, duty, tax, interest or any other amount paid under the existing law in connection with which the applications for refunds were pending or time limit for claiming refund was yet to expire or may crystalize on account of any judgement of courts or tribunals in relation to pending litigations. These are some of the situations which would be covered by the miscellaneous transitional provisions as contained in section 142(3) of CGST, Act which would continue to be governed by section 11B(2) of Central Excise Act, 1944.

45. The provision of section 142(3) does not entitle a person to seek refund who has no such right under the existing law or where the right under the existing law has extinguished or where right under the new CGST regime with respect to such claim has not been exercised in terms of the provision of CGST, Act and the rules framed and notifications issued. Meaning thereby, section 142(3) does not confer a new right which never existed under the old regime except to the manner of giving relief by refund in cash if the person is found entitled under the existing law in terms of the existing law. Section 142(3) does not create any new right on any person but it saves the existing right which existed on the appointed day and provides the modalities for refund in cash if found entitled under the existing law as the entire claim is mandated to be dealt with as per the existing law.

It neither revive any right which stood extinguished in terms of the existing law nor does it create a new right by virtue of coming into force of CGST, Act.

46. Section 174 of the CGST Act read with section 6 of the General Clauses Act saves the right acquired, accrued or vested under the existing law and does not create any new right which never existed on the appointed day i.e on 01.07.2017 under the existing law.

47. The argument of the petitioner by referring to second proviso to section 142(3) of CGST Act that it indicates that section 142(3) would apply to the situations where the assessee has failed to take transitional credit under section 140(1), is also devoid of any merits. The second proviso only indicates that if the assessee has taken transitional credit he will not be entitled to refund. Certainly, an assessee cannot simultaneously claim transitional credit as well as refund of the same amount. The second proviso to section 143(2) cannot be said to be an eligibility condition to claim refund but is only a condition which governs refund as an assessee cannot be permitted to have transitional credit as well as refund of the same tax amount.

48. Section 140(5) applies under the circumstances where input services are received after the appointed day but the tax has been paid by the supplier under the existing law within the time and in the manner prescribed with a further condition that the invoice etc are recorded in the books of account of the such person within a period of 30 days from the appointed day. Section 140(5) also does not help the petitioner. Section 140 (5) has no applicability to the facts and circumstances of this case. In the instant case, admittedly the services in the nature of "port services" were received by the petitioner in the month of April 2017 and invoice was also generated in the month of May 2017.

49. In the peculiar facts of this case, the petitioner did not claim transitional credit but claimed the impugned amount of service tax on "port services" as credit in their ST-3 return which they were admittedly not entitled as they were assessee under service tax only on reverse charge mechanism and admittedly the "port services" availed by the petitioner was not covered under reverse charge mechanism. Thus, the petitioner on the

one hand illegally took credit of service tax on "port services" as credit in their ST-3 return and on the 30 other hand filed application for refund of the same amount under section 142(3) of the CGST, Act which is certainly not permissible in law. The authorities have rightly considered these aspects of the matter also while rejecting the application for refund filed by the petitioner.

50. It is not in dispute that the petitioner has claimed the credit of service tax involved in the present case paid on "port services" as "input service" in ST-3 return filed on 22.09.2017, though they were not entitled to claim such a credit. It is further not in dispute that the petitioner did not include the impugned service tax paid on "port services" in its ER-1 return and accordingly was neither entitled to include nor included the same as transitional credit in TRAN-1 under CGST Act. As per the notification (Annexure-5) extending the date of filing TRAN-1 to 31.10.2017, the same was in relation to certain service tax issues which were paid after 30.06.2017 under reverse charge basis to cover instances of bills raised on 30.06.2017 since credit is available only if the payment is made and the payment in such cases could be made only after 30.06.2017. However, in the instant case the bill was admittedly generated on 23.05.2017, services availed and bill amount including service tax was paid in April 2017 but the original bill did not reach the petitioner for unknown/undisclosed reasons.

51. It is apparent from the impugned orders that the specific case of the respondent is that the petitioner had claimed CENVAT Credit under ST-3 return thereby treating the services involved in the present case as their input services used for providing output service, whereas they are not output service provider and the same cannot be used for providing output services. Therefore, it cannot be their input services under Rule 2 (l) of CENVAT Credit Rules, 2004. I am also of the considered view that the petitioner could not have claimed the impugned service tax on port services in ST-3 return as they were registered for discharging their liability under the service tax only on reverse charge mechanism. Rather it is the case of the petitioner that they had included the impugned service tax in ST-3 Return under compelling circumstances of non-receipt of

original invoice dated 23.05.2017 and this was done only attempting to save their credit which they had failed to claim through ER-1 return and then as transitional credit through TRAN-1 under section 140(1) of the CGST Act. Thus, the authority has rightly held that petitioner had wrongly claimed Credit of the impugned service tax under ST-3 return and omitted to claim the impugned service tax as CENVAT Credit in ER-1 Return.

52. Further case of the respondent is that the petitioner as a manufacturer was eligible to claim CENVAT Credit on impugned service i.e "port services" and should have claimed the credit in their ER-1 Return within the prescribed time and accordingly could have claimed transitional credit through TRAN-1 under section 140 of CGST, Act. Thus, late receipt of the original invoice which has been cited as the reason for failure to claim CENVAT Credit under the existing law and transitional credit under section 140(1) of the CGST, Act was wholly attributable to acts and omissions of the petitioner and its service provider of the "port services" and the respondent authorities had no role to play. The petitioner had failed to avail the opportunity to claim CENVAT Credit of service tax on port services in terms of the existing law read with section 140 of CGST, Act and had no existing right of refund on the date of coming into force of CGST, Act. The petitioner having not used the port services for export was not entitled to claim refund under the existing law. The petitioner was also not entitled to refund on account of the fact that the petitioner had already taken credit of the service tax paid on port services in ST-3 Return of service tax although admittedly the petitioner was not entitled to take such credit in ST-3 Return. On account of aforesaid three distinct reasons the petitioner was rightly held to be not entitled to refund under section 142(3) of CGST, Act by the impugned orders.

53. All the aforesaid provisions referred to and relied upon by the learned counsel of the petitioner do not entitle a person like the petitioner to any relief in the circumstances of acts and omissions of the service provider (port authority) or the service recipient (the petitioner) who have failed to comply the provision of law, both under the existing law and also under the CGST Act. The relied upon provisions of CGST Act do not cover any such

situation relating to any consequences due to inter parte acts and omissions. In the instant case, as per the case of the petitioner, the entire problem has cropped up due to non-receipt of the invoice in original from the port authorities although the port services were availed and payments for the same to the port authorities were made by the petitioner in the month of April 2017, the invoice was generated by the port authorities in the month of May 2017 but the original invoice was received by the petitioner only on 20.09.2017 i.e after coming into force of CGST Act. The late receipt of the invoice is essentially between the petitioner and the port authorities and the tax collecting authorities had nothing to do in the matter. Certainly, the delay in receipt of 32 original invoice is not attributable to the respondent authorities under the existing law or under the new law.

54. The authorities have held in the impugned orders that in the instance case, the timeline for claiming CENVAT Credit qua the service tax paid on port services was not followed by the petitioner, although the services were availed, the entire payment was made and the bill was also generated in the month of April/May, 2017. Further, it has also been held in the impugned orders that the petitioner not only failed to claim the CENVAT Credit as per law, but illegally claimed the credit of the same while filing service tax return although the petitioner was not entitled to do so as the petitioner was not registered as a service provider. The authorities have also held that the service tax paid on port service was not eligible for refund under the existing law as the said services were not utilised for export. Thus, the petitioner on the one hand did not claim CENVAT Credit as per the procedure established by law under the existing law and on the other hand violated the provisions of law while filing his service tax returns and claimed the amount as input service and thereafter filed his petition for refund on 28.06.2018 referring to Section 142(3) of the CGST Act. The petitioner never had a right to claim refund under the existing law and had failed to exercise their right to claim CENVAT Credit as per law and wrongly claimed the impugned amount as credit in Service Tax Return (S.T. 3 return).

55. In view of the aforesaid findings, I do not find any reason to interfere with the findings and reasons assigned by the adjudicating authority as well as the appellate authority rejecting the application for refund filed by the petitioner under section 11B of Central Excise Act read with Section 142(3) and 174 of CGST Act. The impugned orders are well reasoned orders calling for no interference. Accordingly, this writ petition is dismissed."

4.12 Authorized representative has referred to number of other decisions to support the case of revenue. I find that those decisions are on the same issues as I have discussed above and on the basis of the decisions as above conclude in favour of revenue and hence do not take each decision for analysis separately.

5.1 Appeal is dismissed.

(Order pronounced in the open court on 03.03.2023)

(Sanjiv Srivastava)
Member (Technical)

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