* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 20 September 2023**

Judgment pronounced on: 06 November 2023

\+ W.P.(C) 13968/2021

BT (INDIA) PRIVATE LIMITED ..... Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Arjyadeep Roy, Adv.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Ravi Prakash, CGSC with Mr. Yasharth Shukla, Adv. for R-1

Mr. Ashok Kumar Arya and Mr. Aman Rewaria, Advs. for R-2

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J.

A. INTRODUCTION

1. The petitioner impugns the order dated 04 October 2021 passed by the second respondent and in terms of which its applications for refund of unutilized CENVAT credit have come to be negatived. The refund

claims were lodged in respect of the quarters pertaining to October 2014 to December 2014, January 2015 to March 2015 and
April 2015 to June 2015. These applications which were dated 29

September 2015, 23 December 2015 and 29 March 2016 respectively were made on the ground of the input services having been utilized by the petitioner in connection with „*export of services*‟. The services in question being Broadcasting, Business Support, IT Software and Management, Maintenance or Repair services.

2. As would be evident from the record, although the applications had been made on 29 September 2015, 23 December 2015 and 29 March 2016, the respondents chose to issue a first deficiency memo on 05 November 2019 followed by three other communications dated 13 May 2020, 19 May 2020 and 01 June 2020. According to the petitioner, its representatives were thereafter invited to several meetings in order to enable the respondents to ascertain the nature of services provided by the petitioner to its principal entity and to verify the claim for refund as made.

3. In terms of the impugned order dated 04 October 2021, the second respondent has come to conclude that the services rendered by the petitioner would not fall within the ambit of the expression „*export of services*‟ as contemplated under Rule 6A of the **Service Tax Rules, 1994**[1].

4. The second respondent holds that with respect to Broadcasting services, even though the ordering company was an entity based out of Mauritius, the customer operation details as provided would indicate beneficiaries of service being present in India and that even the satellite services offered by the petitioner being in respect of channels

[1] 1994 Rules

broadcasted in India. The second respondent holds against the petitioner additionally upon it coming to conclude that in terms of Section 2(105) of the **Finance Act, 1994**[1] read with Section 2(16), the services rendered to a Head Office would also imply services being provided to a Branch Office or representative in India and thus falling outside the net of „*export of service*" as contemplated under the Act and the 1994 Rules.

5. Insofar as services relating to Management, Maintenance and Repair were concerned, the second respondent has held that those would not fall within the ambit of „*export of service*" since the petitioner had failed to submit any agreement or invoice with respect to such services being provided to clients outside India. While dealing with IT Software Service, the second respondent negatived the claim for refund by observing that merely because the address of the customer is outside India, the same would not necessarily mean that those services had been exported out of the country.

6. Proceeding then to consider the Business Support Service component of the activities undertaken by the petitioner, the second respondent notes that while the petitioner had entered into an agreement with its parent company, the service itself was provided to international customers of the parent company or its group entities and that such customers were possibly present in India. It also took into

[1] the Act

consideration the fact that payment terms, as settled in favour of the petitioner, appeared to indicate that it was being paid on a commission and a cost-plus markup basis and that no invoices appear to have been raised upon the international customers. The second respondent in this respect held that the petitioner had in any case failed to place any invoices on record. It was on an overall consideration of the aforesaid aspects that the second respondent came to ultimately conclude that the service recipient was located in India and consequently the services rendered by the Petitioner would not qualify as an „*export of service*".

7. The second respondent went on to hold that the services rendered by the petitioner would in fact fall and qualify as „*intermediary services*" as defined under the **Place of Provision of Services Rules, 2012**[2], and for this reason also the applications for refund were liable to be rejected.

8. For the purposes of evaluating the challenge as raised, it would be expedient to take note of the following undisputed facts.

B. BRIEF FACTUAL BACKGROUND

9. The petitioner submitted self-assessed returns for the quarters in question before the Service Tax Commissionerate in terms of Section 70 of the Act. No further action on those returns appears to have been initiated by the respondents either in terms of the powers conferred by Section 72 or Section 73 of the Act. It

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[2] PoPS Rules

becomes pertinent to note that the former provision enables the Adjudicating Authority to undertake a „best judgment assessment", in case an assessee either fails to furnish a return or having submitted a return fails to assess the tax payable in

accordance with the provisions of the Act. In either of those situations, the Adjudicating Authority stands empowered by law to require the assessee to produce accounts, documents and evidence and after affording an opportunity of hearing, make an assessment of the value of taxable service to the best of its judgment and determine either the sum payable by the assessee or the amount liable to be refunded.

10. Section 73 empowers an Adjudicating Authority to place the assessee on notice in a case where it is found that service tax has either not been levied or paid or has been short levied, short paid or erroneously refunded. The Proviso to Section 73(1) enables the said authority to act against an assessee in case service tax has not been levied or paid or has been short levied, short paid or erroneously refunded by reason of fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the Act or the Rules framed thereunder with the intent to evade payment of service tax.

11. It becomes pertinent to note that the power under Section 73(1), in terms of the provision as it stands today, is available to be invoked within 30 months from the relevant date. The expression „*relevant date*" is defined in Section 73(6) of the Act. However, and at the time when the refund applications were made, the power under Section 73(1) could have been invoked within a period of 18 months. Insofar as the Proviso to Section 73(1) is concerned, the same can be invoked within a period of five years from the relevant date.

12. Sections 72 and 73 of the Act are extracted hereinbelow: -

> "**72. Best judgment assessment.**—If any person, liable to pay service tax—
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> (a) fails to furnish the return under Section 70;
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> (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."

xxxx xxxx xxxx

> "**73. Recovery of service tax not levied or paid or shortlevied or short-paid or erroneously refunded.**—(1) Where any service tax has not been levied or paid or has been shortlevied or short-paid or erroneously refunded, the Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or shortpaid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
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> Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—
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> (a) fraud; or
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> (b) collusion; or
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> (c) wilful mis-statement; or
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> (d) suppression of facts; or

(e) contravention of any of the provisions of this chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been *substituted*.

Explanation. —Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of thirty months or five years, as the case may be.

(1-A) Notwithstanding anything contained in sub-section (1) (except the period of thirty months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that subsection, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.

(1-B) Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been selfassessed in the return furnished under sub-section (1) of Section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in Section 87, without service of notice under subsection (1).

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(2-A) Where any appellate authority or tribunal or court concludes that the notice issued under the proviso to sub-section
(1) is not sustainable for the reason that the charge of, —

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax, has not been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of thirty months, as if the notice was issued for the offences for which limitation of thirty months applies under subsection (1).

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "thirty months" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation-1.—For the removal of doubts, it is hereby declared that the interest under Section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer, but for this subsection.

Explanation-2. —For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this chapter or of the rules made thereunder with intent to evade payment of service tax. (4-A) [* * *]

(4-B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to subsection (1) or the proviso to sub-section (4-A).

(5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.

(6) For the purposes of this section, "relevant date" means, — (*i*) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or shortpaid—

(a) where under the rules made under this chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this chapter or the rules made thereunder;

(ii) in a case where the service tax is provisionally assessed under this chapter or the rules made thereunder, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund."

13. The procedure for the making of a refund claim is prescribed by Rule 5 of the **CENVAT Credit Rules, 2004**[3]. The said Rule reads as

[3] CCR Rules

follows: -

"**Rule 5 - Refund of CENVAT credit**

(1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette:

Refund amount=

$$\frac{(\text{Export turnover of goods} + \text{Export turnover of services}) \times \text{Net CENVAT credit}}{\text{Total turnover}}$$

Where,-

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net CENVAT credit" means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;

(C) "Export turnover of goods" means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bond or letter of undertaking;

(D) "Export turnover of services" means the value of the export service calculated in the following manner, namely:-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period - advances received for export services for which the provision of service has not been completed during the relevant period;

(E) "Total turnover" means sum total of the value of -

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of sub-rule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

(2) This rule shall apply to exports made on or after the 1st April, 2012:

Provided that the refund may be claimed under this rule, as existing, prior to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012, within a period of one year from such commencement:

Provided further that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Service Tax Rules, 1994 in respect of such tax.

Explanation 1.- For the purposes of this rule,-

(1) "export service" means a service which is provided as per rule 6A of the Service Tax Rules 1994;

(1A) "export goods" means any goods which are to be taken out of India to a place outside India.

(2) "relevant period" means the period for which the claim is filed.

Explanation 2.-For the purposes of this rule, the value of services shall be determined in the same manner as the value for the purposes of sub-rule (3) and (3A) of rule 6 is determined."

14. Since the respondents had in the course of their submissions also alluded to the provisions of Sections 11B and 11BB of the **Central Excise Act, 1944**[4], and which provisions stand adopted by virtue of

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[4] Excise Act

Section 83 of the Act, we deem it appropriate to reproduce those provisions hereinbelow: -

> "**11-B. Claim for refund of duty and interest, if any, paid on such duty**.— (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Principal Commissioner of Central Excise or Commissioner of Central Excise or Deputy Principal Commissioner of Central Excise or Commissioner of Central Excise before the expiry of two years from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12-A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:
>
> Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws(Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act
>
> Provided further that the limitation of two years shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.
>
> (2) If, on receipt of any such application, the Assistant Principal Commissioner of Central Excise or Commissioner of Central Excise or Deputy Principal Commissioner of Central Excise or Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:
>
> Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Principal Commissioner of Central Excise or Commissioner of Central Excise or Deputy Principal Commissioner of Central Excise or

Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

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

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

(f) the duty of excise and interest, if any paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (*f*) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (*f*) of the first proviso to subsection (2)shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its reassembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification

in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (*f*) of the first proviso to subsection(2), including any such notification approved or modified under subsection (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Explanation.— For the purposes of this section,—

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means,—

(*a*) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,—

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full

discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(*ea*) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of Section5A, the date of issue of such order;

(*eb*) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(*ec*) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;

(f) in any other case, the date of payment of duty."

"**11-BB. Interest on delayed refunds**.— If any duty ordered to be refunded under sub-section (2) of Section 11-B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below five per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty ordered to be refunded under subsection (2) of Section 11-B in respect of an application under subsection (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

> *Explanation*.— Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or any court against an order of the Assistant Principal Commissioner of Central Excise or Commissioner of Central Excise or Deputy Principal Commissioner of Central Excise or Commissioner of Central Excise, under sub-section (2) of Section 11-B, the order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section."

C. SUBMISSSIONS OF BT INDIA

15. Assailing the impugned order, Mr. Gulati, learned senior counsel appearing for the petitioner, submitted that since the second respondent had neither contested the return as submitted by the petitioner in exercise of powers conferred by Section 72 of the Act nor was the petitioner ever placed on notice in accordance with Section 73 of the Act, it was impermissible for the respondents to have denied the claim for refund by seeking to question the self-assessed returns as submitted by the petitioner. According to Mr Gulati, in the absence of a power of „*best judgment assessment*" being invoked or the respondents having resorted to Section 73 of the Act, the claim for refund as submitted could not have been rejected.

16. Mr. Gulati submitted that there can be no dispute with respect to the fact that an assessment as contemplated in taxing statutes would also include a self-assessment. This, according to learned counsel, is a proposition which is no longer res integra and stands authoritatively settled by the Supreme Court in **ITC Limited vs. Commissioner of**

Central Excise Bombay[5]. Mr Gulati invited our attention to the following passages from that decision: -

> "**21.** The first question for consideration is whether the assessment includes self-assessment also. Prior to the amendment by the Finance Act, 2011 the assessment had been defined in Section 2(2) thus :
>
> > "2(2) "assessment" includes provisional assessment, reassessment and any order of assessment in which the duty assessed is nil;"
>
> **22.** After the amendment of Section 2(2) made by the Finance Act, 2011 the definition of „assessment" reads thus :
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> > "2(2) "assessment" includes provisional assessment, selfassessment, re-assessment and any assessment in which the duty assessed is nil;"
>
> **23.** <u>It is apparent from the amended definition that self-assessment, provisional assessment, reassessment and any assessment in which the duty assessed is nil, is an assessment. Assessment includes selfassessment, when the provision of self-assessment has been incorporated in Section 17(1), and corresponding change has been made in the definition of assessment in Section 2(2). Earlier the word "self-assessment" was not included in the definition of assessment</u>.
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> **29.** <u>The first question for consideration is whether in the case of self-assessment without passing a speaking order, it can be termed to be an order of self-assessment. It was urged on behalf of the assesses that there is no application of mind and merely an endorsement is made by the authorities concerned on the bill of entry which cannot be said to be an order much less a speaking order</u>.
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> **30.** In *Escorts Ltd.* v. *Union of India & Ors.* - (1994) Supp. 3 SCC 86 = 1998 (97) E.L.T. 211 (S.C.) the question arose for consideration as to the Bill of Entry classifying the imported goods under a certain tariff item and paying the duty thereon. This Court held that in such a case signing of the bill of entry itself amounted to passing an order of assessment. Hence, the application seeking a refund on the ground that imported goods fell under a different item

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[5] (2019) 17 SCC 46

attracting a far lower rate of duty, having been filed more than six months after the payment of duty, was rightly rejected as timebarred. What is of significance is that an entry made in the bill of entry has been held to be an order of assessment passed by the Assessing Officer. This Court considered the provisions of Sections 47 and 17 of the Customs Act and has observed :

> "9. Reading Sections 47 and 17 together, it is clear beyond any doubt, *that as soon as the bill of entry is filed, the proper officer examines the goods, tests them, assesses the proper duty and permits clearance of goods only after the duty and other charges*, if any, are paid. In the scheme of the Act, there is no room for contending that any goods will be allowed to be cleared without assessment of the duty, whether provisional or final, as the case may be.
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> 10. Now it may be noticed that the *Act does not prescribe any particular form in which the order of assessment is to be made. In the very nature of things, no formal order of assessment can be expected when there is no dispute as to the classification or the rate of duty. No formal order can be expected in such a case, it is more like 'across-thecounter' affair. In the present case, it may be reiterated that the appellant himself classified the goods under Tariff Item No. 73.33/40 and paid the duty at the rate applicable thereunder. At that stage, he did not raise any dispute either as to classification or as to the right of duty applicable. Hence, there was no occasion for passing a formal order since there was no lis at that stage. The bill of entry presented by the appellant was signed, signifying approval by the assessing officer. That itself is an order of assessment in such a situation. We are, therefore, not prepared to agree that there is no order of assessment in this case, and therefore, the limitation prescribed in Section 27 did not begin to run. Section 27 is emphatic in language. It says that an application for refund of duty shall be made before the expiry of six months from the date on which the duty was paid. In the face of this provision, the authorities under the Act, including the Government of India, had no option but to dismiss the appellant's application. This is also the view taken by this Court in Madras Rubber Factory Ltd. v. Union of India (1976) 2 SCC 255."*

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".

17. It was then contended that an Adjudicating Authority cannot while considering an application for refund either question the selfassessment made by the assessee nor can it delve into issues touching upon the merits of the self-assessed return. According to learned senior counsel, proceedings pertaining to refund are akin to execution proceedings, and thus, while dealing with such claims, it is impermissible for the Adjudicating Authority to either sit in appeal over the self-assessment made by the assessee or for that matter seek to reopen or revise the self-assessment.

18. In support of the aforesaid submissions, Mr. Gulati placed reliance upon the following observations as appearing in the decision of the Supreme Court in *ITC Limited*: -

> "**41.** It is apparent from the 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.
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> xxxx xxxx xxxx
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> **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 reassessment 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, reassessment is not permitted nor conditions of exemption can be adjudicated. Reassessment is permitted only under Sections 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 reassessment 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* [*Hero Cycles Ltd.* v. *Union of India*, 2009 SCC OnLine Bom 801: (2009) 240 ELT 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.* [*Priya Blue Industries Ltd.* v. *Commr. of Customs*, (2005)
10 SCC 433 : (2004) 172 ELT 145]

xxxx xxxx xxxx

47. When we consider the overall effect of the provisions prior to amendment and post amendment under the Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."

19. Mr. Gulati additionally drew our attention to the following principles as enunciated by the Supreme Court in **Collector of Central Excise Kanpur v. Flock (India) Private Limited**[6]:-

[6] (2000) 6 SCC 650

"**1.** The consequence of non-challenge of an appealable order passed under the Central Excise and Salt Act, 1944 (hereinafter referred to as "the Act") arises for determination in this appeal. To be more specific, the question is in a case where the Assistant Collector of Central Excise passes an order classifying a product under a particular tariff item and the said order, though appealable is not challenged by the assessee in appeal, whether in the application for refund of the duty paid, the assessee is entitled to question the order of the Assistant Collector as erroneous.

xxxx xxxx xxxx

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 taken by us also gains support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as 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 refund which, if we may term it so, is in the nature of execution of a decree/order….."

20. The said principles, as laid down in *Flock (India)* were further reiterated by the Supreme Court in **Priya Blue Industries Limited v.**

Commissioner of Customs (Preventive)[7]. The relevant parts of the said judgment are extracted hereinbelow:

> "**5.** Under Section 27 of the Customs Act, 1962, a claim for refund can be made by any person who had (*a*) paid duty in pursuance of an order of assessment, or (*b*) a person who had borne the duty. It has been strenuously submitted that the words
>
> "in pursuance of an order of assessment" necessarily imply that a claim for refund can be made without challenging the assessment in an appeal. It is submitted that if the assessment is not correct, a party could file a claim for refund and the correctness of the assessment order can be examined whilst considering the claim for refund. It was submitted that the wording of Section 27, particularly, the provisions regarding filing of a claim for refund within the period of 1 year or 6 months also showed that a claim for refund could be made even though no appeal had been filed against the assessment order. It was submitted that if a claim for refund could only be made after an appeal was filed by the party, then the provisions regarding filing of a claim within 1 year or 6 months would become redundant as the appeal proceedings would never be over within that period. It was submitted that in the claim for refund the party could take up the contention that the order of assessment was not correct and could claim refund on that basis even without filing an appeal.
>
> **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."

21. The submission essentially was that refund proceedings are neither in the nature of assessment nor re-assessment and thus the

[7] (2005) 10 SCC 433

second respondent stood denuded of any jurisdiction to question or review the claim for refund as sought by the petitioner. According to learned senior counsel, a self-assessment can be reopened or modified only by either taking recourse to appropriate appellate proceedings in cases where an order may have been passed or insofar as the present case is concerned, in accordance with the provisions contained in Sections 72 and 73 of the Act.

22. Mr. Gulati then took serious objection to the impugned order arguing that the same was rendered in clear violation of the principles of natural justice. According to Mr. Gulati, the so-called deficiency memos dated 05 November 2019, 13 May 2020, 19 May 2020 and 01 June 2020 never placed the petitioner on notice of the view which the second respondent was proposing to take and which has ultimately been adopted by it while rejecting its applications for refund. Mr. Gulati pointed out that a reading of the aforesaid communications would indicate that they were more in the nature of interrogatories rather than a notice calling upon the petitioner to show cause why its claim for refund was considered untenable on merits.

23. The impugned order and the rejection of the claim for refund was also assailed on an alleged violation of Clause 3.2 of the Central Excise Manual and which stipulates that deficiency memos should be issued within 15 days from the date of receipt of the refund application. Mr. Gulati submitted that in the present case, the communications noticed hereinabove came to be issued after more than four years from the date when the refund applications had been made.

24. Clause 3.2 of the Central Excise Manual which was referred to is extracted hereinbelow: -

> "3. **Scrutiny of refund claim and sanction**
>
> xxxx xxxx xxxx
>
> 3.2 The Divisional Office will scrutinise the claim, in consultation with Range, and check that the refund application is complete and is covered by all the requisite documents. This should be done, as far as possible, the moment refund claim is received and in case of any deficiency, the same should be pointed out to the applicant with a copy to the Range Officer within 15 days of receipt."

25. Continuing along this thread, Mr. Gulati also invited our attention to the Circulars dated 04 April 1990 and 01 October 2002, which prescribe and mandate that refund claims must necessarily be adjudicated and disposed of within three months. According to Mr. Gulati, since the respondents woefully failed to adhere to the aforenoted mandated timelines, the refund claims could not have been rejected on grounds as taken in the impugned order.

26. Insofar as the aforesaid proposition is concerned, Mr. Gulati also sought to draw sustenance from the decision rendered by this Court in **Jian International v. Commissioner of Delhi Goods and Services Tax**[9], which though rendered in the context of the Delhi Goods and Services Tax Rules had made the following pertinent observations while dealing with refund claims: -

> "**6.** Having heard Learned Counsel for the parties, this Court finds that Rules 90 and 91 of CGST/DGST Rules provide a complete code with regard to acknowledgement, scrutiny and grant of refund. The said Rules also provide a strict timeline for carrying out the aforesaid activities. For instance, Rules 90(2) and (3) of the DGST Rules states that within fifteen days from the date of

filing off the refund application, the respondent has to either point out discrepancy/deficiency in FORM GST RFD03 or acknowledge the refund application in FORM GST RFD02. In the event deficiencies are noted and communicated to the applicant, then the applicant would have to file a fresh refund application after rectifying the deficiencies…..

xxxx xxxx xxxx

8. Admittedly, till date the petitioner's refund application dated 4th November, 2019 has not been processed. As neither any acknowledgment in FORM GST RFD-02 has been issued nor any deficiency memo has been issued in RFD-03 within timeline of fifteen days, the refund application would be presumed to be complete in all respects in accordance with sub-rule (2), (3) and (4) of Rule 89 of CGST/DGST Rules.

9. To allow the respondent to issue a deficiency memo today would amount to enabling the Respondent to process the refund application beyond the statutory timelines as provided under Rule 90 of the CGST Rules, referred above. This could then also be construed as rejection of the petitioner's initial application for refund as the petitioner would thereafter have to file a fresh refund application after rectifying the alleged deficiencies. This would not only delay the petitioner's right to seek refund, but

[9] 2020 SCC Online Del 2606

> also impair petitioner's right to claim interest from the relevant date of filing of the original application for refund as provided under the Rules.
>
> xxxx xxxx xxxx
>
> **11.** Consequently, this Court is of the view that the respondent has lost the right to point out any deficiency, in the petitioner's refund application, at this belated stage.
>
> **12.** Accordingly, this Court directs the respondent to pay to the petitioner the refund along with interest in accordance with law within two weeks."

27. It was the submission of Mr. Gulati further that the so-called deficiency memos cannot be read as substituting or subserving the salutary purposes of a **Show Cause Notice**[8]. It was submitted that as pointed out hereinbefore, the deficiency memos issued in 2019 and 2020 only required the petitioner to provide further information and documentation. Those notices in any case, according to learned senior counsel, did not ever place the petitioner upon notice of the grounds on which the second respondent either proposed to reject the refund application or was inclined to negative its claim. It was submitted that although the petitioner vide its various emails, collectively enclosed as Annexure P-13, had repeatedly sought personal hearing, no opportunity of hearing was afforded nor was any SCN issued.

28. Mr. Gulati took strong exception to the procedure as adopted by the respondent, contending that the entire record would reveal that the petitioner was never made aware of the basis of rejection of its claim

[8] SCN

for refund and those reasons came to light only when the impugned order came to be passed.

29. While seeking to expound upon the purposes which are served by a SCN and the obligation of the respondents to disclose the material or grounds on which a particular action is proposed to be taken, Mr. Gulati referred for our consideration the following passages from the decision of the Supreme Court in **Gorkha Security Services v. Government (NCT of Delhi) & Ors**[9]**:-**

> "**21.** The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.
>
> **22.** The High Court has simply stated that the purpose of showcause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice,

[9] (2014) 9 SCC 105

a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit. We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.

xxxx xxxx xxxx

27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken….”

30. It was then contended that undisputedly refund for a similar set of services was granted to the petitioner for the period pertaining to July 2014 to September 2014. In the absence of there being any fundamental variation in the nature of services that were rendered by the petitioner, Mr. Gulati would contend that the respondents have clearly acted arbitrarily in rejecting the refund claims in question. It was submitted that while the principles of res judicata may not strictly be applicable to matters relating to tax, it is also well settled that where a fundamental aspect recurring over different assessment years remains

unquestioned and unchanged, the respondents would clearly stand estopped from taking a contrary view.

31. Reliance in this regard was placed upon the following pertinent observations as rendered by the Supreme Court in **M/s Radhasoami Satsang, Soami Bagh, Agra v. Commissioner of Income Tax**[10]:-

> "**13.** One of the contentions which the learned senior counsel for

[10] (1992) 1 SCC 659

the assessee-appellant raised at the hearing was that in the absence of any change in the circumstances, the Revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. He relied upon some authorities in support of his stand. A Full Bench of the Madras High Court considered this question in *T.M.M. Sankaralinga Nadar & Bros.* v. *CIT* [4 ITC 226 (Mad) (FB)] . After dealing with the contention the Full Bench expressed the following opinion:

> "The principle to be deduced from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e.g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income; such questions if decided by a Court on a reference made to it would be res judicata in that the same question cannot be subsequently agitated."

xxxx xxxx xxxx

16. We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

17. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter — and if there was no change it was in support of the assessee — we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under Sections

11 and 12 of the Income Tax Act of 1961."

32. Insofar as the question of the petitioner rendering „*intermediary services*" is concerned, Mr. Gulati argued that the aforesaid issue clearly stands answered against the respondents in light of the judgment rendered in **Verizon Communication India Pvt. Ltd v. Assistant Commissioner, Service Tax, Delhi III & Anr**[13]. The relevant parts of the said judgment are extracted hereinbelow: -

> "**45.** In any event the Circular dated 3rd January 2007 would in any event not apply to the services provided by Verizon India to Verizon US. In order to determine who the „recipient" of a service is, the agreement under which such service has been agreed to be provided has to be examined. When the Master Supply Agreement between Verizon India and Verizon US is examined, it is plain that the recipient of the service is Verizon US and it is Verizon US that is obliged to pay for the services provided by Verizon India.
>
> **46.** The position does not change merely because the subscribers to the telephone services of Verizon US or its US based customers „use" the services provided by Verizon India. Indeed in the telecom sector, operators have network sharing and roaming arrangements with other telecom service providers whose services they engage to provide service to the former's subscribers. Yet, the „recipient" of the service is determined by the contract between the parties and by reference to (a) who has the contractual right to receive the services; and (b) who is responsible for the payment for the services provided (i.e., the service recipient). This essential difference has been lost sight of by the Department. In the present case there is no privity of contract between Verizon India and the customers of Verizon US. Such customers may be the „users" of the services provided by Verizon India but are not its recipients.
>
> xxxx xxxx xxxx
>
> **53**. The Department was also not justified in characterising the arrangement of provision of services as one between related

persons viz., Verizon India and Verizon US. In doing so the Department was applying a criteria that was not stipulated either under the ESR or Rule 6A of the ST Rules.

[13] 2017 SCC Online Del 10299

Summary of conclusions

54. To summarise the conclusions:

xxxx xxxx xxxx

(iii) That Verizon India may have utilised the services of Indian telecom service providers in order to fulfil its obligations under the Master Supply Agreement with Verizon US made no difference to the fact that the recipient of service was Verizon US and the place of provision of service was outside India.

(iv) The subscribers to the services of Verizon US may be „users" of the services provided by Verizon India but under the Master Supply Agreement it was Verizon US that was the „recipient" of such service and it was Verizon US that paid for such service. That Verizon India and Verizon US were „related parties' was not a valid ground, in terms of the ESR or the Rule 6A of the ST Rules, to hold that there was no export of service or to deny the refund.

xxxx xxxx xxxx

(vi) Even for the period after 1st July 2012 the provision of telecommunication service by Verizon India to Verizon US satisfied the conditions under Rule 6A(1)(a), (b), (d) and (e) of the ST Rules and was therefore an „export of service". The amount received for the export of service was not amenable to service tax."

D. CONTENTIONS OF THE RESPONDENTS

33. Controverting the aforenoted submissions, learned counsel representing the respondents firstly submitted that the petitioner should be relegated to the alternative remedy as provisioned for under Section

85 of the Act and file an appeal before the appropriate Appellate Authority, challenging the impugned order. Learned counsel for the respondents also submitted that the allegation of the principles of natural justice having been violated is also clearly misconceived bearing in mind the deficiency memos which were issued. It was further pointed out that the representatives of the petitioner had also been invited to personal hearings which were conducted on the virtual platform on 24 July 2020 and again on 24 & 28 June 2021, 26 July 2021 and 05 August 2021.

34. Insofar as the challenge on merits is concerned, it was the submission of learned counsel that the claims for refund that may be made with respect to CENVAT credit would necessarily have to be considered in accordance with the provisions made in Section 11B of the Excise Act read with Rule 5 of the CCR Rules. According to learned counsel, Section 83 of the Act contemplates certain provisions of the Excise Act, including Sections 11B and 11BB, to be applicable to service tax in the same manner as they would apply to assessment of excise duty. It was in the aforesaid backdrop that it was contended that since Section 11B (2) of the Excise Act is predicated upon the competent authority being „*satisfied'* that the whole or any part of the duty is refundable, similar tests should apply when it comes to refund of CENVAT credit. According to learned counsel, this is clearly indicative of the issue of refund not resting on the mere ipse dixit of the assessee.

35. Similarly, according to learned counsel, Rule 5 of the CCR Rules speaks of determination of the amount that is liable to be refunded. It was further submitted that Rule 5 makes the grant of refund subject to the procedure, safeguards, conditions and limitations as may be specified by the **Central Board of Excise and Customs**[11] in terms of a notified order.

36. Learned counsel in this connection drew our attention to the notification so issued in terms of the aforesaid statutory provision dated 18 June 2012. Our attention was specifically drawn to Clauses 2 and 3 of the said notification and which are extracted hereinbelow: -

> "….**2. Safeguards, conditions and limitations.** - Refund of CENVAT Credit under rule 5 of the said rules, shall be subjected to the following safeguards, conditions and limitations, namely:-
>
> (a) the manufacturer or provider of output service shall submit not more than one claim of refund under this rule for every quarter:
>
> *Provided* that a person exporting goods and service simultaneously, may submit two refund claims one in respect of goods exported and other in respect of the export of services every quarter.
>
> (b) in this notification quarter means a period of three consecutive months with the first quarter beginning from 1st April of every year, second quarter from 1st July, third quarter from 1st October and fourth quarter from 1st January of every year.
>
> (c) the value of goods cleared for export during the quarter shall be the sum total of all the goods cleared by the exporter for exports during the quarter as per the monthly or quarterly return filed by the claimant.

[11] the Board

(d) the total value of goods cleared during the quarter shall be the sum total of value of all goods cleared by the claimant during the quarter as per the monthly or quarterly return filed by the claimant.

(e) in respect of the services, for the purpose of computation of total turnover, the value of export services shall be determined in accordance with clause (D) of sub-rule (1) of rule 5 of the said rules.

(f) for the value of all services other than export during the quarter, the time of provision of services shall be determined as per the provisions of the Point of Taxation Rules, 2011.

(g) the amount of refund claimed shall not be more than the amount lying in balance at the end of quarter for which refund claim is being made or at the time of filing of the refund claim, whichever is less.

(h) the amount that is claimed as refund under rule 5 of the said rules shall be debited by the claimant from his CENVAT credit account at the time of making the claim.

(i) In case the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and amount sanctioned.

3. Procedure for filing the refund claim. - (a) The manufacturer or provider of output service, as the case may be, shall submit an application in Form A annexed to the notification, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, in whose jurisdiction,-

(i) the factory from which the final products are exported is situated.

(ii) the registered premises of the provider of service from which output services are exported is situated.

(b) The application in the Form A along with the documents specified therein and enclosures relating to the quarter for which refund is being claimed shall be filed by the claimant, before the expiry of the period specified in section 11B of the Central Excise Act, 1944 (1 of 1944).

(c) The application for the refund should be signed by-

(i) the individual or the proprietor in the case of proprietary firm or karta in case of Hindu Undivided Family as the case may be;

(ii) any partner in case of a partnership firm;

(iii) a person authorized by the Board of Directors in case of a limited company;

(iv) in other cases, a person authorized to sign the refund application by the entity.

(d) The applicant shall file the refund claim along with the copies of bank realization certificate in respect of the services exported.

(e) The refund claim shall be accompanied by a certificate in *Annexure A-I*, duly signed by the auditor (statutory or any other) certifying the correctness of refund claimed in respect of export of services.

(f) The Assistant Commissioner or Deputy Commissioner to whom the application for refund is made may call for any document in case he has reason to believe that information provided in the refund claim is incorrect or insufficient and further enquiry needs to be caused before the sanction of refund claim.

(g) At the time of sanctioning the refund claim the Assistant Commissioner or Deputy Commissioner shall satisfy himself or herself in respect of the correctness of the claim and the fact that goods cleared for export or services provided have actually been exported and allow the claim of exporter of goods or services in full or part as the case may be."

37. Learned counsel specifically referred to Clause 3(g) of the said notification and which speaks of the Assistant or the Deputy Commissioner being obliged to record their satisfaction with respect to the correctness of the claim as well as the fact that goods cleared for export or services provided have actually been exported. According to learned counsel, it is only when such satisfaction is reached that the

claim of the exporter of goods or services is liable to be granted in full or in part.

38. In view of the aforesaid, it was the contention of the respondents that a conjoint reading of Section 11B of the Excise Act and Rule 5 of the CCR Rules would lead one to the irresistible conclusion of a power of determination inhering in the competent authority even at the stage where an application for refund may be made.

39. Insofar as the orders of refund made on earlier occasions is concerned, learned counsel would contend that since the issue of refund of CENVAT credit is essentially one relating to assessment of tax, it is the well settled precept of res judicata being inapplicable which would govern. It was thus contended that merely because orders of refund may have been framed in the past, the same would neither operate as res judicata nor could it be said to operate as an estoppel against the respondents.

40. Learned counsel further submitted that the reliance placed on Section 73 of the Act is clearly misconceived since the refund has not been denied on grounds which are spoken of in that provision. Learned counsel also laid emphasis on Section 73 being applicable only in a situation where either service tax has not been levied or paid or has been short levied, short paid or erroneously refunded. According to learned counsel, neither of those situations prevail in the facts of the present case when one bears in mind that the application itself stood confined to refund of CENVAT credit.

41. It was then lastly contended that the second respondent has recorded detailed and cogent reasons in support of its conclusion that the services rendered by the petitioner did not qualify as „*export of services*" coupled with the ultimate conclusion which came to be recorded by the said respondent, who on a due consideration of facts found that the petitioner was liable to be viewed as an „*intermediary*" in terms of the provisions contained in Rule 2(f) read with Rule 9 of the PoPS Rules. On an overall consideration of the above, the respondents would urge us to dismiss the writ petition.

E. THE NATURAL JUSTICE CHALLENGE

42. Having noticed the rival submissions which were addressed, we first take up for consideration the challenge laid to the impugned order on the ground of violation of the principles of natural justice. The respondents have in this regard essentially referred to the deficiency notices dated 05 November 2019 and the three follow up communications dated 13 & 19 May 2020 and 01 June 2020. It was their contention that the aforenoted deficiency notices are liable to be read as evidence of sufficient and broad compliance with the natural justice requirements. We find ourselves unable to sustain that contention for the following reasons.

43. As we view the deficiency memos which had been issued, we find that those communications essentially called upon the petitioner to furnish additional documentation and provide further details with

respect to the various transactions which formed the subject matter of the claim for refund. Those communications, as Mr. Gulati rightly contended, were more in the nature of interrogatories rather than a SCN. In order for the deficiency memos to qualify as notices which would be compliant with the requirements of the principles of natural justice, it was incumbent upon the respondents to have confronted the petitioner with the issue of „*export of services*" as well as whether it was an „*intermediary*". For a notice to be recognized as being compliant with the principles of natural justice, it was incumbent upon the respondents to place the petitioners on due notice of the proposed action or the view that they were inclined to take.

44. However, and as a reading of the deficiency memos would indicate, they abjectly failed to either place the petitioner on notice of the view proposed to be taken nor did those communications confront the petitioner with the conclusion which ultimately formed the basis for the passing of the impugned order. It is in this context that the principles enunciated in *Gorkha Security Services* assume significance.

45. In the said decision, the Supreme Court has while expounding upon the basic requirements of a SCN, significantly observed that in order for such a notice to be recognized as fulfilling the requirements of the principles of natural justice, it must necessarily embody the material or the grounds on the basis of which an action is proposed to be initiated. It was further held that a notice to show cause must also necessarily disclose the particular penalty or action which is proposed to be taken.

46. When tested on the aforesaid precepts, it becomes apparent that the deficiency memos abjectly fail to meet the two foundational precepts as enunciated by the Supreme Court in *Gorkha Security Services*. As was noticed by us hereinabove, the respondents neither called upon the petitioner to explain why the services rendered by it would not be liable to qualify as an „*export of services*" nor did it place the petitioner on notice of the second respondent proposing to take the view that the petitioner was an „*intermediary*". More fundamentally, we find that the deficiency memos did not embody a preliminary view or opinion that may have been formed by the second respondent for rejecting the applications for refund. We are thus of the firm opinion that the deficiency memos did not fulfil the rudimentary requirements of an action being imbued and informed by the principles of natural justice.

47. It becomes pertinent to note in this regard further and as was rightly contended by Mr. Gulati, that a deficiency memo does not serve the same purpose as a SCN. A communication of the former genre is essentially aimed at requiring the noticee to place additional material and evidence for the consideration of the competent authority. This would also flow from the requirements put in place in terms of Rule 5 of the CCR Rules read along with the Notification dated 18 June 2012. It becomes pertinent to note that the aforesaid Notification specifies the various particulars, details and documentation which must accompany and form part of a refund claim. A deficiency memo would thus be

confined to the applicant assessee being called upon to fulfil any shortcoming or supplement documentation that must accompany a claim for refund. In any event, the deficiency memo cannot be viewed as a substitute for a SCN. 48. We, in this regard, agree with the observations rendered by the Gujarat High Court in **New Pensla Industries v. Union of India**[15] and which in our considered opinion, correctly held that a deficiency memo is not in the nature of a SCN and that it merely serves the purpose of placing a party on notice of being liable to furnish additional information and remedy any deficiency in a claim that may

[15] 2017 SCC Online Guj 2596

be laid.

F. EXAMINATION OF A REFUND CLAIM

49. That takes us then to the principal question and which relates to the nature and extent of the power that may be available to be exercised by the Adjudicating Authority while considering a claim for refund.

50. In terms of the Act, every person liable to pay service tax is obliged to furnish a self-assessed return in terms of Section 70. The return so submitted can be questioned either in accordance with Section 72, if the competent authority is of the opinion that the assessee has failed to assess the tax in accordance with the provisions of the Act or Rules made thereunder or in circumstances which are enumerated in Section 73.

51. It becomes pertinent to note that the expression „*assessment*" has been duly defined under the 1994 Rules to include self assessment of service tax. Rule 2(b) of the said Rules is reproduced hereinbelow:-

> "Rule 2 - Definitions
>
> (1) In these rules, unless the context otherwise requires,--
>
> xxxx xxxx xxxx
>
> (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;"

52. A comprehensive reading of the provisions of the Act would thus establish that a self-assessed return stands placed on a pedestal equivalent to that of an actual order of assessment, provisional or best judgment assessment or a reassessment. This issue in any case is liable to be answered against the respondent in light of the decision in *ITC Limited*.

53. That takes us then to Rule 5 of the CCR Rules and which embodies the procedure liable to be followed by an assessee claiming refund of CENVAT credit. It becomes pertinent and at the outset to note that while Rule 5(1) does employ the expression „*determined*", the same is of little relevance insofar as the question which stands posited before us is concerned. This, we do hold, since we find that the determination which is spoken of in Rule 5(1) is confined to a quantification of the refund allowable in accordance with the formula prescribed therein. We thus find ourselves unable to sustain the

submission of the respondent that the word „*determined*" must be read in aid of recognizing a power of assessment being available to be exercised while considering a claim for refund.

54. However, and undisputedly Rule 5(1) of the CCR Rules also enables the Board to specify the safeguards, conditions and limitations subject to which a refund of CENVAT credit may be allowed. Undisputedly, the notification dated 18 June 2012 owes its genesis to this power which stands placed in the hands of the Board. The said notification in Clause 3(g) obliges the Assistant of the Deputy Commissioner to examine and verify the correctness of the refund claim and to ensure that goods cleared for export or services provided have actually been exported. It is the aforesaid safeguard and condition as contained in that Notification which the respondents would urge us to recognise as conferring an adjudicatory power upon the competent authority while considering a claim for refund.

55. The petitioner on the other hand, contends that the extent of the power which is available to be exercised by an authority while considering a claim for refund is no longer res integra and stands concluded in light of the judgments rendered by the Supreme Court in *Flock(India), Priya Blue Industries* and *ITC limited*.

56. In order to evaluate the rival submissions, we firstly note that the Act adopts Section 11B of the Excise Act. As is evident from a reading of the said provision and more particularly Section 11B (2), a refund is granted by the competent authority upon it being satisfied that the whole or any part of the duty paid is refundable. In order to discern and

appreciate the ratio decidendi of *ITC Limited,* we also deem it apposite to notice Sections 17 and 27 of the **Customs Act, 1962**[12], which are reproduced hereinbelow: -

> "**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 entries made under Section 46 or Section 50 and the self-assessment of goods referred to in subsection (1)] and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.
>
> Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.
>
> (3) For the purposes of verification 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 [* * *] 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.

[12] Customs Act

Explanation.—For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under Section46 or an exporter has entered any export goods under Section 50before 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."

xxxx xxxx xxxx

"**27. Claim for refund of duty**.— (1) Any person claiming refund of any duty or interest,—

(*a*) paid by him; or (*b*) borne by him, may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:

Provided that where an application for refund has been made before the date on which the Finance Bill, 2011 receives the assent of the President, such application shall be deemed to have been made under sub-section (1), as it stood before the date on which the Finance Bill,2011 receives the assent of the President and the same shall be dealt with in accordance with the provisions of sub-section (2):

Provided further that the limitation of one year shall not apply where any duty or interest has been paid under protest:

Provided also that where the amount of refund claimed is less than Rupees One hundred, the same shall not be refunded.

Explanation.—For the purposes of this sub-section, "the date of payment of duty or interest" in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

(1-A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28-C) as the applicant may furnish to establish that the amount of duty or interest in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty or interest, has not been passed on by him to any other person.

(1-B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely—

(a) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of Section 25, the limitation of one year shall be computed from the date of issue of such order;

(b) where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction;

(c) where any duty is paid provisionally under Section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment.

(2) If on receipt of any such application, the Assistant Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

(a) the duty and interest, if any, paid on such duty paid by the importer or the exporter, as the case may be if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person; (*d*) the export duty as specified is Section 26;

(e) drawback of duty payable under Sections 74 and 75;

(f) the duty and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify;

(g) the duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made where—

(i) such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry; or

(ii) the duty actually payable is reflected in the reassessed bill of entry in the case of reassessment.

Provided further that no notification under clause (*f*) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal, the National Tax Tribunal or any Court or in any other provision of this Actor the regulations made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (*f*) of the first proviso to subsection (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (*f*) of the first proviso to subsection(2), including any such notification approved or modified under subsection (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

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

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

Section 27(2) is thus a provision which is *pari materia* with Section 11B (2) of the Excise Act.

59. The Supreme Court in *ITC Limited*, notwithstanding Section 27(2) employing the expression „*satisfied*" held that unless a selfassessed return is revised or doubted in exercise of powers of reassessment, best judgment assessment or where it be alleged that duty had been short levied, short paid or erroneously refunded, those powers

would not be available to be exercised at the stage of considering an application for refund. Having noticed the statutory position which prevails, we turn then to the decisions which would have a bearing on the question which stands posited.

60. *Flock (India)* was one of the earliest decisions which dealt with the aspect of a claim for refund emanating from a return which had been duly assessed. In *Flock (India)*, the self-assessed returns had been duly assessed by the Assistant Collector and the issue of classification was answered against the assessee. The aforesaid order of the Assistant Collector came to be affirmed by the Collector (Appeals). It was thereafter and while seeking to prosecute a claim for refund that the assessee sought a review of the aforesaid decisions which had been rendered by the authorities. Negativing the said contention, the Supreme Court observed that once an assessment filed had been duly adjudicated in accordance with the procedure prescribed under the statute, it would be impermissible for the said decision being reviewed or revisited at the stage of consideration of a refund claim.

61. In *Priya Blue Industries*, the Supreme Court was faced with a situation where a Bill of Entry had been duly assessed and the duty payable in terms of that assessment deposited under protest. It was thereafter that an application for refund came to be preferred. As would be evident from the conclusions ultimately recorded in that decision, the Supreme Court categorically held that once an order of assessment came to be made, the duty was liable to be paid in accordance with that order alone. Their Lordships pertinently observed that unless such an

order of assessment is reviewed or modified in appeal, the duty as determined to be payable would remain untouched and it would not be open for an assessee to seek a review of the assessment order, bearing in mind the fact that the claim for refund is not akin to proceedings in appeal. It was further held that the authority which is enjoined to consider a refund claim can neither sit in an appeal over an assessment made nor can it review an order of assessment.

62. Both these decisions and the views expressed therein came to be specifically noticed and reaffirmed by three learned Judges of the Supreme Court in *ITC Limited*. The decision of the Supreme Court in *ITC Limited* assumes added significance, insofar as the present case is concerned, in light of it having found that a self-assessment return, even in the absence of a formal order dealing with the same, would nonetheless amount to an assessment. We had in this regard and in the preceding parts of this decision noticed the definition of the expression „*assessment*‟ as contained in Rule 2(b) of the 1994 Rules which includes a self-assessment of service tax and thus being evidence of a position similar and akin to that which obtains under the Customs and Excise Acts.

63. Their Lordships in *ITC Limited* categorically held that notwithstanding a self-assessed Bill of Entry having been merely endorsed by the competent authority, the same would nonetheless amount to an „*assessment*‟. It was in that backdrop that it was held that once a self-assessed return had been duly accepted, the same could not

be modified or varied by an authority while considering an application for refund.

64. It becomes pertinent to note that the appellant before the Supreme Court in that case, had sought to press the claim for refund asserting that it had due to inadvertence failed to submit a selfassessment return taking into consideration an exemption notification. It was this claim which came to be ultimately negatived by the Supreme Court and which held that a claim for refund cannot be entertained unless the order of assessment, and which would include a self-assessment return, is modified in accordance with the procedure prescribed in the statute. In our considered opinion, it is these principles enunciated in *Flock (India)*, *Priya Blue Industries* and *ITC Limited*, which compel and convince us to observe that the impugned order is clearly rendered unsustainable.

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

terms of Rule 3 of the CCR Rules. It was in respect of the accumulated CENVAT credit that the application for refund came to be made.

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

67. We thus come to the firm conclusion that in the absence of the self-assessed return having been questioned, reviewed or re-assessed, the claim for refund of CENVAT credit could not have been denied by the respondents. When confronted with the application for refund, all that the respondents could have possibly examined or evaluated was whether the provisions of Rule 5 read along with the various prescriptions contained in the notification dated 18 June 2012 had been complied with. The respondents, at this stage of the proceedings, could

not have doubted, questioned or undertaken a merit review of the self-assessed return which had been submitted.

68. The reliance which is placed on Clause 3(g) of the Notification dated 18 June 2012 also would not justify the denial of refund, since the expressions „*determine'* and „*satisfy*" as appearing in the parent Rule as also the Notification noted hereinabove would have to be construed bearing in mind the limited jurisdiction and authority which was available in the hands of the Adjudicating Authority and exercised by it while considering the application for refund. In any case, the mere usage of the expressions „*determine*" or „*satisfy*" would, in our considered opinion, not amount to expanding the nature of the authority which the second respondent could have exercised while evaluating an application for refund. Once the self-assessed return of the petitioner and in terms of which its claim of refund and of being inexigible to service tax had attained finality and had not been reassessed or questioned, the refund was clearly liable to be granted automatically.

69. At the stage of consideration of the application for refund, it would be impermissible for the second respondent to question whether the services rendered by the petitioner amounted to an „*export of service*" or even dwell upon issues which related to its principal claim of not being liable to pay service tax. The recognition of such a power being available to be wielded while considering an application for refund would clearly be contrary to the principles propounded in *ITC Limited*. The acceptance of such a contention would amount to recognising the existence of an adjudicatory function inhering in the

refund sanctioning authority and would clearly be abhorrent to the principles enunciated in the said decision of the Supreme Court.

70. Since the liability or otherwise of the petitioner to pay service tax would flow and rest only upon the assertions made in the selfassessed return, the various issues which have been gone into by the second respondent while passing the impugned order would clearly be an exercise beyond the jurisdiction which could otherwise be recognised to exist at the stage of consideration of a refund claim. We thus find that the impugned order is clearly rendered unsustainable on this score and is liable to be set aside for the aforesaid reasons.

G. CERTAINTY IN TAXATION MATTERS

71. We also find merit in the contention of Mr. Gulati, who had assailed the impugned order additionally on the basis of the refunds which had been duly granted for earlier periods. While it is true that the principles of res judicata may not be strictly applicable, we find that the nature and ambit of services which were rendered by the petitioner across separate assessment periods had remain unchanged. The respondents do not base their decision on any change in circumstance or differentiation in the spectrum of services that the petitioner undertook across different block assessment periods. 72. In this regard, it would be pertinent to recall that the Supreme Court in *M/s Radhasoami Satsang* had held that while each assessment year may constitute a unit in itself, unless a „*fundamental aspect common to different assessment years has come to be altered'*, the taxing authorities would be bound by the view already

taken and it would in any case be impermissible for them to take contrarian views with respect to an identical set of facts.

73. As noticed hereinabove, the respondents while passing the impugned order have not alluded to any material change which may have justified a different or contrary view being taken. We thus find ourselves unable to sustain the impugned order on this additional ground.

H. THE ALTERNATIVE REMEDY OBJECTION

74. Insofar as the argument of the respondent based on an alternative remedy is concerned, the same is noticed only to be rejected since we have already found that the action which had been initiated was in gross violation of the principles of natural justice. Undisputedly, a violation of the principles of natural justice constitutes an exception to the self-imposed restraint which we exercise when called upon to invoke our constitutional powers conferred by Article 226 of the Constitution. In addition, we have also found that the second respondent while considering the claim for refund has clearly acted in excess of the jurisdiction which could have been exercised. On this score also, we find no merit in the objection as taken by the respondents.

I. DIRECTIONS

75. Accordingly, and for all the aforesaid reasons, the writ petition shall stand allowed. The impugned order dated 04 October 2021 is hereby quashed and set aside. The respondents shall as a consequence of the

above, process the claim as submitted by the petitioner and effect refunds in accordance with law.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

NOVEMBER 06, 2023
RW/neha