CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-II

Date of hearing/decision: 23.05.2017

Appeal No. ST/3475/2012-SM
[Arising out of the Order-in-Appeal No.39(ST)RPR-I/2012 dated 01/06/2012, passed by the Commissioner (Appeals), Customs & Central Excise Raipur (C.G.)

CCE Raipur … Appellant

Vs.

Hind Energy & Coal Benefication … Respondent

Appearance:

Present Shri G.R. Singh, AR for the appellant
Present Miss Sakshi CA / Vibha Narang, Advocate for the respondent

Coram: Hon'ble Mr.Ashok K. Arya, Technical Member

FINAL ORDER No. 53435/2017

Per Ashok K. Arya :

1. The Revenue is in appeal against Order in Appeal no. 39/2012 dated 01/06/2012 whereunder inter alia the appellant has been allowed the benefit of self-adjustment of the demand of service tax against the refund admissible to the appellant for the excess payment of service tax made.

2. Both sides represented by the Ld. DR, Shri G.R. Singh for the revenue and Ld. Advocates, Miss Vibha Narang

and Ld. CS Miss Sakshi for the respondent namely, M/s Hind Energy And Coal Benefication have been heard.

3. After careful consideration of the facts of the case and the submissions of both the sides, it appears that matter is covered by the Tribunal's decision in case of *Dell India Private Limited Vs Commissioner Service Tax Bangalore*, 2016 (42) S.T.R. 273 (Tri.- Bang.), where Tribunal has inter alia observed as under:

> **6.** After careful consideration of the facts on record and the circumstances cited by the appellant, when the assessee paid excess amount of tax to the exchequer, law of the land is very clear under Article 265 of the Constitution of India, which says that "No tax shall be levied or collected except by authority of law." If Revenue becomes very rigid on strict compliance of the procedure every time and all the time, there could be situations where such rigidness and strictness on the part of the Revenue could become contrary to the provisions of the Article 265 of the Constitution of India.
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> **6.1** Strictly speaking, one can be in general agreement with the pleadings of the learned AR appearing for the Revenue that the present appellant is not strictly covered under those different Rules of S.T.R., 1994 i.e. Rule 6(3), Rule 6(4A), Rule 6(4B) and Rule 6(1A) of the Service Tax Rules, 1994. But when one sees the combined effect of the provisions of S.T.R., 1994 just quoted above, the implications are that the present appellant has to be given the benefit of adjustment of excess service tax paid by them during the relevant period i.e. April 2009 to September 2009. Revenue is also in agreement with the fact that there had been excess payment of service tax during the relevant period. The appellant interpreting the above provisions of Service Tax Rules 1994 made the adjustment of this excess payment of service tax during the later period though Revenue pleads that the appellant had only one route of claiming this excess payment of service tax by filing a refund claim as per the provisions of Service Tax Rules. However, considering the overall facts on record and the submissions of both the sides, a liberal interpretation and generous view of these Rules quoted above (Service Tax Rules) needs to be taken. I am accordingly taking the combined and liberal view of the Rules quoted above, whereunder the adjustment of the excess service tax paid would be allowed during the later period to the appellant assessee. Here I take the support from the decision of CESTAT, New Delhi in case of *General Manager (CMTS)* v. *CCE, Chandigarh* (supra). It is made clear that though this case law of CESTAT, New Delhi talks about excess payment of service tax, the issue was failure to opt for centralized registration under Rule 4(2) of the S.T.R., 1994 by the

assessee concerned. In this decision, CESTAT, Delhi has *inter alia* held that regarding adjustment against tax liability during other months amount to collection of tax without authority of law contrary to Article 265 of the Constitution of India. Consequently, I am of the considered view that this adjustment of excess payment of service tax, considering the facts on record is admissible to the appellant and more so when we consider the combined effect of the relevant provisions of Service Tax Rules, 1994 quoted above. The CESTAT, New Delhi's decision quoted above in this regard has discussed various provisions of Service Tax Rules, 1994. This discussion make the position more clear for the purpose of present facts. Here to have more clarity, the following is quoted from this decision :-

7.1 Thus sub-rule (4A) read with Rule (4B) (of Service Tax Rules, 1994) would apply to a situation where an assessee on account of his inability to correctly determine the amount received during a particular month for the service provided, has paid service tax on the basis of his estimation and subsequently, when the exact amount received during the month, has been determined, the amount of service tax paid on the estimation basis is found to be in excess of his actual tax liability. In fact, in such a situation the excess amount paid by him is like advance payment of service tax during the month in excess of the actual service tax liability and which can always be adjusted against his service tax liability for other months as there is no unjust enrichment angle involved. For example, if against actual payments of Rs. 4 crore received by an assessee in a particular month against services provided, on which his service liability @ 10% adv. is Rs. 40 lakhs, he has paid tax of Rs. 50 lakhs on the basis of his estimated receipt of rupees five crores during the month, the excess tax payment of Rs.10 lakh paid is like an advance payment of tax whose incidence has not been passed on to his customers. In fact, w.e.f. 1-3-2008, sub-rule (1A) of Rule 6 has been introduced by Notification No. 4/2008-S.T., dated 1-3-2008 which also provides that without prejudice to the provisions of sub-rule (1) of Rule 6, every person liable to pay service tax may, on his own, pay an amount as service tax in advance to the credit of Central Government and adjust the amount so paid against service tax liability, which he is liable to pay in subsequent period, subject to the condition that he intimates the details of the amount paid in advance to the Jurisdictional Superintendent of Central Excise. The excess payment referred to in sub-rule (4A), read with sub-rule (4B), is like advance payment under sub-rule (IA) of Rule 6. There is no condition in Rule 6(4A) read with Rule 6(4B) providing that for availing of the adjustment facility, the assessee must have opted for centralized registration under Rule 4(2). Moreover, when an assessee during certain months, for reasons other than interpretation of law, taxability, classification, valuation or applicability of exemption, has paid service tax in excess of his actual tax liability, the Government cannot retain the excess tax paid by the assessee by refusing its adjustment against his tax liability during other months and refusing adjustment of such excess tax payment during a month against tax liability during other months and appropriation and retention of the same would amount to collection of tax without the authority of law which is contrary for the provisions of Art. 265 of the Constitution of India. As held by the Apex Court in case of *Ispat Industries Ltd.* v. *CC, Mumbai* reported in 2006 (202) 561 (S.C.) (paras 26 to 29) whenever there is conflict between a norm in a higher layer in the hierarchy of the laws in the legal system of the country and a norm in a lower layer in the hierarchy, the norm in the higher layer in the hierarchy will prevail. Therefore, if excess payment of tax in a month is not on account of reasons involving interpretation of law, taxability, classification, valuation or

> applicability of exemption notification and is purely on account of inability of the assessee to exactly determine the total amount collected during the month against the bills raised as a result of which he had determined his tax liability on estimation basis, the excess amount of tax paid during the month can be adjusted against his tax liability during other months and in this regard, there cannot be any monetary limit.

3.1 The subject matter also appears to be covered by Tribunal's decision in case of *GM, Telecom, BSNL Vs. CCE, Raipur* 2015 (38) STR 1182 (Tri.-Del.), where Tribunal has inter alia observed as under –

> We have considered the facts and the submissions made in this case. As is evident from the several judgments cited above, it has been consistently held that substantial benefit cannot be denied in such cases merely because some aspects of the procedure had not been followed. Indeed, such adjustment has been permitted by the CESTAT in BSNL's own case cited in the earlier para. In the present case there has been no mala fide on the part of the appellant as is evident from the fact that the adjudicating authority refrained from imposing any penalty observing that the appellant acted in a bona fide manner and mala fide cannot be attributed to them.

3.2 Considering above decisions of the Tribunal and the observations referred above, there is no merit in the appeal filed by the Revenue. Consequently, the impugned order is sustained and the appeal dismissed as without merits.

[Order dictated and Pronounced in the open court]

(Ashok K. Arya)
Member (Technical)