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

**Service Tax Appeal No. 87447 of 2016**

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-097-16-17 dated 25.07.2016 passed by the Commissioner of Central Excise (Appeals), Pune-I)

**M/s. Namrata Developers** **Appellant**
899, Somwar Peth, Talegaon Dabhade,
Tal. Maval, Pune 410 506.

Vs.

**Commissioner of Central Excise, Pune-I** **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri Ashok Nawal, Chartered Accountant, for the Appellant
Shri Dilip Shinde, Assistant Commissioner, Authorised Representative for the Respondent

**CORAM:**

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

Date of Hearing: 22.02.2022
Date of Decision: 22.02.2022

**FINAL ORDER NO. A/85182/2022**

This appeal is directed against the order in appeal No PUN-EXCUS-001-APP-097-16-17 dated 25.07.2016 of the Commissioner (Appeals), Central Excise, Pune. By the impugned order, the Commissioner (Appeals) has upheld the Order in original No P1/ADC/ST/59/2014 dated 31.03.2014 of the Additional Commissioner of Central Excise Pune – I holding as follows:

*"ORDER*

*16.1 I confirm the demand of service tax amount of Rs.30,60,691/-(Rupees Thirty Lakhs Sixty Thousand Six Hundred And Ninety One Only) Inclusive of Edu. Cesses for the period from October 2011 to March 2012, in respect of Construction of Complex Service provided under the provisions of sub-clause (zzzh) of section 65(105) of the Finance Act 1994.*

*16.2 I order recovery of interest at appropriate rate (as applicable during the material period on the demand of Service*

*Tax confirmed at Para 16.1 above, under the provisions of Section 75 ibid.*

*16.3 I impose a penalty of Rs.10,000/-(Rupees Ten Thousand only) on the assessee, M/s Namrata Developers. for their failure to file correct service tax returns, during the period from October 2011 to March 2012, as provided under Section 70 ibid, under the provisions of Section 77(2) ibid.*

*16.4 Since the penalty is proposed to be imposed under Section 78 of the Act, I refrain from imposing penalty under Section 76 of the Finance Act, 1994 upon M/s Namrata Developers.*

*16.5 I impose penalty of Rs.30,60,691/-(Rupees Thirty Lakhs Sixty Thousand Six Hundred And Ninety One Only) M/s Namrata Developers., under Section 78 of the Act. I also give an option as provided under 1st and 2nd proviso to Section 78 of the Act that if the service tax amount along with interest is paid within 30 days from the date of receipt of this order, the noticee is liable to pay penalty equal to 25% of the service tax confirmed at 16.1 above. However, this option is available to the noticee if the Penalty is also paid within 30 days from the date of receipt of this officer.*

*17. This order is issued without prejudice to any other action that may be taken under this law or any other law for the time being in force in India."*

2.1 Appellant is engaged in providing taxable services namely "Construction of Residential Complex Services" became taxable with effect from 22/06/2010.

2.2 During the scrutiny of ST-3 returns filed Appellant, it was noticed/observed that they had short paid Service Tax during the period October 2011 to September 2011 amounting to Rs. 30,60,691/-. Details of the short payments are as below.

| Sr. No. | Period of ST-3 | Assessable Value After abatement | Service Tax of liability @ 10.30% Rs. | Paid vide GAR- 7 Challan No. and date | Amount paid Rs | Remarks |
|---|---|---|---|---|---|---|
| 1 | April | 237647 | 2447769/- | 69103331010 | 2447769/- | No default |

| | | | | | | |
|---|---|---|---|---|---|---|
| | 11 to Sept. 11 | 48/= | | 201150084 Dt. 10/10/2011 | | |
| 2 | Oct. 11 To March 12 | 511401 14/- | 5267431/ = | 69103331010 201150084 Dt. 10/10/2011 69103332903 201251153 Dt 29/3/2012 69103332903 201251188 Dt.29/3/2012 | 2447769/-<br><br>2014049/-<br><br>192691/- | Short paid Rs. 2447769/- + 6,12,922/- |
| | | | | Total Rs. | 46,54,509/- | 30,60,691/- |

2.3 Hence, SCN dated 04.04.2013 was issued for recovery of the short paid service tax.

2.4 This show cause notice was adjudged by the Additional Commissioner as per the order in original referred in para 1, above and upheld by the Commissioner (Appeal) as per the impugned order.

2.5 Aggrieved appellants have filed this appeal.

3.1 I have heard Shri Ashok Nawal, Chartered Accountant for the appellant and Shri Dilip Shinde, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that-

- Service tax on the services provided by them became leviable from 22.06.2010. They had certain confusion about the about the levy, mode, and manner of valuation and payment of service tax
- During the October 2010 to September 2011 Appellant made payment of Service Tax on the Gross Amount received in money equal to the gross amount of the agreements entered during the relevant period. They submitted detail list of Agreements along with sample copies of agreement which was wrongly reported in ST-3 and Service tax was paid on entire amount of agreement.
- At the time of scrutiny Appellant was only advised that the Service Tax was required to be paid on the receipt/ due

basis and not on the agreement basis. After filing of the Service Tax return

- Appellant, themselves realized that such change of mode of calculation i.e. shift from calculation on agreement basis/Accrual basis to receipt cum due basis resulted in the wrong computation of the Service Tax liability and wrong reporting in ST-3 returns.
- They adjusted the excess amount of the service tax paid by them during the period October 2010 to September 2011, and reflected in the ST-3 returns filed by them during the period October 2011 to March 2012, as indicated in table below:

| Period | Oct'10 to March '11 | Apr'11 to Sept'11 | Oct'11 to Mar'12 | Total |
|---|---|---|---|---|
| Total Tax payable as per actual receipts after abatement | 4,33,341 | 19,65,679 | 52,64,857 | 76,63,877 |
| Total Tax paid | 11,24,132/- [6,90,790 excess paid] | 24,47,769. [4,82,090 excess paid] | 40,91,977 [11,72,880 excess adjusted ] | 76,63,877 |

- Further, Appellant vide letter dated 28/01/2013 intimated the department about excess payment made by them and subsequent adjustment.
- Appellant further submits that, due to calculations mistake during the period Oct 11 to March 12, they have inadvertently short paid amount of Rs. 18,85,237/-. Thereafter, Appellant voluntarily paid the said amount on 03/05/2012 and subsequently Appellant also deposited the interest of Rs. 1,10,157/- vide Challan No. 50150 dated 20/12/2012 for the late payment in payment of Service Tax
- They rely on following judicial pronouncements.

a. Rajdeep Buildcon Pvt Ltd. [2011 (21) STR 663 (T-Mum)]

b. General Manager, Bharat Sanchar Nigam Ltd. [2016 (41) S.T.R. 475 (Tri. – Del

c. Chola Business Services Ltd. [2017 (47) S.T.R. 192 (Tri. - Chennai)]

d. Cherry Hill Interiors Ltd. [2016 (42) S.T.R. 74 (Tri. - Del.)]

e. Dell India Pvt. Ltd. [2016 (42) S.T.R. 273 (Tri. - Bang.)]

f. Nirma Architects & Valuers [2006 (1) S.T.R. 305 (Tri. - Del.)]

g. State Bank Of Hyderabad 2016 (43) S.T.R. 415 (Tri. – Hyd

h. Telecom District Manager, Bsnl [2017 (47) S.T.R. 282 (Tri. - Del.)]

i. Garima Associates [2015 (40) S.T.R. 247 (Tri. - Mumbai)]

j. L&T Sargent & Lundy Limited [2016 (43) S.T.R. 249 (Tri. - Ahmd.)]

k. Powercell Battery India Ltd [2010 (19) S.T.R. 400 (Tri. Bang

l. Dahej Harbour And Infrastructure Ltd. [2011 (24) S.T.R. 676 (Tri. - Ahmd.)]

m. Afcons Infrastructure Ltd. [2016 (45) S.T.R. 433 (Tri. - Mumbai)]

n. Jubilant Organosys Ltd. [2015 (38) S.T.R. 1230 (Tri. - Del.)]

o. Oil & Natural Gas Corporation Limited [2016 (43) S.T.R. 317 (Tri, - Ahmd.)]

For Issue no. 2- Non Observance of Procedure - Substantial Benefit Can Not Be Denied, we rely on

a. Plantech Consultants Pvt. Ltd[2016 (41) S.T.R. 850 (Tri. - Mumbai)]

b. Garima Associates [2015 (40) S.T.R. 247 (Tri. - Mumbai)]

c. L&T Sargent & Lundy Limited [ 2016 (43) S.T.R. 249 (Tri. - Ahmd.)]

For Issue no. 3- Double Taxation Is Not Permissible, we rely on

a. Sanjivani S.S.K. Ltd. [ 2009 (241) E.L.T. 431 (Tri. - Mumbai)]
b. Urvi Construction [2010 (17) S.T.R. 302 (Tri. - Ahmd.)]
c. Geeta Industries P. Ltd. 2011 (22) S.T.R. 293 (Tri. - Del.)

3.3 Arguing for the revenue learned authorized representative while reiterating the findings recorded in the impugned order, submits:-

- Appellant is entitled to avail the benefit of Rule 6(4A) of the Service Tax Rules, 1994 subject to prescribed procedure laid down under the Law. the adjustment of excess amount paid under Rule 6(4A) is subject to the following conditions namely –
    - Excess amount paid is on account of reasons not involving interpretation of law, taxability, classification, valuation or applicability of any exemption notification.
    - The details and reasons for such adjustment shall be intimated to the jurisdictional Superintendent of Central Excise within a period of 15 days from the date of such adjustment
- Before applying the Rule 6(4A) of the Service Tax Rules, 1994, it is necessary for the appellant to establish that there was excess payment of Service Tax, In this regard, the first appellate authority, in Para 7.1 of the Order-in-Appeal dated 25.07.2016, has observed that the documents submitted by the appellant to substantiate their claim of excess payment are incoherent, not co-relatable and unsustainable.
- The case laws sighted by the appellant are distinguishable as given below:
    - Siemens Ltd. [2013 (29) STR 168 Tri. - Chennai], Rajdeep Buildcon Pvt. Ltd. [2011 (21) STR 663 Tri. – Mumbai], Nirma Architects &Valuers [2006 (1) STR 305 Tri. - Delhi] & State Bank of Hyderabad [2016 (43) STR 415 Tri. Hyderabad). In these cases there was no dispute regarding excess payment & the adjustment was reflected in the tax returns submitted by the assessee. Whereas in the present case, the dispute is regarding adjustment of excess payment of service tax as claimed by the appellant, however, the same has not been reflected / shown by the appellant in their ST-3 returns of the relevant period.

- Telecom District Manager, BSNL (2017 (47) STR 282 Tri.- Delhi). In this case, there is no discussion on the applicability of Rule 6 (4A). Moreover, there was no dispute regarding excess payment. The tribunal had relied on the decision in the case of Powercell Battery [2010 (19) STR 400 Tri. - Bangalore) wherein the period involved was April 2006 to September 2006 and the revenue had contended that the adjustment facility was not available to the assessee before 01.03.2007. Thus, the issue involved was different from the present case.
- Dahej Hardware & Infrastructure Ltd. [2011 (24) STR 676 Tri. - Bangalore] It is a case of advance payment (covered under Rule 6(3), and not adjustment of excess payment of tax under Rule 6(4A). The matter was remanded with direction that assessee could produce documents and other evidence to substantiate the claim of excess payment. Whereas, in the present case the evidence produced by the assessee was found to be incoherent, not co-relatable and unsustainable.

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

4.2 The issues that need determination in the present appeal are as follows:

a. Whether the amount of Rs 18,85,237/-, which was short paid by the appellant and subsequently paid along with the interest but prior to issuance of any show cause notice, was sufficient compliance with the provisions of Finance Act, 1994, or the appellant was needed to be proceeded against by the revenue by issuance of the show cause notice and also penalized under Section 78 with an amount equal to the tax short paid.
b. Whether appellant was correct in claiming the adjustment of the excess service tax amounting to Rs 11,72,880/- paid during period October 2010 to September 2011, during the period October 2011 to March 2012.

c. Whether extended period can be invoked and penalties imposed on the appellant.

4.3 In respect of issue at *"a."*, I observe that Section 73 (3) of the Finance Act, 1994 clearly lays down as follows:

*(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 18 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 sub-section.*

*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.*

Admittedly in the present case the amount short paid by the appellant during the period October 2011 to March 2012, was made good by the appellant themselves on 03.05.2012. They also paid the interest due on the amount so short paid. Having done so, in my the appellant should have been allowed the benefit of the provisions contained in Section 73 (3) of the Finance Act, 1994 and no proceeding albeit for confirmation of the demand against the appellant and for imposition of penalty could have been initiated.

4.5 In respect of the remaining amount i.e. Rs 11,72,880/-, which is listed at "b" in para 4.2 above, the contention of the appellant is that excess payment of service tax of Rs 11,72,880/- made during the period October 2010 to September 2011, which was claimed to be adjusted during the period October 2011 to March 2012..

4.6 Learned Authorized representative referred to Para 7.1 to 7.3 of the impugned order has stating as follows:

*"7 I have carefully gone through the records of the case and submissions made by the Appellant in their Appeal Memorandum & the Personal Hearings. I find that the issue to be decided is whether the demand raised on the basis of the ST-3 scrutiny for the period April, 2011 to March, 2012 is sustainable?*

*7.1 I find that the allegation in the instant case is that there was short payment of Service Tax by the Appellants, which was noticed during the scrutiny of ST-3. The Appellant submitted that they had inadvertently paid Service Tax on the gross amount of the agreement. The Appellant submits that on realizing their mistake they have adjusted the excess amount paid - under Rule 6(4A) of the Service Tax Rules, 1994 (hereinafter referred to As STR). From the submissions made by the Appellant, I find that their contention of excess payment of service tax is too weak) Even though they have submitted various documents to substantiate their claim of excess payment of service tax, the said documents are not correlatable For example, the summary of calculation of the service tax liability in tabular form, as mentioned in the service tax returns have been enumerated at Page No. E, G and H of their written submissions. However, the amounts, figures in all the three tables are at variance and far from correlation. Similarly, I find that the submissions in this regard are also incoherent, not relatable and unsustainable as they are far from any logic.*

*7.2 Assuming but not accepting the Appellant's claim that there was an excess payment, I find that Rule 6 of STR relates to payment of service tax. Sub Rule 4A of the said Rules states that 'where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the* *case may be, the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be. Further, I find that such adjustment are subject to the conditions laid down in Sub Rule 4B of Rule 6 of STR, which states that the adjustment of excess amount paid, under sub-rule (4A), shall be subject to the condition that the excess amount paid is on account of reasons not involving interpretation of law, taxability, valuation or applicability of any exemption notification. From the submissions of the Appellant, I find that the reasons stated for the excess payment, as claimed, is that "at the time of making the Service Tax calculations for the initial period, they were having confusion about the mode and manner of calculation of the Service Tax liability as the levy was newly introduced w.e.f. 22.06.2010 and for the purpose of Filling the return and payment of Service Tax they calculated the Gross Amount Received in money equal to the gross amount of the agreements entered during the relevant period ie. from October 2010 to March 2011; that they were not clear about the provisions of the complex taxing statutes as being a partnership firm not having skilled manpower, who are well aware of the complex provisions of Service Tax law." From the above, it can be inferred that it is an admitted fact by the Appellant that the excess payment was on account of reasons involving interpretation of law and valuation. Therefore, the Appellant have rendered themselves ineligible for the facility of adjustment of excess payment in the subsequent liability. Further, I agree with the findings of the Respondent, in as much as, the Appellants have nothing on record which indicate that they sought clarification or any intimation prior to the self adjustment.*

*7.3 In this regard I place reliance on the decision of the Hon'ble CESTAT in the case of BBC World (I) Pvt. Ltd. Vs. Commr. Of Service Tax. New Delhi, where it was held as under :*

***4.1** Sub-rule (3) of Rule 6 of the Service Tax Rules, 1994 provides that where an assessee has paid service tax in respect of a taxable service, which is not so provided by him either wholly or partially for any reason, the assessee may adjust the excess service tax so paid by him on pro rata basis, against his service tax liability for the subsequent period, if the assessee has refunded the value of the taxable service and the service tax* *thereon to the person from whom it was received. Thus the conditions to be satisfied for adjustment of excess payment of service tax during some period against service tax liability for subsequent period are that -*

*(a) the excess payment must be relatable to some service or services not provided for which payment had been received by the service provider; and*

*(b) the payment for the services not provided along with service tax paid on it has been refunded to the person from whom it was received."*

*Rule 6(3) will not be attracted in cases where excess payment is due to reasons other than that mentioned above e.g. payment of service tax at higher rate or higher value etc."*

4.7 Admittedly the service tax on the activities undertaken by the appellants was introduced with effect from 22.06.2010. Initially appellants discharged the tax liability on the transactions undertaken by them on the accrual basis. Financial Accounting in India is mostly on the accrual basis. All the direct and indirect taxes are also based following the principal of Financial accounting on the accrual basis. In the accrual basis of Financial Accounting a transaction gets accounted for all the purposes in the books of account on the date when the document relating to the transaction are prepared. To explain central excise duty, VAT or any other indirect tax becomes payable immediately when the invoices covering the goods is prepared. Another system of accounting is on the basis of the receipt. In this system transaction is accounted in the book of account on the date when the payments are receipt for the transactions made in goods and services. Service Tax when introduced followed the receipt based accounting system for levy and collection of tax. The assessee was obliged to pay the taxes on the basis of the gross amounts received during the taxing period.

4.8 On page 39 of the appeal paper book, ST-3 return filed by the appellant for the period October 2010 to March 2011 is available. At *"F. Value of taxable Service tax payable and gross amount charged (all figures in rupees) for service provider.",* is indicated. In the table against, "Total gross Amount received in money, against the service provided" appellant has indicated Rs 43,655,609/- and have determined his service tax liability on the basis of this taxable value so computed. On page 45, is Annexure B, giving the details of all the 13 agreements entered by the appellant during that period, clearly showing that the this amount is the total agreement value and not the amount received by them during that period.

4.9 Similarly on page 88 of the appeal paper book, ST-3 return filed by the appellant for the period April 11 to September2011 is available. At *"F. Value of taxable Service tax payable and gross amount charged (all figures in rupees) for service provider.",* is indicated. In the table against, "Total gross Amount received in money, against the service provided" appellant has indicated Rs 95,059,494/- and have determined his service tax liability on the basis of this taxable value so computed. On page 94, is Annexure H, giving the details of all the 42 agreements entered by the appellant during that period, clearly showing that the this amount is the total agreement value and not the amount received by them during that period.

4.10 From the perusal of the ST-3 returns and the Annexure B and H it is quite evident that the appellant discharged the service tax liability on the agreement value, even without receiving the entire consideration as per the agreement. Subsequently appellant realized their mistake and started filing their ST-3 returns on the basis of Receipt. So the ST-3 return for the period October 2011 to March 2012 was filed by the appellant on the receipt basis. At *"F. Value of taxable Service tax payable and gross amount charged (all figures in rupees) for service provider.",* is indicated. In the table against, "Total gross Amount received in money, against the service provided" appellant has indicated Rs 204,560,492/- and have determined his service tax liability on the basis of this taxable value so computed. However while discharging the service tax liability they claimed adjustment as per Rule 6 (4A) of the Service Tax Rules, 1994 toward the service tax paid by them during the period October 2010 to September 2011, in respect of the amounts that they had not received during the said period. On page 118, is Annexure L, giving the details of all the 124 agreements against which the appellants had received the part consideration during that period. Annexure L also list outs the payment received by the appellants against the 13 (Annexure B) and 42 (Annexure H) agreements against which they had discharged the entire service tax liability on the agreement value.

4.11 Thus the entire issue is because of the change in the manner of accounting of the transaction for the purpose of computation of service tax liability from the accrual basis to the receipt basis. In my view the issue is in any way connected to any of the exclusion clause viz ***involving interpretation of law, taxability, valuation or applicability of any exemption notification.*** It is also on record that the appellants have intimated the concerned authorities about the adjustment made by them vide their letter dated 28.01.2013. Though it can be argued that stricter compliance with the rule 6(4A) would have required that this intimation should have been made within fifteen days of the adjustment, I am of the view that such procedural lapse in making the intimation a few days later should not be the reason for allowing the substantial benefit available to appellant. I am supported in my view by the decisions in the cases as follows:

*Garima Associates [**2015 (40) S.T.R. 247 (Tri. - Mumbai)**]*

*6. I find that appellant admittedly paid the excess amount of Rs. 2,57,205/- towards service tax in the quarter ending December, 2009. The adjudicating authority allowed the adjustment of Rs. 1,00,000/- in the quarter towards service tax liability and in quarter ending March, 2010 adjustment of the remaining amount of Rs. 1,57,205/- was disallowed. The adjustment of the excess payment is provided under Rule 6(1A) of Service Tax rules which is reproduced below : -*

*Rule 6. Payment of service tax. - (1) -------------------------*

*(1A) Without prejudice to the provisions contained in sub-rule (1), every person liable to pay service tax, may, on his own volition, pay an amount as service tax in advance, to the credit of the Central Government and adjust the amount so paid against the service tax which he is liable to pay for the subsequent period :*

*Provided that the assessee shall, -*

*(i) intimate the details of the amount of service tax paid in advance, to the jurisdictional Superintendent of Central Excise*

*within a period of fifteen days from the date of such payment; and*

*(ii) indicate the details of the advance payment made, and its adjustment, if any in the subsequent return to be filed under section 70 of the Act;]*

*From the above Rule, it is seen that the assessee is permitted to pay service tax in advance and the same can be adjusted against service tax which he is liable to pay for subsequent period provided assessee intimated amount paid in advance to the jurisdictional Superintendent of the service tax within period of 15 days from date of such payment and intimate the details of advance payment made and its adjustment in the subsequent return to be filed under Section 70 of the Act. In the present case there is no dispute that appellant have deposited advance service tax of Rs. 2,57,205/-. As regard the condition provided in the proviso to Rule 6(1A), it is observed that regarding the excess payment though the specific intimation was not given to the Superintendent, but from facts, it is clear that excess payment was reflected in ST3 returns for the period Oct.-Dec., 2009 and adjustment thereof was reflected in the ST3 returns for the quarter ending March, 2010. The details of these excess amount as well as adjustment was revealed only on the scrutiny of these returns therefore it cannot be said that appellant have not complied with conditions prescribed in the proviso to Rule 6(1A) of Service Tax Rules, 1994. The Adjudicating Authority as well as the ld. Commissioner (Appeals) have denied the adjustment only on the ground that the case of the appellant is covered under Rule 6(4A) and not under 6(1A) and in terms of Rule 6(4A) the adjustment is allowed only for Rs. 1,00,000/- whereas I observed that the appellant throughout from the date of show cause notice maintained that claim for adjustment is under Rule 6(4A). From the fact that the appellant have paid service tax in excess to the tune of Rs. 2,57,205/- in the quarter ending Dec, 2009, therefore the said amount is nothing but advance payment of service tax and as discussed above the condition provided in Rule 6(1A) stand complied with as both the requirements stand fulfilled by way of communication in the form ST3 returns to the department, even if the procedure was not scrupulously followed. Merely for non-observance of the procedure laid down in the rule cannot be made reason for* *denial of adjustment. I am of the considered view that intention of the rule is very clear that whatsoever excess amount was paid in advance, the same should be adjusted against forth coming tax liability and if it is not allowed it will amount that Government will unjustly enriched with excess amount which cannot be intention of the law. Similar case, this Tribunal is of the view that amount paid in excess because what was required to be paid is nothing but service tax paid in advance. Therefore the same is allowed to be adjusted in subsequent liability of the service tax. Some of the judgments are referred below :*

*2011 (24) S.T.R. 676 (Tri. - Ahmd.)*

*DAHEJ HARBOUR AND INFRASTRUCTURE LTD.*

*Versus*

*C.C.E. & C., VADODARA*

*4. I have considered the submissions. This is not a case of excess payment of service tax for reasons indicated in sub-rule (4B) of Rule 6 of Service Tax Rules, 1994. None of the reasons for excess payment given in Rule covers this situation. This is a case of advance payment of service tax for the e-service already rendered but payment not received. It is settled law that service tax cannot be recovered in respect of the same service twice. If an advance payment is made, the question of adjustment does not arise. In reality, in the month of April, 2008, when the service tax is to be calculated, the value of service rendered should have been indicated as the value of service which was received on which service tax was payable. In respect of service already rendered in March but payment not received even though the assessee was not required to make the payment they had made the payment. In such a situation all they had to do was in the accounts maintained, show that service tax as paid on March for invoice issued in April. Therefore, the question of paying the service tax for the portion of service rendered in March, 2008 again in April, 2008 does not arise. The impugned order requires the appellant to pay service tax twice on the same service rendered just because they made an advance payment of service tax. In fact, it was a practice in Central Excise department to require the assessee to debit in PLA in the month of March, 2008 even in respect of the goods not cleared. Subsequent clearances against these payments cannot be called as adjustment. If the assessee makes an advance payment* *towards service rendered, the service tax cannot be demanded once again. In my view, therefore, it will not be correct to say that this is covered by the provisions of Rule 6 of Service Tax Rules, 1994 and therefore the assessee was wrong in adjusting the amount subsequently. In fact it was the assessee's claim that service tax had already been paid in March but their request has not even been considered by the lower authorities since lower authorities have taken a view that assessee did not produce documentary evidence to show that there was excess payment in the month of March, 2008. According to Section 72 of Finance Act, 1994 when a person liable to pay service tax fails to assess the tax in accordance with the provisions, the Central Excise officers can ask the person to produce the accounts, documents or other evidence, as he may deem necessary and after taking into account all the relevant material has to make an assessment order. When the assessee replied to Superintendent of Service tax on 11-3-2009 stating that service tax payable in the month of March, 2008 was actually less than what was paid, the assessing officer could have called for the documents and other evidence which he needed to verify to confirm the claim. Instead of doing this, the assessee was straightway issued a show cause notice. In fact, in this case even though assessee claimed that they have made wrong assessment, the assessing officer failed to act according to Section 72 of Finance Act, 1994, which requires him to make an assessment when there is mistake. The same would apply for the month of April also. Nevertheless, this was an omission on the part of Central Excise officers but the fact remains that the assessee has only made statement that there was an excess payment in the month of April, 2008 and no documentary evidence to support this statement was made. Therefore, I cannot find fault with the conclusion reached by the lower authorities that there was no documentary evidence for excess payment in the month of March, 2008. I feel, the original adjudicating authority should have verified the total value of service rendered, amount received towards service rendered and amount of service tax payable in the month of March, 2008 and April, 2008. If the assessee had made payment of service tax for a service already rendered but amount not received or invoice not raised, that amount is to be treated as an advance paid towards service tax* *due and does not become excess payment. Under these circumstances, I feel that this is a fit case for waiver of pre-deposit and remand the matter at this stage itself to the lower authorities, so that assessee can produce the details of service rendered, invoices raised and payment received for the month and service tax paid for the month of March and April, 2008 and show to the adjudicating authority that there was an advance payment for service rendered in March, 2008. If it is shown that assessee had paid the tax in advance, in my opinion, no further proceedings would he required against the appellant. However, while remanding the matter, I make it clear that this remand is to be taken as an open remand with all issues open and observations made are only for the purpose of remand. The original adjudicating authority shall be at liberty to consider all the issues and pass a well reasoned order.*

*2010 (20) S.T.R. 815 (Tri. - Chennai)*

*CHETTINAD CEMENT CORPORATION LTD.*

*Versus*

*COMMR. OF C. EX., TRICHY*

*Heard both sides. Both sides confirm that this is not a case of either delayed payment of service tax or failure to pay service tax. On the other hand, the service tax was paid in excess during the month of March, 2007 which has been adjusted towards the service tax liability for the subsequent months. In a way the appellants have paid tax in advance. As such, they cannot be penalized under Section 76 of the Finance Act, 1994 which applies to cases of failure to pay service tax. Hence the penalty imposed under Section 76 is set aside.*

*2. As regards the penalty of Rs. 1,000/- imposed under Section 77, the learned consultant states that the appellants are not pressing their appeal. Hence the same is confirmed. The appeal is partly allowed in the above terms.*

*The judgments relied upon by the Revenue in the case of Rishi Shipping v. Commissioner of Central Excise, Rajkot [2014 (33) S.T.R. 595 (Tri.-Ahmd.)] which was followed by Hon'ble Apex Court judgment in case of CCE, New Delhi v. Hari Chand Shri. Gopal [2010 (260) E.L.T. 3 (S.C.)]. I am of the view that the case of Rishi Shipping (supra) is related to the adjustment of excess amount in terms of Rule 6(4A) where limit is only Rs. 1 lakh whereas in the present case appellant claimed that* *adjustment is in terms of Rule 6(1A) therefore the said judgment is not applicable. As per my above discussion, I am of the considered view that as per the facts, appellant's case is covered by Rule 6(1A) of Service Tax Rules, 1994 according to which the adjustment of advance payment is permissible against service tax liability in the subsequent period without any limit of the amount, therefore the impugned order is not sustainable, hence the same is set aside. Appeal is allowed.*

***Plantech Consultants Pvt. Ltd[2016 (41) S.T.R. 850 (Tri. - Mumbai)]***

6.1 As regard adjustment of excess paid service tax during the period May, 2006-July, 2006 and the adjustment of the same in the month of August, 2006 is squarely in terms of sub-rule (4A) of Rule 6 of Service Tax Rules, which is reproduced below :

*"(4A) Notwithstanding anything contained in sub-rule (4), where an assessee has opted for registration under sub-rule (2) of rule 4 these rules and has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, for the reason of not receiving details of payments received towards the value of the taxable services at his other premises of offices, the assessee may adjust such excess amount so paid as service tax by his against his service tax liability for the subsequent period and the details of such adjustment shall be intimated to the jurisdictional Superintendent of Central Excise within a period of fifteen days from the date of such adjustment"*

*From the above sub-rule, it is permitted that excess paid service tax for the month or quarter can be adjusted in the next month or quarter. In the present case the excess paid service tax during the period May, 2006 to July, 2006 was adjusted against service tax liability of August, 2006.*

*6.2 As regard intimation to the Jurisdictional Superintendent of Central Excise regarding the such adjustment, we find that even though appellant have not specifically intimidated to the Superintendent in this regard but adjustment was declared in their ST3 returns, accordingly intimation of such adjustment stand made to the department. Even if it is considered that the said procedure was not strictly adhered to, at the most it is a procedural lapse, merely for this procedure lapse the fact that* *the excess amount was paid could not be deviated. Moreover, amount which was paid in excess, is neither the service tax nor an amount which was payable by the appellant, therefore in any case the said amount cannot be permitted to be retained by the Government. The only option is either to refund that amount or allow adjustment. In our view, the adjustment is very appropriate and favourable to Revenue as compared to the refund. For this reason also the adjustment cannot be held as illegal. We have gone through judgments cited by the ld. Counsel on this issue and found that adjustment of excess paid Service Tax has been allowed in various cases. In view of above position, we are of the considered view that the adjustment made by the appellant of the excess paid amount in the subsequent service tax liability is absolutely in order."*

4.12 Since on merits itself I find that issue needs to be adjudged in the favour of appellant, the issue mentioned by me at "c" becomes redundant, hence is not taken up by me for discussions.

4.13 In view of the discussions made above I am not in position to sustain the impugned order.

5.1 Impugned order is set aside and appeal is allowed.

(Order pronounced in the open court)

**(Sanjiv Srivastava)**
**Member (Technical)**

*tvu*