

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

C.M.A.Nos.709 and 1108 of 2011

Commissioner of Central Excise,
Puducherry Commissionerate,
Puducherry 605 001. ..Appellant in both appeals/
Appellant

versus

M/s.BSNL,
Cuddalore 607 001. .. Respondent in both appeals/
Respondent

Prayer: Civil Miscellaneous Appeals are filed under Section 35G of Central Excise Act, 1944, against the Final Order Nos.545 and 546 of 2010, dated 12.05.2010, on the file of Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006.

For Appellant : Mr.V.Sundareswaran,
Senior Standing Counsel for Customs

For 2nd respondent : Mr.S.Udayakumar
Senior Standing Counsel for Respondent

COMMON JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

The Commissioner of Central Excise, Puducherry Commissionerate, has filed the instant Civil Miscellaneous Appeal, against the Final Order Nos.545 and 546 of 2010, dated 12.05.2010, on the file of Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006.

2. Short facts leading to the appeal are that M/s.Bharat Sanchar Nigam Ltd (BSNL), Cuddalore, respondent herein, provides taxable services, under Section 69 of the Finance Act, 1994 and paying service tax regularly. According to the applicant, the respondent has paid service tax, during the period from November

2000 to May 2002, on the value of taxable service, received in one calendar month. They adjusted the Service Tax excess paid, during the previous month with the service tax liability for the subsequent months, contrary to the provisions of the Service Tax Rules 1944.

3. As per Rule 6(1) of the Service Tax Rules, 1994, the service tax, on the value of taxable services received during any calendar month, should be paid to the credit of the Central Government, by 25th of the month immediately following the said calendar month. Rule 6(3) of the said Rules, states that where an assessee has paid to the credit of Central Government 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 against his service tax liability for the subsequent period, if the assessee has refunded the value of taxable service and the Service tax thereon to the person from whom it was received.

4. According to the applicant, the respondent-BSNL was adjusting the service tax payable on monthly basis, without even paying the service tax as well as, without refunding the value of the taxable service and service tax collected from the concerned persons. Thus, the respondent had contravened the provisions of sub-rule (3) of Rule 6 of the Service Tax Rules, 1994, wherein, it was clearly mentioned that service tax collected during any calendar month should be paid by 25th of the following month. A Show Cause Notice was issued to the respondent, demanding service tax of Rs.46.55 Lakhs. The Adjudicating Authority, vide Order-in-Original No.01/2004, dated 30.01.2004, confirmed the demand made in the Show Cause Notice along with interest.

5. Being aggrieved by the same, the respondent-BSNL has filed an appeal before the Commissioner (Appeals), Chennai. The appellate authority has observed that the excess and short payments made by the respondent-BSNL had been adjusted by the Jurisdictional officer and that the respondent has also indicated to the department that they were making payments tentatively, as the exact amount could not be correctly determined and that the excess payment would be adjusted in the subsequent remittance. The respondent-BSNL has also paid the interest, as calculated by the department. Further contention has been made to the effect that the CBEC Board had clarified that the service tax billed and collected may be based on the Finance Contro System of the Telephone Service provider and this system has to be taken for consideration. Having regard to the rival submissions, the appellate authority allowed the appeal filed by the respondent-BSNL and consequently, set aside the Order-in-Original, dated 30.01.2004.

6. Against the abovesaid order, the appellant has filed an appeal before the CESTAT, Chennai, which has observed that the appellant during the period November, 2000 to May, 2002 had demanded service tax, taking into account, only the shortage of payment of service tax, whereas, the excess amount paid by the respondent had not been considered. Further, the Tribunal was of the view that the respondent-BSNL was required to file only half yearly returns. Based on above observations, the Tribunal upheld the order of the Appellate Authority and rejected the appeal of the appellant. Against which, the Commissioner of Central Excise, Puducherry Commissionerate, has filed the instant Civil Miscellaneous Appeal, raising the following substantial questions of law,

"(1) Whether the Service Tax paid in excess can be permitted to be adjusted towards the short payment the Service Tax for the subsequent period, contrary to the provisions of Rule 6(3) of Service Tax Rules 1994?

(2) Whether the Hon'ble CESTAT, Chennai is correct in holding that suo moto adjustment of excess paid Service Tax in the subsequent months can be made, when there is a separate procedure to claim refund of the excess paid taxes under Section 11B of the Central Excise Act 1944?"

7. Mr.V.Sundareswaran, learned Senior Standing Counsel for Customs submitted that the Adjudicating Authority is right in demanding the service tax of Rs.46.55 Lakhs, for the reason that as per Rule 6, the service tax on the value of the taxable service received during any calendar month should be paid to the credit of the Central Government by 25th of the month immediately following the said calendar month. The respondent had adjusted the service tax paid in excess for certain months against the service tax due to be paid for subsequent months. According to him, such an adjustment is permissible in terms of Rule 6(3), in the case of an assessee, who had paid to the credit of Central Government, service tax in respect of a taxable service, which is not so provided by him either wholly or partially for any reason, provided he has refunded the value of taxable service and the service tax thereon to the person from whom it was received. In the instant case, no value of taxable service and the service tax thereon were refunded to the person from whom it was received by the respondent. In other words, this is a case where the service tax payable in accordance with law is not being properly assessed and paid.

8. Learned Senior Standing Counsel for the appellant further submitted that the respondent suo moto paid a certain amount of service tax and if the same was found to be in excess, they have adjusted the so paid excess amount against the tax liability of the following month. According to him, such adjustment is not authorized in law and the respondent ought to

have followed the procedure prescribed under sub-rule (4) & (5) of Rule 6 of the Service Tax Rules, 1994, for which, the provision relating to provisional assessment prescribed under Rule 7 of Central Excise Rules, 2002, including the payment of interest would apply. Accordingly, the provisions of Rule 6(3) will not be applicable.

9. It is the further case of the Learned Senior Standing Counsel for the appellant that the respondent neither requested the Deputy Commissioner of Central Excise, Cuddalore nor did the Deputy Commissioner of Central Excise, Cuddalore permit them for payment of Service Tax on provisional basis under the provisions of Rule 6(4) of Service Tax Rules, 1994 and therefore, the suo moto adjustment of excess payment is not correct as per law. He further submitted that the respondent ought to have applied for the refund of service tax in excess for certain months in terms of Section 83 of the Finance Act, 1994, read with Section 11B of the Central Excise Act, 1994, as they cannot suo moto adjust the excess payment of service tax for the subsequent period in terms of rule 6(3).

10. Refuting reliance on the Board's Circular F.No.149/5/95-CX-4, dated 15.10.1996 and F.No.149/01/99-CX-4, dated 29.01.2001, learned Senior Standing Counsel for the appellant contended that the Board's Circular, dated 15.10.1996 was issued prior to the amendment of Rule 6(1), viz., prior to 16.10.1998. Prior to 16.10.1998, service tax was liable to be paid on the billed amount and from 16.10.1998 onwards, the liability to pay is on the amount of value received. According to him, the learned Appellate Authority has failed to see that the Board's Circular, dated 15.10.1996 dealt with the issue of difference between the amounts of service tax collected (based on the amount billed) and service tax actually collected. It was only in that context, it was clarified that the tax might be paid on the telephone bill received rather than billed. In any event, according to him, after 16.10.1998, the service tax has to be paid by 25th of the following month on the value received in a particular month. The Board's second Circular, dated 29.01.2001, dealt with the method of payment i.e., through TR-6 Challan and it was issued in the context of respondent becoming a corporate entity. He further contended that the appellate authority also failed to take note that the Board, while clarifying certain issues, relating to Cellular Operators, vide F.No.149/01/96-CX-4, dated 13.10.1997 (Query No.III) has stated that excess payment made earlier cannot be adjusted in the subsequent payment of service tax required to be made by them without following the procedure of excess payment made earlier.

11. On the above aspects, we have heard Mr.S.Udayakumar, learned standing appearing for the respondent submitted that the BSNL has adjusted the service tax paid in excess for certain

months against the service tax due to be paid for the subsequent months suo-motu. According to him, such an adjustment is permissible in terms of Rule 6(3) of the Service Tax Rules, 1994. It is also his contention that BSNL was making payments tentatively, as the current amount could not be correctly assessed and that the excess payments were adjusted in the next remittance. Interest as calculated and communicated by the Income-Tax Department was also paid by the BSNL. He prayed to sustain the impugned orders.

Heard the learned counsel for the parties and perused the materials available on record.

12. What is paid by the BSNL, for the period, November' 2000 to May' 2002, deduced from the material on record, is as follows:

Sl.N o.	Month	Service Tax Due	Service Tax Collected	Service Tax paid to the credit of Central Government	Service Tax short paid
1	Nov. 00	33,74,593	33,74,593	30,94,384	2,80,209
2	Dec. 00	11,60,325	10,60,000	10,60,000	1,00,325
3	Jan. 01	33,71,903	33,71,903	33,66,900	5,003
4	May 01	29,58,879	29,58,879	22,40,000	7,18,879
5	Jul. 01	27,33,524	27,33,524	27,00,298	33,226
6	Sep. 01	29,56,934	29,56,934	24,95,367	4,61,567
7	Nov. 01	29,15,416	29,15,416	20,00,000	9,15,416
8	Jan. 02	29,95,107	29,95,107	28,00,000	1,95,107
9	May 02	33,90,997	33,90,997	14,45,512	19,45,485

13. Material on record further discloses that BSNL has also adjusted the payment of service, in the subsequent months suo-motu. Contention of the Income-Tax Department is that Rule 6(3) of the Service Tax Rules, will not be applicable. Before the Original Authority, they have contented that in terms of Section 83 of the Finance Act, 1994, Section 11B of the Central Excise Act, 1944, have been made applicable to service tax, which deal with refund of excess duty. In view of the same, the Assessing Officer has observed that the respondent-BSNL ought to have applied for refund of service tax paid in excess for certain months, in terms of Section 83 of the Finance Act, 1994, r/w. Section 11B of the Central Excise Act, 1944 and they cannot suo-motu adjust the excess payment of service tax, for certain months against the Service Tax, due to be paid for the subsequent period, in terms of Rule 6(3) of the Service Tax Rules, 1994. Perusal of the order of the Order-in-Original

No.01/2004, dated 30.01.2004, does not indicate adjudication, on the aspect, as to whether, Rule 6(3) of the Service Tax Rules, would be applicable to the case on hand.

14. Having regard to the submission of the learned counsel appearing for the parties and upon perusal of the materials on record, we are of the view that the matter has to be remanded to the original adjudicating authority and accordingly, while setting aside to the Order impugned, remand the matter to the original adjudicating authority, with a direction to consider the applicability of Rule 6(3) of the Service Tax Rules, to the facts of these cases and record a finding, as to whether, the assessee can suo-motu adjust the tax or entitled to refund of the excess payment of service tax, said to have been made, during the relevant period. He is further directed to adjudicate the proceedings, in accordance with the procedure, within a period of eight weeks, from the date of receipt of a copy of this order.

15. The Civil Miscellaneous Appeals are disposed of, accordingly. No costs.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

skm

To

1. The Commissioner,
Customs, Excise and Service Tax
Appellate Tribunal (CESTAT),
South Zonal Bench, Chennai 600 006.

2. The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to Mr.S. Udayakumar, Advocate Sr.31674

C.M.A.Nos.709 and 1108 of 2011

VGI (CO)

EU 08.08.16