CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. I

SERVICE TAX APPEAL NO.54315 OF 2014

[Arising out of the Order-in-Original No. DEL-SVTAX-ADJ-COM-58-61-13-14 dated 05/05/2014 passed by Commissioner (Adjudication), Service Tax Commissionerate, New Delhi.]

M/s B.L. Kashyap & Sons Ltd., **...Appellant**
E-23, B-1, Extension
Mohan Cooperative Industrial Estate,
Mathura Road,
New Delhi – 110 044.

Versus

Commissioner of Service Tax, **...Respondent**
17-B, IAEA House, Near WHO Building,
Mahatma Gandhi Marg, Indraprastha Estate,
New Delhi – 110 002.

APPEARANCE:

Shri R.P. Jindal, Advocate for the appellant.
Shri Rajeev Kapoor, authorized representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50737/2023

DATE OF HEARING : 24.05.2023
DATE OF DECISION: 30.05.2023

P. ANJANI KUMAR

M/s B.L. Kashyap & Sons Ltd.[1] assail the order dated 05.05.2014 vide which 4 show cause notices[2] i.e. dated 23.04.2009, 24.04.2009, 22.10.2009 and 22.10.2010

[1] **Appellant**
[2] **SCNs**

respectively were adjudicated. The present appeal emanates from the SCN dated 24.04.2009.

2. Briefly, stated the brief facts of the case are that the appellant has short paid or excess paid the service tax payable by them in the months of April, May, June, August and September 2007; while paying the service tax short paid or adjusting service tax excess paid the appellant reflected the same in the ST-3 returns filed for the period April 2007 to September 2007 under the column 4A (I) (a) (iii)describing the same to be "by adjustment of excess amount paid earlier and adjusted in this period under Rule 6 (3) of Service Tax Rules[3]; on being asked by the Department, the appellant vide letter dated 26.05.2008 explained that the excess payment made in the month of June and July was adjusted in the returns for the months of August and September. The appellant explained to the Department giving monthwise details of adjustments on account of short payment/excess payment in April to September 2007. It appeared to the Department that such adjustment under Rule 6 (3) of STR is permissible only when the appellant has paid service tax for a taxable service which was not provided wholly or partially and when the appellant refunds the consideration received to his customers before making adjustment of excess paid service tax; despite the explanation given by the appellant vide letter dated 20.03.2009, a SCN dated 24.04.2009 was issued to the appellant seeking to recover the service tax of Rs.

[3]**STR**

1,58,52,669/- alleged to have been wrongly adjusted by the appellant along with interest and penalty; Adjudicating authority vide the impugned order has confirmed the demand and imposed the penalty of Rs. 1,60,00,000/- on the appellant.

3. Shri R.P. Jindal, learned counsel for the appellant submits that the present case is a result of incorrect filing of the entries in the ST-3 returns by the appellant; instead of adjusting the service tax paid in terms of Rule 6 (4A) they have wrongly mentioned the details under Rule 6 (3) of STR in the ST-3 returns filed by them; they have made good the service tax short paid along with interest; service tax due was fully paid by them along with interest; the same cannot be demanded again simply for the reason that the same was mentioned under a wrong column in the returns. He submits that the adjustments in the service tax paid were only on account of short payment in earlier months and excess payment in subsequent months; Adjudicating authority has failed to verify the facts as narrated by the appellant; the Adjudicating authority did not make any enquiry/investigation as to whether the entries made in Column No. 4A (I) (a) (iii) were on account of the short or excess tax paid during the earlier period; the SCN is merely based on the premise that the adjustments were in terms of Rule 6 (3) of STR and that the appellant has failed to produce evidence to the effect that they have received payments for provision of service; they had not provided the service and that they have refunded

the consideration and service tax paid by his customers in violation of provision of Rule 6 (3) of STR. Learned counsel further submits that in terms of Rule 6 (4A) of STR, the appellants can adjust tax excess paid. He submits that mere mentioning the fact under a wrong column and mere quoting a wrong rule should not render them liable to pay service tax again; the impugned order is cryptic and was passed mechanically without even considering the submissions made in the reply to the SCN. He submits lastly that the whole of the demand is time barred as ST-3 returns for the period April to September 2007 were filed on 25.10.2007 and the SCN was issued on 24.04.2009.

4. On the other hand, Shri Rajeev Kapoor, authorized representative for the Department reiterated the findings of the impugned order and he submits that the provisions of Rule 6 (3) of STR are very clear and the appellant has failed to show satisfactorily that they have refunded the service tax for which no service has been provided by them.

5. Heard both sides and perused the case records.

6. It is the case of the appellant that they have made good/ adjusted the short or excess service tax paid by them during the months April to September 2007 and have by mistake shown such adjustment under the Column 4A (I) (a) (iii) of the ST-3

return; they have made good the service tax short paid along with interest; they are entitled to make such adjustments in terms of Rule 6 (4A) of STR, 2004. We find that the appellant submits that the mistake of short or excess payment has occurred due to the newly introduced Works Contract Service. On going through the records of the case and the reconciliation statements submitted by the appellant, it is clear that the appellant has certainly short paid service tax in initial months of April, August and September and excess paid in the months of May, June and July. On reconciliation they have paid the service tax liability along with interest and reflected the same in the returns for the period October 2007 to March 2008. We find that the adjudicating authority simply goes by the show cause notice and bases his confirmation of service Tax on the appellants on the entries made in the ST-3 returns, referring to Rule 6(3) of STR. Adjudicating authority finds as follows :-

> "35. I find in the above SCN that the assessee has wrongly adjusted Rs. 1,58,52,669/- (1,53,59,607+3,07,187+1,85,875) in contravention of provisions contained under Section 66, 68 (1) and Rule 6 (1), (2). (3) during the months of May, June, August and September 2007 (ST 3 return for April 2007 to September 2007).
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> 36. Per "Rule 6 (3), the assessee may adjust its service tax liability for the subsequent period if they have refunded the value of taxable service and the service tax thereon to the person from whom it was received. From perusal of letter dated 20.03.09, the assessee has failed to substantiate its claim regarding refund of value. It appears that the assessee has willfully misstated facts with intent to evade payment of service tax.
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> 37. The assessee under its reply dated 18.06.09 (para 5) stated that they made mistake of classifying some of their running contracts under the category of works contract service from June 07 onwards and availed the composition scheme. They claimed it as unintended mistake.
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> 38. I find that the assessee has violated the provisions of Rule 6 (3) of Service Tax Rules, 1994 during the relevant period. They did

> not explain anything regarding contravention of provisions of the said rules under any of its reply on record and claimed that they have discovered the mistake on their own. I am not inclined to take on record these contentions of the assessee as these were not found convincing. Therefore, they are required to pay the said demand along with interest as applicable".

7. From the above, it is seen that the Adjudicating authority has not considered the submissions of the appellant and the reconciliation statements submitted thereof; the Adjudicating authority did not discuss the submissions made by the appellants and the Chartered Accountants Certificate. He proceeds only on the premise that the appellant has violated the provision of Rule 6 (3) of STR, 1994. We find that the adjudicating authority did not counter or negate the claims and submissions of the appellants. Not even a single piece of evidence has been adduced to show that the appellants have in fact violated the provisions of Rule 6 (3) of STR, 1994. Except for making a bald averment that the appellants have violated the provisions of Rule 6 (3) of STR, 1994, no other discussion is made to show as to how the conclusions were drawn.

8. Further, we find that the legal provision in STR as far as it relates to present case are as follows :-

> "6 (3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, [or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract] the assessee may take the credit of such excess service tax paid by him, if the assessee -
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> (a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or]

> (b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.
>
> 6 (4A) Notwithstanding anything contained in sub-rule (4), 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".

9. In view of the above position, we find that the appellant can adjust the service tax excess paid against his service tax liability for the succeeding month or quarter; sub-Rule 4A of Rule 6 of STR starts with a non-obstante clause and, therefore, the procedure prescribed for the earlier rules, if any, are not applicable in the instant case; the appellant is eligible to avail the provisions of Rule 6 (4A) of STR, 1994. The fact that the appellant has made good the service tax short paid by them, along with interest, is not refuted either in the SCN or the impugned order. Therefore, we find that there is considerable force in the submissions of the appellant.

10. We find that the Tribunal in the case of **Schwing Stetter (India) Pvt. Ltd.** versus **Commissioner of Central Excise, LTU, Chennai**[4] has observed that :-

> "4. Heard both sides and perused the records. The short issue to be decided is whether the appellant has short paid the service tax during the month of July, 2011 by wrongly adjusting the service tax excess paid by them in the month of May, 2011 or otherwise. Both

[4] **2016 (45) S.T.R. 101 (Tri. – Chennai)**

the authorities below have observed that as per Rule 6(4A) of STR, 1994, it is a wrong adjustment since Rule says that the assessee may adjust such excess amount paid by him against his service tax liability for the succeeding month or quarter and not in the subsequent months. The contention of the appellant is that the benefit of the same should be extended to the subsequent months after the succeeding month. It is a well-settled legal principle that the statute should be interpreted as it is even if the intention is imperfect, imprecise or there is an obvious omission. Even though the appellants have not specifically intimated the department in this regard, but adjustment was declared in their ST-3 returns, accordingly intimation of such adjustment stands made to the department. Even if it is not adhered to, at the most it is a procedural lapse and merely for this procedural lapse the excess amount paid could not be deviated and cannot be permitted to be retained by the Government. Section 13 of the General Clauses Act, 1897 provides that singular include the plural. Accordingly, month includes months. Further the case laws relied on by the appellants are squarely applicable to the facts of the present case. The issue stands settled against the Revenue and in favour of the appellant-assessee. In view of the above, I am of the considered view that the excess amount paid in the month of May, 2011 adjusted by the appellants in the subsequent months tax liability is absolutely in order. Therefore, invoking Section 73(1) for a non-existing 'short-payment' is not sustainable. Accordingly, the impugned order is set aside and the appeal is allowed with consequential relief, if any, in accordance with law".

10.1 Tribunal in the case of **Dell India Pvt. Ltd.** versus **Commissioner of Service Tax, Bangalore**[5] has observed that:-

"5.1 Here moot issue is whether the assessee can make claim for the excess payment made to the exchequer; if they can claim, whether they can claim this excess payment by way of refund for which there are separate provisions under the law of Service Tax or they could get this claim by way of making adjustment as provided under Service Tax Rules 1994, where relevant provisions could be Rule 6(3), Rule 6(4A), Rule 6(4B) and Rule 6(1A) of the said Rules (supra).

5.2 Revenue has argued that appellant's case cannot be covered under above quoted Service Tax provisions of 1994 and it was imperative on the part of the appellants to file refund claim within the prescribed limit as per the provisions of law of Service Tax.

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

[5] **2016 (42) S.T.R. 273 (Tri. – Bang.)**

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.

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.

7. Considering above discussion, the appeal is allowed in above terms".

10.2 Tribunal in the case of **General Manager (CMTS)** versus **Commissioner of Central Excise, Chandigarh**[6] has observed that :-

> "6. The only point of dispute in this case is as to whether the assessee during the period of dispute were permitted to adjust excess amount of service tax paid for certain months against their service tax/education cess liability for the subsequent months. There is no dispute that if these adjustments are permitted, there would be no short payment. The department's contention is that for such adjustments under Rule 6(4A) read with Rule 6(4B), the assessee should have obtained centralized registration under Rule 4(2).
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> 7. Rule 6 of the Service Tax Rules deals with the manner of payment of service tax and when the same is to be paid. According to sub-rule (1), the service tax for a particular month shall be paid to the credit of the Central Government by sixth of the next month by the assessee, if the duty is deposited electronically through internet banking; and by the 5th day of the next month, in any other case.
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> 7.1 Sub-rule (2) of Rule 6 prescribes the manner of payment of service tax, which according to this sub-rule is to be paid with the banks notified by the C.B.E. & C. for this purpose in TR-6 form or, in any other manner as prescribed by the C.B.E. & C. Sub-rule (3) of Rule 6 covers a situation where an assessee had received payment for certain services to be provided and had paid the service tax on it, but for some reasons, he could not provide the services wholly or partly and according to this rule, the assessee can adjust the excess payment of service tax calculated on *pro rata* basis against his service tax liability for subsequent period if he has refunded the value of taxable service along with service tax to the person from whom it was received. Thus, the sub-rule (3) provides for limited facility of adjustment in the cases where the amount has already been received by an assessee for the service to be provided and tax leviable thereon had been paid, but subsequently, due to some reasons, the service was not provided either in full or in part. Sub-rule (4) of the Rule 6 provides for provisional assessment, in the case where the assessee for any reason is unable to correctly estimate on the date of deposit, the actual amount payable for a particular month or a quarter, as the case may be, and according to this rule, he may request the jurisdictional Asstt./Dy. Commissioner for payment of service tax on provisional basis. Sub-rule (4A) provides that notwithstanding anything contained in sub-rule (4), where the assessee has paid to the credit of Central Government any amount in excess of the amount liable to be paid towards the service tax liability in the month/quarter, as the case may be, the assessee may adjust such excess amount paid by him against his service tax liability in subsequent month/quarter and sub-rule (4B) lays down the conditions for such adjustment. The main condition is that the excess payment is not on account of any reasons involving interpretation of law, taxability, classification, valuation or applicability of any exemption notification. The other conditions are that an assessee with centralized registration under Rule 4(2) can adjust excess payment in one month against this tax liability in other months without any limit, for other assessee, there is a monetary limit of Rs. one lakh for such adjustment. In our view harmonious construction of Rules 6(4), 6(4A) and 6(4B) would be that Rule 6(4) applies to a case where due to reasons involving interpretation of law, taxability, classification, valuation or applicability of exemption notification, the assessee is unable to correctly determine his service tax liability for a

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[6] **2014 (36) S.T.R. 1084 (Tri. – Del.)**

particular month/period and Rule 6(4A) read with Rule 6(4B) would apply when tax liability cannot be determined for a particular month due to other reasons. Thus sub-rule (4A) read with Rule (4B) 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 (1A) 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) E.L.T. 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".

11. In view of the facts of the case and the ratio of the decision cited above, we are of the considered opinion that the impugned order cannot be sustained and is liable to be set aside and we do

so. Since, we have held the issue in favour of the appellant on merits, we are not going into the issue of limitation.

12. In view of the above, the appeal is allowed.

(Order pronounced in open court on 30/05/2023.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

PK