

Whether the excess payment of service tax can be adjusted against the future liability without any monetary or period limit? For example, whether the excess payment of say Rs. 10 lakhs during the month of March, can be adjusted straightaway against the payment due for April, or in a few installments spread over a few months, say @ Rs. 2 lakhs for 5 months starting April, as the adjustment depends upon arising of the future liability?

Sub-rules (4A) and (4B) of rule 6 of the Service Tax Rules, 1994 which are relevant, read as follows.

“(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.”

“(4B) The adjustment of excess amount paid, under sub-rule (4A), shall be subject to the following conditions, namely:-

(i) excess amount paid is on account of reasons not involving interpretation of law, taxability, classification, valuation or applicability of any exemption notification,

(ii) excess amount paid by an assessee registered under sub-rule (2) of rule 4, on account of delayed receipt of details of payments towards taxable services may be adjusted without monetary limit,

(iii) in cases other than specified in clause (ii) above, the excess amount paid may be adjusted with a monetary limit of Rupees one lakh rupees for a relevant month or quarter, as the case may be,

(iv) the details and reasons for such adjustment shall be intimated to the jurisdictional Superintendent of Central Excise within a period of fifteen days from the date of such adjustment.”

As per the above sub-rules, the excess payment made can be adjusted only once with a monetary limit of Rs. 1 lakh. The assessee in the case cited above, will have to file a refund claim for Rs. 9 lakh with the Service Tax Department, as Section 83 of the Finance Act, 1994 reads, “83. Application of certain provisions of Act 1 of 1944 – The provisions of the following section of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise: - 9C, 9D, **11B**, 11BB, 11C, 12 12A, 12B. 12C, 12D, 12E, 14, [14AA]*, 15, 33A, 35F, 35FF to 35-O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, [38A]* and 40.”

The reasons for the above statement are as follows. Notice the phrase, “succeeding month or quarter, as the case may be”, in sub-rule 4A, as per which, the excess payment can be adjusted against the service tax liability for the succeeding month or quarter, as the case may be. The phrase ‘as the case may be’ is mentioned because the first proviso to sub-rule (1) of rule 6 of the Service Tax Rules, 1994, qualifies the assessee who is an individual or proprietary firm or partnership firm, to make quarterly payments of service tax; and the others have to pay the service tax on monthly basis. Secondly, clause (iii) of sub-rule (4B) of rule 6 ibid specifies adjustment of excess payment with a monetary limit of Rs. 1 lakh depending upon the category of payment, either on monthly or quarterly basis. So, when one reads the two phrases together, ‘succeeding month or quarter’ of sub-rule 4A and

'Rupees one lakh rupees for a relevant month or quarter' of sub-rule 4B, one gets the impression that what is envisaged is adjustment of Rs. 1 lakh only for the subsequent period of payment, either monthly or quarterly, and that too once only.

And the other conditions imposed in sub-rule (4B) *ibid*, the excess amount adjustable is not 'on account of reasons involving interpretation of law, taxability, classification, valuation or applicability of any exemption notification'. The amounts arising out of the above issues are those pending in disputes in various higher fora, and the deposits made can be adjusted straightaway, without any monetary limit, or in the alternative a refund claim as mentioned above can be sought for from the department. Similarly, in the case of the assessee who are registered under the centralized billing or accounting system under sub-rule (2) of rule 4 *ibid*, there is no monetary limit for adjustment of excess payment of service tax for the subsequent period. Therefore, the excess payment of service tax *simpliciter* alone, can be adjusted for the next month or quarter of payment, to the extent of Rs. 1 lakh only once, and the balance, if any, should be sought for by way of a refund claim from the department. Of course, this adjustment is also qualified with the stipulation of the procedure to intimate the Superintendent concerned within 15 days of such adjustment.

Contrast this with sub-rule (3) of rule 6 of the Service Tax Rules, 1994, which reads,

"(3) 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 (calculated on a pro rata basis) 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."

In the above scenario, where an assessee paid service tax in advance, who later on did not provide any service, hence there was no liability on his part to pay the service tax in the first instance, as per the above sub-rule, in case he refunded the service tax to the person from whom he received, can adjust the amount without any restriction on the amount or the period. Notice the words, 'for the subsequent period' in the above sub-rule (3) against the words, 'for the succeeding month or quarter' of sub-rule (4A).

Similarly, another scenario envisaged in sub-rule (1A) of rule 6 of the Service Tax Rules, 1994, which reads as follows.

"(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,-

++ 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

++ 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;

Explanation: For the removal of doubt, it is hereby clarified that in case the value of the taxable service is received before providing the said service, service tax shall be paid on the value of service attributable to the relevant month, or quarter, as the case may be."

In the above case, an assessee can pay service tax in advance and adjust the same as and when he receives the taxable value on pro rata basis during the subsequent period. There is no restriction as to the amount and the period of adjustment, as in the case of non-provision of service mentioned in sub-rule (3) of rule 6. Notice the words, 'for the subsequent period' in the above sub-rule (1A), against the words, 'for the succeeding month or quarter' of sub-rule (4A).

Sub-rule (4) of rule 6 *ibid*, deals with the provisional assessment and reads as follows.

"(4) Where an assessee is, for any reason, unable to correctly estimate, on the date of deposit, the actual amount payable for any particular month or quarter, as the case may be, he may make a request in writing to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, giving reasons for payment of service tax on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, on receipt of such request, may allow payment of service tax on provisional basis on such value of taxable service as may be specified by him and the provisions of the Central Excise (No.2) Rules, 2001, relating to provisional assessment, except so far as they relate to execution of bond, shall, so far as may be, apply to such assessment."

Now, see sub-rule (4C) of rule 6 *ibid*, which reads as follows.

"(4C). Notwithstanding anything contained in sub-rules (4), (4A) and (4B), where the person liable to pay service tax in respect of services provided or to be provided in relation to renting of immovable property, referred to in sub-clause (zzzz) of clause (105) of section 65 of the Act, 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, on account of non-availment of deduction of property tax paid in terms of notification No.24/2007-Service Tax, dated the 22nd May, 2007, from the gross amount charged for renting of the immovable property for the said period at the time of payment of service tax, the assessee may adjust such excess amount paid by him against his service tax liability within one year from the date of payment of such property tax. The details of such adjustment shall be intimated to the Superintendent of Central Excise having jurisdiction over the service provider within a period of fifteen days from the date of such adjustment."

In the above case, the exemption provided to the property tax paid to the local bodies in terms of Not. No. 24/2007-ST, dated 22.5.2007, can be adjusted against payment of service tax on renting of immovable property, within one year of payment of the said property tax, in case of non-availment of the said exemption at the initial stage of payment of service tax on the gross charges under the renting of immovable property service.

So, in the cases of advance payment, centralized accounting system and non-provision of taxable service, there is no restriction as to the amount and period, as to the adjustment of excess payment of service tax. In the case of excess payment *simpliciter* alone, such adjustment can be made only once during the subsequent month or quarter, as the case may be, with a monetary limit of Rs. 1 lakh. The balance service tax excess paid earlier, on this account has to be sought for by way of a refund claim. In the case of deposits made

where certain issues are pending in various appellate fora, a refund claim has to be sought for. In the case of property tax paid, the amount can be adjusted against the future service tax liability within one year of the payment of service tax on renting of immovable property service.

The reasons for the stipulation of monetary and period restrictions imposed on adjustment of excess payment of service tax *simpliciter* appears improper, although the alternate path of filing of refund claim is available, which is a bit cumbersome procedure when compared with the self-adjustment of excess payment of Service Tax by the assessee, which is also subject to scrutiny of assessment of ST3 return to which such adjustment pertains and gets reflected in the relevant ST3 return as also the verification by the audit groups.

The fall out of the restriction imposed under these sub-rules (4A) and (4B) of rule 6 of the Service Tax Rules, 1994 is that an assessee who paid excess service tax by Rs. 10 lakhs during the month of March, if adjusts the whole amount against his liability during April or the subsequent months, such adjustment beyond Rs. 1 lakh only once, i.e., to the extent of Rs. 9 lakhs is not permissible, and his service tax liability of Rs. 9 lakhs is treated as not discharged, and all the provisions of the Act and the Rules relating to the non-payment of service tax are applicable.

++ Another aspect is that the restriction on adjustment of excess payment of service tax on monetary and period terms puts the assessee to the loss of interest that may have accrued in case such monies were put to use in the furtherance of business or commerce. And the Government does not give any interest on such excess payment of service tax, as no circumstances attracting equitable jurisdiction can be established to allow interest, as per the proviso to Section 1 of the Interest Act, 1839, as decided in the case law, UOI Vs. Bharat Vijay Mills Company Limited, by the Gujarat High Court, citation, 1988 (34) ELT 605 Gujarat, the excerpts of which are reproduced below.

++ The only relief available is delayed refund interest under Section 11BB of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, in case the assessee filed refund claim under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, for the excess payment of service tax of Rs. 9 lakhs in the example cited above and not got the refund in time. The period covering the date of excess payment of service tax to the date of the occurrence of the delayed payment of refund is lost without interest on the monies paid excess towards service tax, even if an assessee follows the refund procedure for such excess payment.

++ Paragraphs 25 and 26 of the judgment UOI Vs. Bharat Vijay Mills Company Limited cited above, which are relevant are reproduced below.

“25. It is urged on behalf of the Mills that they are entitled to claim interest under Section 1, Interest Act, 1839. Section 1, Interest Act reads as under:-

“1. Power of Court to allow interest. - It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, than from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the terms of payment : provided that interest

shall be payable in all cases in which it is now payable by law.”

It was urged that since the sums which the Mills had claimed were certain, they were entitled to claim interest under the aforesaid provision. In the alternative, it was urged that in any case, the Mills were entitled to interest under the proviso to the aforesaid section. The aforesaid Section 1, Interest Act, has been interpreted by the Privy Council in B.N. Railway v. Ruttanji Ramji, AIR 1938 PC 67. The Privy Council held that under the said section, interest for the period prior to the date of the suit may be awarded. If there is an agreement for the payment of interest at a fixed rate, or it is payable by usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest as for instance the Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in a promissory note or bill of exchange under Section 80, Negotiable Instruments Act. So far as the proviso is concerned, the Privy Council held that the proviso to Section 1 applies to a case in which the Court of equity exercises jurisdiction to allow interest. But in order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction.

26. *The above decision of the Privy Council was relied upon by the Supreme Court in Thawardas v. Union of India, AIR 1955 SC 468. The Supreme Court held that Interest Act applies where interest is not otherwise payable by law. It further held that following among other conditions must be fulfilled before interest can be awarded under the Act: (i) there must be a debt or a sum certain; (ii) it must be payable at a certain time or otherwise; (iii) these debts or sums must be payable by virtue of some written contract at a certain time; and (iv) there must have been a demand in writing stating that interest will be demanded from the date of the demand. Where not one of these elements is present, the Court cannot allow interest simply because it thought the demand was reasonable. In the instant case, claim for interest is not based on any agreement. Claim for interest does not arise out of any trading transactions and, therefore, there is no question of any usage of the trade having the force of law. There is no statute under which the Mills are entitled to claim interest. Therefore, the only basis on which interest can be claimed is that there was a certain sum due to them and that they had made a demand for the same by a notice in writing. It was however, urged that the claim for interest would be covered by the proviso to Section 1. In other words, the Mills are entitled to claim interest as claimed by them under the proviso to Section 1, Interest Act. Now, as pointed out by the Privy Council, the proviso to Section 1 applied to a case in which the Court of Equity exercises jurisdiction to allow interest. But in order to invoke equitable jurisdiction, it is necessary in the first instance to establish existence of state of circumstances which attracts equitable jurisdiction. Now, besides submitting that the Mills are entitled to claim interest on equitable grounds, it is not established that in similar case the Court of equity would exercise jurisdiction to award interest. In other words, existence of state of circumstances which attracts equitable jurisdiction is not established. But apart from that in Para 9 of Section 2 of Part I of Volume 27 of Halsbury's laws of England, Third Edition under the caption "Equitable right to interest" cases where equity interest may be recovered are enumerated as follows:-*

"Equitable right to interest. - In equity interest may be recovered in certain cases where a particular relationship exists between the creditor and the debtor, such as mortgagor and mortgagee; obligor and obligee on a bond; personal representative and beneficiary principal and surety; vendor and purchaser; principal and agent, solicitor and client; trustee and cestui que trust; or, where the debtor is in a fiduciary position to the creditor. Interest is also allowed on pecuniary legacies not paid within a certain time; on the dissolution of a partnership; on the arrears of an annuity where there has been misconduct or improper

delay in payment; or in the case of money obtained or retained by fraud. It may also be allowed where the defendant ought to have done something which would have entitled the plaintiff to interest at common law, or has wrongfully prevented the plaintiff from doing something which would have so entitled him."

The Mills' claim does not fall under any of the aforesaid categories. Therefore, in my opinion, they are not entitled to claim interest on the ground of equity...."

Therefore, it may be equitable on the part of the Government to allow the adjustment of excess payment of service tax without any restrictions imposed under sub-rules (4A) and (4B) of rule 6 of the Service Tax Rules, 1994, by lifting the said restrictions which appear unreasonably.