IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 267 of 2011

(Arising out of Order-in-Original No. 05/2011-ST-Commr. dated 31.01.2011 passed by the Commissioner of Central Excise, Customs and Service Tax, 6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018)

M/s. Aircel Limited **: Appellant**
Codissia Towers,
7A, Huzur Road,
Coimbatore – 641 018

VERSUS

The Commissioner of Central Excise and Service Tax **: Respondent**
6/7, A.T.D. Street, Race Course Road,
Coimbatore – 641 018

APPEARANCE:

Shri Raghavan Ramabadran, Advocate for the Appellant

Shri M. Ambe, Deputy Commr. (Authorized Representative) for the Respondent

CORAM:

HON'BLE MRS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40044 **/ 2023**

DATE OF HEARING: 03.02.2023
DATE OF DECISION: 09.02.2023

Order : [Per Hon'ble Mrs. Sulekha Beevi C.S.]

Brief facts of the case are that the appellant viz., M/s. Aircel Limited, Coimbatore is a provider of taxable service under the category of "Telecommunication Service". They provide telecommunication service to all the subscribers in the areas comprised in the jurisdiction of the State of Tamil Nadu except Chennai City. In respect of the subscribers comprised in the territorial jurisdiction of Chennai City, such service is provided by their associate

company viz., M/s. Aircel Cellular Limited (hereinafter referred to as 'ACL'). In order to provide flexibility to customers, both M/s. Aircel Ltd. (appellant) and M/s. ACL introduced common recharge facility. By such common recharge facility, when the subscribers of M/s. Aircel Ltd. visit Chennai, they can utilize the services of the dealers and distributors of M/s. ACL for the purchase of recharge cards/top-up cards. Similarly, when the subscribers of M/s. ACL visit places in the territorial jurisdiction of the State of Tamil Nadu other than Chennai, the subscribers can utilize the services of the dealers and distributors of M/s. Aircel Ltd. for the purchase of recharge cards/top-up cards. At the time of sale of the recharge cards/top-up cards, the respective dealers collected appropriate Service Tax due thereon from the customers and paid into the Government account every month. The amount due to each of these companies was settled between these companies through credit notes raised on each other.

2.1 M/s. Aircel Ltd., who is the appellant herein, had filed ST-3 returns for the period from 01.10.2007 to 31.03.2008 on 23.04.2008. Subsequently, they filed revised return for the same period on 03.07.2008 along with a letter dated 30.06.2008 wherein they had explained the circumstances under which the revised return was filed. They also furnished copies of the credit notes raised.

2.2 On perusal of the revised return, it appeared to the Department that the appellant had contravened the provisions of Rules 6(3), 6(4) and 6(4A) of the Service Tax Rules, 1994 since they had wrongly adjusted the excess paid Service Tax towards the payment of Service Tax pertaining to a latter period and on account of such wrong adjustment, there was short payment of Service Tax to the tune of Rs.2,19,36,614/-.

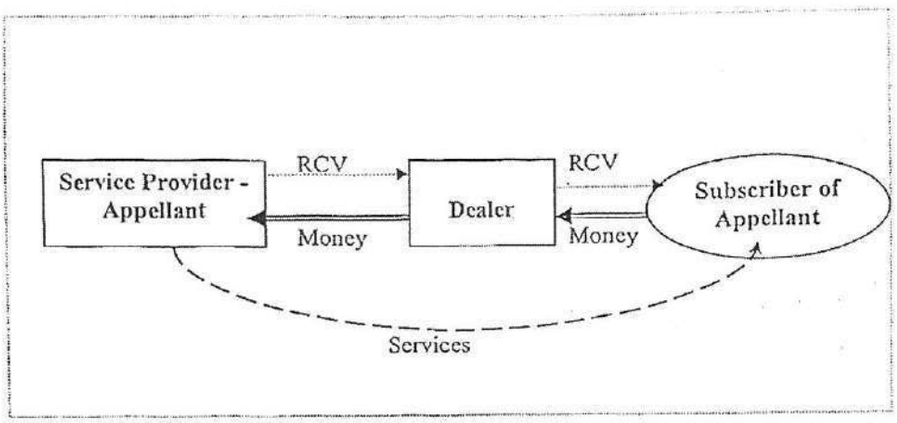
3. A Show Cause Notice No. 04/2009 dated 01.07.2009 was issued to the appellant proposing to demand the short-paid Service Tax along with interest and also for imposing

penalties. After due process of law, the Original Authority vide order impugned herein confirmed the demand along with interest and also imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

4.1 Learned Counsel Shri Raghavan Ramabadran appeared and argued on behalf of the appellant. He submitted that the appellant is engaged in providing telecommunication services to the subscribers in the State of Tamil Nadu excepting Chennai; M/s. ACL is a group company who had licence for providing telecommunication services to subscribers within Chennai only. That from August 2007, the appellant and M/s. ACL had introduced the facility of common recharge for each other's subscribers whereby the appellant and M/s. ACL could sell Recharge Vouchers (RCVs) or Start-Up Kits (SUKs) to subscribers through their respective dealers so as to provide flexibility to their subscribers. To illustrate, the Learned Counsel for the appellant explained that when subscribers of M/s. ACL travel within the telecommunication circle of the appellant, they could recharge or top-up using RCVs sold by the appellant through its dealers and vice versa. The diagrammatic representation of the flow of transaction, as given by the Learned Counsel for the appellant, is as under:-

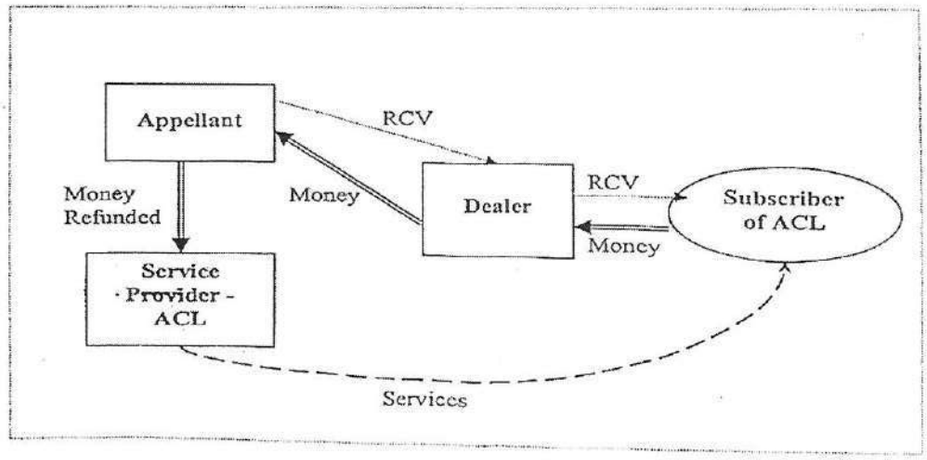
Situation – 1

RCV sold by AL. Subscriber of AL buys the RCV and service is provided by AL



Situation – 2 – COMMON RECHARGE FACILITY

RCV sold by AL. Subscriber of ACL buys the RCV and service is provided by ACL



4.2 The Learned Counsel submitted that as Service Tax is liable to be paid on services provided or agreed to be provided, the appellant would remit applicable Service Tax on the entire value of the recharge vouchers at the time when the RCVs were sold to dealers. Subsequently, in a case where a subscriber of M/s. ACL is roaming within the circle of the appellant, he may purchase the RCV from the dealer of the appellant. In such cases, the telecommunication services are actually provided by M/s. ACL. However, the Service Tax on the value of such vouchers which are sold to the subscribers of M/s. ACL would have been paid by the appellant even though the services are actually provided by M/s. ACL. This led to a situation where Service Tax payments were made in compliance with law for services to be provided, though the taxable services were not rendered by the person discharging the Service Tax. During the impugned period, the appellant had discharged Service Tax of Rs.2,19,36,614/- for the period ending 31.03.2008 against the RCVs provided to the subscribers of M/s. ACL, which was not liable to be paid by the appellant as M/s. ACL had actually rendered the services. Likewise, M/s. ACL had remitted Rs.1,40,10,900/- as Service Tax for the services actually rendered by the appellant. The amounts due to

each other for the value of services as well as Service Tax was settled by raising credit notes. Basing on the credit notes, the appellant and M/s. ACL would net off the amounts payable to the other for arriving at the taxable value for computing the Service Tax payable.

4.3 During the month of March 2008, the appellant filed its returns by including the value of RCVs which were sold to M/s. ACL. In order to rectify this anomaly, the appellant revised its return by showing the actual taxable value. The appellant adjusted the excess tax paid by adjusting the same towards their subsequent tax liabilities under Rule 6(3) of the Service Tax Rules, 1994.

4.4 The Show Cause Notice has been issued alleging that the adjustment carried out by the appellant is not in accordance with Rule 6(3) of the Service Tax Rules, 1994. The Department does not dispute that Service Tax has been paid by both the appellant and M/s. ACL on the same RCVs. The demand has been raised alleging that the appellant cannot resort to Rule 6(3) to adjust the excess payment of tax. The Original Authority has confirmed the demands mainly on the following observations:-

a. That Rule 6(3) of the Service Tax Rules relates to refund of value of taxable service and Service Tax thereon to person from whom it was received. However, the gross amounts in the instant case were passed on to M/s. ACL and not to the person from whom the amounts representing value of taxable service and Service Tax thereon was received.

b. That therefore, the entire case falls beyond the scope of Rule 6(3) of the Service Tax Rules and the appellant was not entitled to the benefit of adjustment.

c. That Rule 6(3) was not the proper mechanism for the purpose of adjustment of Service Tax though the

appellant herein had paid Service Tax on gross receipts for which no taxable services were provided.

4.5.1 It was urged on behalf of the appellant that the issue has been settled in the case of their associate company M/s. ACL for the period from January 2009 to March 2010 and the same has attained finality. The very same issue as to whether such adjustment can be made under Rule 6(3) was decided in the case of M/s. ACL vide Order-in-Original No. 68/2011 dated 30.11.2011. In the said case, the Adjudicating Authority had set aside the entire demand raised on this issue. In the said case, the Original Authority observed that when the assessee (M/s. ACL) does not provide the service for which the amounts have already been received (through appellant) there can be no levy of Service Tax and the assessee is entitled to refund of Service Tax already paid, subject to Section 11B of the Central Excise Act, 1944. It was also opined that Rule 6(3) of the Service Tax Rules was consciously crafted for this purpose and it would not be justified to hold that the assessee therein was liable to pay Service Tax on the amounts received in advance when no services were provided. Thus the very same issue in case of the associate company was held in favour of the assessee. The Department has not filed any appeal against the said order and the issue has attained finality. Subsequently, he submitted that there were no further demands issued to M/s. ACL on this count and is deemed to have attained finality in all respects.

4.5.2 The Learned Counsel for the appellant pointed out that the issue that has been decided thus, in favour of the assessee (M/s. ACL), who is their associate company, pertains to one leg of the transaction. The appellant is aggrieved with the present demand for it seeks to levy tax

on the other leg of the same transaction on identical allegations.

4.5.3 The Learned Counsel drew support from the decision of the Hon'ble Apex Court in the case of *M/s. Birla Corporation Ltd. v. Commissioner of Central Excise [2005 (186) E.L.T. 266 (S.C.)]* to argue that the Department cannot pick and choose to pursue demands against assessees when the issue involved has attained finality. The decisions in *M/s. Jayaswals Neco Ltd. v. Commissioner of Central Excise, Nagpur [2006 (195) E.L.T. 142 (S.C.)]* and *M/s. Boving Fouress Ltd. v. Commissioner of Central Excise, Chennai [2006 (202) E.L.T. 389 (S.C.)]* were also relied upon.

4.6.1 Rule 6(3) of the Service Tax Rules was adverted to, to contend that the said Rule allows adjustment of excess Service Tax paid. The Adjudicating Authority, vide impugned order, has confirmed the demand by denying the benefit of adjustment on the sole ground that the refund of value of taxable service and Service Tax component thereon was only made to M/s. ACL and not to the end customer.

4.6.2 To argue that Rule 6(3) of the Service Tax Rules, 1994 has to be interpreted in a liberal manner and not in a rigid way, the Learned Counsel drew support from the decisions in the cases of *M/s. Nirma Architects & Valuers v. Commr. of C.Ex., Ghaziabad [2006 (1) S.T.R. 305 (Tri. – Del.)]* and *Commissioner of Central Excise, Salem v. M/s. SRC Projects Ltd. [2010 (20) S.T.R. 687 (Tri. – Chennai)].* The said case was later affirmed by the Hon'ble jurisdictional High Court as reported in *Commissioner v. M/s. SRC Projects Ltd. [2017 (51) S.T.R. J34 (Mad.)]*

4.7 He prayed that the entire demand may be set aside and the appeal may be allowed, with consequential benefits.

5.1 The Learned Authorized Representative, Shri M. Ambe, appeared and argued for the Department. The Learned Authorized Representative referred to paragraph 16 of the impugned order, which reads as under:-

> *"16.1 As could be seen from the above, adjustment of the excess paid Service Tax is permissible subject to the presence of the parameters as indicated below:*
>
> *a) The assessee should have paid Service Tax to the credit of the Central Government;*
>
> *b) Service Tax should have been paid in respect of a taxable service, which is not so provided by him either wholly or partially for any reason;*
>
> *c) Adjustment of the excess paid Service Tax should be against the Service Tax liability for the subsequent period;*
>
> *d) The assessee should have refunded the value of taxable service and the Service Tax thereon to the person from whom it was received.*
>
> *16.2 I observe in the instant case that 'Aircel' had claimed that for certain amounts received from the dealers/distributors, they had not provided any taxable services to the subscribers of 'Aircel' and that since the said gross amounts collected by 'Aircel' are pertaining to the subscribers of 'ACL', the same are passed on to the latter through Credit Notes.*
>
> *16.3 However, Rule 6(3) of the STR is relating to the refund of the value of the taxable service and the Service Tax thereon to the person from whom it was received. I observe that the gross amounts were passed on to 'ACL' and not to the person, from whom*

the amounts representing the value of the taxable service and Service Tax thereon was received. As per Rule 6 of the STR, the liability to pay Service Tax arises the moment consideration/payments are received by the service provider towards the value of Taxable Services provided or to be provided. Accordingly, the obligation on 'Aircel' to pay Service Tax arises when they received the consideration towards recharge coupons sold to their dealer/distributors. In view of the above, I find that the instant case falls beyond the scope of Rule 6(3) of the STR and therefore, 'Aircel' had failed to qualify themselves to avail the aforesaid benefit of adjustment in terms of Rule 6(3) of the STR."

5.2 It is argued by the Learned Authorized Representative for the Department that the appellant having not refunded the value of taxable service and Service Tax thereon to the end customer, they cannot claim adjustment under Rule 6(3) of the Service Tax Rules, 1994. He submitted that in paragraph 20.3, the Adjudicating Authority has rightly observed that Rule 6(3) is not the proper mechanism for the purpose of adjustment of Service Tax which was paid by the appellant though the services were provided by M/s. ACL.

5.3 He prayed that the appeal may be dismissed.

6. Heard both sides.

7. The issue to be analysed is whether the adjustment of the Service Tax of Rs.2,19,36,614/- towards the Service Tax liability for the subsequent period, is in accordance with the provisions of Rule 6(3) of the Service Tax Rules, 1994 or not. The appellant has obtained licence for providing telecommunication services in the entire State of Tamil Nadu except Chennai. The associate company of the appellant, namely, M/s. Aircel Cellular Ltd. (ACL), has

obtained licence for providing telecommunication services only in Chennai. When a subscriber of the appellant-company travels to Chennai, he can purchase a recharge card/top-up card from M/s. ACL. While making the purchase, along with the amount, Service Tax is collected by the associate company M/s. ACL. As and when the recharge card is activated by the subscriber, even if he is within Chennai, since he is a subscriber of the appellant-company (M/s. Aircel Ltd.), Service tax is paid by the appellant on the said card. Thus, according to the appellant, there is double payment of Service Tax, by the appellant-company as well as the associate company i.e., M/s. ACL. The nature of the activity and the transaction on which the Service Tax has been collected is explained in the diagrammatic representation provided by the appellant (as reproduced hereinabove at paragraph 4.1 of this order). It is also necessary to state that the present issue is with regard to pre-paid services only and not post-paid services.

8. We have to say that there is no dispute alleged in the Show Cause Notice with regard to the payment of Service Tax by both companies. The discussion made by the Adjudicating Authority at paragraphs 11 and 12 of the impugned order makes this clear. So also, there is no dispute that the appellant-company and M/s. ACL have settled between themselves such amount collected along with Service Tax by issuing credit notes to each other. The discussions in paragraph 11 and 13 of the impugned order are reproduced below:-

> *"11. I observe from the records of the case that 'Aircel" and 'ACL' sell recharge cards/coupons to their respective dealers/distributors, which are intended for cross utilization by the subscribers of both the Companies through common recharge platform in order to provide flexibility to the customers. The amount of Service Tax collected from the dealers/distributors, at the time of sale of*

the recharge cards/coupons, is paid to the credit of the Government Account. When the subscriber activates the recharge card/coupon, service is considered to have been provided and the Income is recognized in the books of the accounts of the respective Companies to which the subscribers belong. The Income in respect of the other Company, inclusive of the Service Tax element contained therein, is passed on through the accounting mechanism of issue of Credit Notes at the end of the Financial Year.

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13. The issue that arises in this context is as a result of adjustment of the Service Tax, which was remitted to the exchequer on receipt of the advances and in anticipation of the services to be provided to own subscribers, but not provided as the taxable services were pertaining to the subscribers of the other Company."

9. The demand has been confirmed on the sole ground that the appellant is not eligible to make the adjustment of excess Service Tax paid by them as the appellant has not refunded the value of taxable service and Service Tax thereon to the end consumer as required under Rule 6(3) of the Service Tax Rules.

10. Rule 6(3) of the Service Tax Rules, 1994 reads as under:-

> *"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 service tax thereon to the person from whom it was received."*
>
> (Emphasis supplied)

11.1 In paragraph 16 of the impugned order, the Adjudicating Authority has discussed this view as to the requirement to refund the consideration along with Service Tax to the end customer in order to claim the benefit of adjustment provided in Rule 6(3). It is observed by the Adjudicating Authority that the gross amounts are being passed to M/s. ACL and not to the person from whom the amounts representing the value of the taxable service and Service Tax thereon were received. It has to be borne in mind that Rule 6(3) provides for an eventuality where tax has been collected and paid to the Government and no service was thereafter provided. In other words, if the service provider collects the consideration for services along with tax and thereafter, for some reason, is not able to provide the said service, can refund the consideration along with tax to the customer. The tax already paid to the Government can be adjusted towards the liability for the subsequent period. By such adjustment, the service provider-assessee need not take the route of refund of excess tax paid as provided under Section 11B of the Central Excise Act, 1944.

11.2 In the present case, it has to be borne in mind that the subscriber has received the services which he has paid for. So, the consideration along with tax paid by the customer is in order. Since only one of the companies had provided the service, and the tax was paid by both companies on the same consideration received, they have adjusted the gross amounts by issuing Credit Notes. The Explanation to Section 67 of the Finance Act, 1994 gives the meaning of "gross amount charged". Sub-clause (c) of the Explanation reads as under:-

> *"67. ....*
>
> *Explanation.-For the purposes of this section, -*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is within any associated enterprise.]"*
>
> (Emphasis supplied)

The assessee having transferred the consideration received from the customer along with tax to the other company who has provided the services, is saved from the principle of unjust enrichment. The requirement of refund in Rule 6(3) is to satisfy the condition of unjust enrichment and not to make the customer unjustly enriched.

11.3 The appellant has mainly relied on the decision rendered in the case of their associate company viz. M/s. ACL vide Order-in-Original No. 68/2011 dated 30.11.2011 on the very same issue. It has to be noted that the demand against the associate company M/s. ACL arises out of the other leg of the very same transaction. The discussions made in the said Order-in-Original dated 30.11.2011 read as under:-

> *"6.1 The assessee's main contention is that when they had not provided the telecommunication service in respect of the subscribers of their associate company, they are not legally required to pay service tax and whatever the amount of service tax already paid by them as been transferred to their associate company along with the value of service who actually provided the service. The assessee contended that both the companies have followed a method of issuing credit notes to each other at the end of every month for accounting the income receivable on account of cross-circle purchase and activation of recharge/top up cards wherein the recharge/top up amount relating to a pre-paid subscriber is recognized as income for the home network operator for provision of telephone service. At the end of every month service tax liability is arrived at in the following manner:*
>
> > *(a) pay service tax on advance receipts actually received from dealers on supply of common recharge cards,*
> >
> > *(b) pay service tax on value of services provided and income recognized from activation made during the month on cards sold and tax paid by the associate company but for which payment is now received by way of credit note covering value of services and service tax and*
> >
> > *(c) reduce the service tax liability for the month on the value of services provided by the associate company on activation of cards sold and tax paid in earlier months by the assessee, for which payment is returned to the associate company by way of issue of credit note covering value of services not provided and applicable service tax. The assessee has therefore, contended that there is no short payment and the payment of service tax is in order.*
>
> .
>
> .

6.5 *As regards the department's another ground that the assessee have not refunded the value to the person from whom it was received, Rule 6(3) of the Service Tax Rules, 1994 is reproduced below for better appreciation of legal provisions:-*

> ***Rule 6(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.*

The literal interpretation of the above Rule means that an assessee can adjust the service tax paid by them against the service tax liability for subsequent period, if only he refunded the amount to the person from whom it was received. At the same time it is pertinent to see that Rule 6 prescribes only the procedure of payment of Service Tax. Whereas under the statute, the power to tax is created by Section 66 of the Finance Act, 1994 and as per Section 68(1) of the Act the Service Tax liability is fastened on the service provider. Further, Section 67 defines the value of service as the amount charged by the service provider for the taxable service. A harmonious reading of the above statutory provisions clearly shows that service tax is payable by the service provider on the value of taxable services provided by him. Therefore it is evident that an amount becomes value of taxable service only when it has nexus with the service provided and for this reason only Rule 6 uses the term "value of taxable service" and not the amount. Even though service tax is payable on taxable value received in advance, it does not create liability on an assessee when taxable service was not provided by him.

6.6 *On perusal of case records and documents, I find that there is no dispute on the fact that the assessee did not provide mobile telephone service to the customers of their associate company when the subscribers purchase the recharge / top up card from the dealers of the assessee. In such a situation, there cannot be a tax liability on the assessee in respect of such recharge / top up card sold under CRP facility to a subscriber of their associate company at Chennai. Since they have already paid the service tax, the next logical and legal step is refund of tax or adjustment of service tax against the*

liability for the subsequent period as per Rule 6(3) of Service Tax Rules, 1994.

6.7 It is pertinent to see that the very purpose of introduction of Rule 6(3) i.e. adjustment of service tax, is to provide instant relief to the assessees when services are not provided either wholly or partially for any reason. The condition prescribed therein i.e. refund of the value along with service tax to the customer, is to ensure that there is no unjust enrichment by the assessee. In the present case, there is no dispute that the assessee has credited the service charges along with the service tax to their associate company who provided the service. By transferring the amount along with service tax to their associate company, the assessee has satisfied the unjust enrichment concept inbuilt under Section 11B of Service Tax Rules, 1994. As the purpose and object of the provisions of Rule 6(3) are satisfied, there is no justification in denying the self adjustment facility.

6.8 It is well settled law that the principles of reasonable construction have to be adopted when literal meaning results in injustice or anomaly. In this connection, reliance is placed on the decision in the case of Nirma Architects & Valuers – 2006 (1) STR 305 (Tri) wherein the Hon'ble Tribunal has held as under:-

> *5.....It can be seen from the above that the law makers have specifically provided for the adjustment of excess paid to the short payment. Resorting to a narrow interpretation that such adjustment is possible only if there is a return of Service Tax to the client and relegate the assessee to the rigmoral of refund procedure, would defeat the salutary intention of the law makers. The provisions of Rule 6(3) are for alleviating the difficulties of the assessee than to create hurdle in smooth functioning of imposition and collection of tax. In my opinion, a narrow interpretation as propounded by DR would make the provisions otiose and non-implementable. I find that, in the interest of justice, the adjustment of short payment of service tax of October to December, 1999 by the appellants to the excess payment of October, 1999 to March, 1999 is well within the law and has to be allowed.*

Reliance is also placed on the following decisions:

Sl. No	*Appellant*	*Citation*
1.	*SRC Projects Ltd.*	*2010 (20) STR 687 (Tri.)*
2.	*Powercell Battery (I) Ltd.*	*2010 (19) STR 400 (Tri.)*
3.	*Janta Travels (P) Ltd.*	*2009 (13) STR 488 (P&H)*

6.9 In view of the facts and circumstances of the case and based on the ratio of the above judgements, there is justification on the assessee's arguments. Accordingly, I hold that the adjustment of service tax made by them is in tune with the provisions of Rule 6(3) of Service Tax Rules, 1994."

(Emphasis supplied)

11.4 Another contention raised by the Learned Counsel for the appellant is that the above order passed by the Adjudicating Authority in the case of their associate company has attained finality.

12.1 The Hon'ble Apex Court in the case of *M/s. Birla Corporation Ltd. (supra)* has held that the Revenue cannot take a different stand when the Revenue has accepted the principles laid down in a previous case. In the case of M/s. *M/s. Jayaswals Neco Ltd. (supra*, the Hon'ble Apex court, relying on the decision in *M/s. Birla Corporation Ltd. (supra)*, has observed as under:-

"6. This Court in Birla Corporation Ltd. v. Commissioner of Central Excise [2005 (186) E.L.T. 266 (S.C.)] relying upon an earlier decision of this Court, held that the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases. In Paragraph 5 of the said judgment it was observed, thus :

> *"In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. (supra) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."*

7. Since the point involved in the present case is identical to the point decided in the Hindustan Gas & Industries case (supra) and the department having

accepted the principle laid therein to the effect that the inserts did not require any precision machining or that any such machining was done by the appellant, cannot be permitted to take a stand different than the principles laid down in the earlier case."

12.2 A similar view was taken in *M/s. Boving Fouress Ltd. (supra)* wherein the Hon'ble Apex Court has observed as under:-

"9. The principle laid down by the Tribunal in Sulzer's case (supra) was accepted by the department and did not challenge the same by filing an appeal in this Court. Thus, the same has attained finality.

10. The Commissioner (Appeals) in its order dated 31st July, 2003 in show cause notices dated 27th September, 1999 and 1st March, 2000 has also recorded a finding that the facts in the Sulzer's case are identical to the facts of the present case. A copy of the decision in Sulzer's case was handed over to the Counsel for the Revenue and he fairly conceded that the facts and the point of law in the said case are identical to that of the present case and therefore covered by that decision.

11. This Court in a catena of decisions has held that where the department accepts the principle laid down by the Tribunal in one case and let it become final, then the department is not entitled to raise the same point in other cases. The department cannot pick and choose. [See : The decisions of this Court in Union of India & Others v. Kaumudini Narayan Dalal & Another - (2001) 10 SCC 231; Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd. - 2003 (158) E.L.T. 130 (S.C.); Birla Corporation Ltd. v. Commissioner of Central Excise -2005 (186) E.L.T. 266 (S.C.); and Jayaswals Neco Ltd. v. Commissioner of Central Excise, Nagpur - 2006 (195) E.L.T. 142 (S.C.). It has been held in all these cases that if no appeal is filed against an earlier order or the earlier appeal involving the identical issue was not pressed by the Revenue, the Revenue is not entitled to press the other appeals involving the same question. In Birla Corporation Ltd. (supra), this Court observed as follows :

"In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was, therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. [2001 (130) E.L.T. 193] cannot be

permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."

12. The principle in Birla Corporation Ltd. (supra) is being followed consistently.

13. Since admittedly the point involved in the present case is identical to the point involved in Sulzer's case (supra) and the department having accepted the principle laid down therein, the department cannot be permitted to take a different stand in the present appeals."

13. The Learned Authorized Representative for the Department has not been able to counter the submission made by the Learned Counsel for the appellant that the Department has not appealed against the Order-in-Original dated 30.11.2011 passed in the case of the associate-company viz. M/s. ACL. We, therefore, have to hold that the issue being identical, is squarely applicable to the case before us.

14. From the discussions made above, after appreciating the facts, evidence and following the decisions, we find that the demand cannot sustain and requires to be set aside, which we hereby do.

15. In the result, the impugned order is set aside.

16. The appeal is allowed with consequential reliefs, if any.

(Order pronounced in the open court on 09.02.2023)

Sulekha Beevi C

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Vasa Seshagiri Rao

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sdd