Service Tax: Credit notes can counter unjust enrichment for Refund: CESTAT

The appellant had entered into agreements with clients which incentivized turnover with ‘brokerage' at rates lower than the standard rates. By its very nature, such reduction in ‘brokerage' would be applied ex-post facto in the month following which the prescribed threshold was crossed.

Accordingly, the clients were entitled to lower ‘brokerage' during the above period but tax liability had been discharged with the prescribed deadline on the ‘brokerage' charged at standard rates - the adjustment was given effect to by issue of credit notes in favour of the clients.

The appellant, therefore, claimed refund.

The refund sanctioning authority denied the claim on the primary ground that tax had been computed and paid by self-assessment and such assessment, having attained finality, could not be challenged through a refund claim. It was held that the assessee, in such cases of uncertainty about the ‘brokerage', should have resorted to provisional assessment envisaged in rule 6(4) of STR, 1994. It was also noted that the claim for refund was not supported by documents that could conclusively cross the hurdle of ‘unjust enrichment.'

In appeal, the Commissioner (A) held that assessment or self-assessment would not prejudice the claim for refund; however, the appellate authority was not satisfied that credit notes were sufficient to establish that the tax burden had not been passed on to the recipients of the service . Accordingly, the first appellate authority held the refund to be due but credited the same to the Consumer Welfare Fund.

The matter is before the CESTAT.

At the outset, the AR relied on the following cases viz. Mysore Electricals Industries Ltd 2006-TIOL-153-SC-CX (that the basis of assessment could be varied only with prospective effect); EID Parry India Ltd [2006-TIOL-1624-CESATAT-MAD] (That duty paid pursuant to self-assessment was not refundable).

The Bench observed that the decisions cited relate to clearance of goods which rests on a taxable event that is entirely at odds with tax on services.

The appellant cited the decisions in Shiva Analyticals (I) Ltd 2007-TIOL-827-CESTAT-BANG which relied upon Mohd Ekram & Sons 2004-TIOL-64-SC-CT to validate credit notes as evidence of payment/reversal of tax collected from customer; AK Spintex Ltd 2009-TIOL-12-HC-RAJ-CX (placing the onus on Revenue to evince lack of authenticity of accounting documents furnished in support of having borne the tax burden); Grasim (Chemical Division) 2011-TIOL-82-SC-CX and S Kumar's Ltd [2003-TIOL-01-CESTAT-DEL-LB].

The Bench extracted S.11B (2) of CEA, 1944 and observed –

- The form of evidence of having borne the duty burden is not prescribed; sufficient flexibility is impliedly permissible and it behoves the original authority to be able to comprehend and appreciate rigorous documentary trail that enable business to be operated efficiently without recourse to rigidity of reporting that is characteristic of bureaucratic grind. That rigour, though arising from convention and practice, having been acknowledged by, and enforceable in, commercial law is the backbone of fiscal engagement.

- Credit and debit notes have been in use for centuries as acknowledgment of dues and debt; these are legally enforceable documents in commercial disputes. It affords a convenience when the financial engagement between two commercial entities is continuing, and not episodic or discrete, for adjustment in ledgers with settlements effected at intervals. Merely because it has the form and appearance of script on paper it cannot be said to be unreliable. More so, in the present matter, when the contents are sufficiently elaborate to include the tax components and there is not a whit of challenge to its authenticity a casual dismissal of this

document was, therefore, not a valid option available to the lower authorities. [AK Spintex Ltd supra refers]

- Credit notes do not exist as inactive exhibits; the financial adjustment is manifested as entries in journals and ledger to impact the consideration made over and received for any goods supplied or service rendered. With credit notes being a conventional method of reflecting the change in consideration, and its authenticity not having been refuted, reliance has necessarily to be placed on the net effect that it has on the taxable transaction. Reversal of 'brokerage' carries with it the reversal of tax collected along with the excess 'brokerage'.

- Availment of CENVAT credit is a privilege and exercisable option that follows discharge of duty or tax liability along with consideration for purchase of goods or procurement of service - it is not evidence of or a mechanism for discharge of duty or tax liability at the provider's end. The manner in which credit is administered is not within the obligatory supervision of the provider of service or supplier of goods. The system is 'honor driven' by predicating the availment on supporting documentation with the onus of reversals placed squarely on the recipient. The issuance of credit note automatically curtails the entitlement and their existence suffices to enforce reversal in the course of scrutiny of returns or audit. In view of implicit reduction of entitlement to credit, with ample recourse for recovery under the Rules, assumption of having passed on the burden of tax fails to be a valid conjecture. The provisions of section 11B of Central Excise Act, 1944 cannot be stretched to fasten what is, essentially, the monitorial responsibility of tax authorities on to an assessee.

Holding that the lower appellate authority had erred in crediting the excess tax collected to the Consumer Welfare Fund, impugned order was set aside and the appeal was allowed.

The Bench directed (the original authority) that the refund be disbursed to the appellant.