IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

ST/568/2011

(Arising out of Order-in-Original No. 20/2011 dated 29.07.2011 passed by the Commissioner of Service Tax, Chennai).

M/s. Citi Bank N.A. : Appellant

Vs.

CCE & ST, Chennai : Respondent

Appearance

Shri Manoj Chauhan, Consultant,
for the Appellant

Shri K. Veerabhadra Reddy, ADC (AR)
for the Respondent.

CORAM :

Hon'ble Ms. Sulekha Beevi, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: **25.01.2019**

FINAL ORDER No. **40176 /2019**

Per Sulekha Beevi,

Brief facts are that the appellant is engaged in providing 'Banking and other Financial Services'. During the course of audit of accounts, it was noticed that the appellant short paid service tax to the extent of Rs. 1,74,41,177/- and short paid education cess of Rs. 3,48,805/- during the period from June, 2005 to August, 2005. It was also noticed that in the relevant ST-3 returns for the subject period, adjustment to the extent of Rs. 1,74,41,177/- was made for the period from June, 2005 to August, 2005 being service tax and Rs. 3,48,805/- being education cess. The said adjustments were shown as excess service tax paid in previous months. The issue of short payment of service tax was communicated to the assessee. The assessee vide letter dated 18.03.2008 replied that they had made adjustments of the tax excess paid by them. The department was of the view that the appellant did not intimate the department about the adjustment and that the provisions of service tax did not allow such adjustment of service tax and that appellant ought to have sought for refund if there is any excess payment of service tax made by them. SCN was issued raising the above allegation and proposing to demand service tax of Rs.1,77,89,982/- for the period June, 2005 to August, 2005, along with interest and also for imposing penalty. After due process of law, the original authority confirmed the demand along with interest and also imposed equal penalty under Section 78 of the Finance Act, 1994. Aggrieved, appellant is now before this forum.

2.1 On behalf of the appellant, Ld. Consultant, Shri Manoj Chauhan, appeared and argued the matter. He submitted that the appellant is engaged in the business of providing banking, credit card services etc. Prior to 01.04.2005, the liability to pay service tax on the commission received for mutual fund distribution activity undertaken by the appellant was the service provider. Therefore, the appellant discharged service tax on the commission on mutual fund distribution activity. With effect from 01.04.2005, as per Notification No. 7/2005-ST dated 01.03.2005, the liability to discharge the service tax on the commission paid by the appellant for mutual fund distribution activity was shifted to the service recipient. Even though service tax was not required to be paid by the appellant on the mutual fund distribution income, they inadvertently paid service tax for the period April, 2005 to May, 2005. On realising that the said payment was made in excess, the service tax paid in the said months was adjusted against the service tax liability of the months of June, 2005 to August, 2005. The appellant filed ST-3 returns for the period April, 2005 to September, 2005 on 25.10.2005 wherein the adjustment was separately shown in such return. In the course of audit, when objection was raised, the appellant had explained the adjustment made by the appellant. This happened during the transition period when the liability to pay service tax was shifted upon the service recipient, on the commission paid on mutual fund distribution activity.

2.2 He adverted to Sub-section 4A of Rule 6 of Service Tax Rules, 1994 and submitted that the said provision offers an option for the assessee to make such adjustment. He relied upon the decisions of the Tribunal in the following cases in support of his contention:-

1. *General Manager (CMTS)*
   2014 (36) STR 1084 (Tri.Del.)

2. *State Bank of Hyderabad*
   2016 (43) STR 415 (Tri.-Hyd.)

3. *Dell India Pvt. Ltd.*
   2016 (42) STR 273 (Tri.-Bang.)

4. *M/s. Plantech Consultants Pvt. Ltd.*
   2015 (11) TMI 1356-CESTAT

2.3 It is also argued by the Ld. Consultant that the adjudicating authority has travelled beyond the scope of the SCN. Nothing is alleged in the SCN that the appellant has claimed the reverse charge benefit for the commission amount realized after 01.04.2005 for the services provided prior to 31.03.2005. However, the adjudicating authority has made certain observations indicating that the appellant has received such commissions after 01.04.2005 for the services provided prior to 31.03.2005, which is factually incorrect and beyond the scope of SCN. He submitted that the appellant had merely adjusted the service tax already paid by them which was not required to be paid towards the liability for the subsequent months. There is no revenue loss or intention to evade payment of service tax and therefore allegation of suppression or fraud is without any basis. Further, the appellant had revealed the entire adjustment in their ST-3 returns. He prayed that the demand may be set aside.

3. Ld. AR, Shri K. Veerabhadra Reddy, ADC, supported the findings in the impugned order. He submitted that Sub-Rule 4A of Rule 6 provides that while making any adjustment the assessee has to inform the department about the adjustment so made. The appellant herein has not informed the department and therefore the adjustment is in violation of law. Further, the adjudicating authority has discussed that the adjustment is made from the amount of commission that is received by the appellant after 01.04.2005 for the services provided up to 31.03.2005. In that case, the appellant cannot adjust the service tax paid by them towards the liability for subsequent months. If there is any excess service tax paid, the appellant ought to have filed a refund

claim. The appellant not having intimated the department and sought permission for making adjustment is guilty of suppression of facts. The demand as well as the penalties imposed are legal and proper.

4. Heard both sides.

5.1 Let us first address the contention of the appellant that the adjudicating authority has travelled beyond the scope of SCN. On perusal of SCN it is seen that the allegation is limited to the adjustment made by the appellant. There is no allegation that such adjustment is with regard to the commission received after 01.04.2005 for the services provided prior to 31.03.2005, etc. In the SCN the demand has been raised alleging that the appellant cannot make such adjustment and ought to have filed a refund claim. However, on perusal of the impugned order, we find that the adjudicating authority has made some impasse observations that the commission received after 01.04.2005 is towards the services provided prior to 31.03.2005. Since the SCN does not make any such allegation, such observation made by the adjudicating authority is definitely beyond the scope of SCN.

5.2 The issue that arises for consideration is whether the adjustment made by the appellant is sustainable. The liability to pay service tax on the commission received on mutual fund distribution activity was on the service provider (appellant herein) upto 01.04.2005. The appellant was discharging service tax on the commission received for mutual fund distribution. Notification 7/2005 – ST w.e.f. 01.04.2005 the liability to pay service tax on such commission was shifted to the service recipient. However, the appellant discharged the service tax for the months April and May, 2005. On realizing wrong payment made by them, they adjusted the said service tax towards the liability for the subsequent months, ie. June, 2005 to August, 2005. They have reflected the adjustment made in their ST-3 returns for the said period in October, 2005. The Tribunal in the case of *General Manager (CMTS)* (supra) had occasion to analyse the issue wherein such adjustment was made. It was observed there in that when the assessee has paid service tax in excess of its actual tax liability, the Government cannot retain the excess tax paid by the assessee by refusing such adjustment against its tax liability during other months. Similarly in *M/s. Plantech Consultants Pvt. Ltd.*(supra), it was held that even though the appellant had not intimated the jurisdictional superintendent if they had declared the adjustment made by them in their ST-3 returns, the adjustment cannot be considered illegal. Even if it is considered that the said procedure of intimating the department is not strictly adhered to, at the most it is only a procedural lapse. At this juncture we would also like to mention that in Central Excise Law there is no such provision for adjustment. In case of excess payment of duty the only option available to the assessee is to apply for refund under Section 11B of the said Act. However, the legislature has made provisions for adjustment of excess tax paid in the Service Tax Rules. This is to facilitate the assessee so as to eliminate the hassles to obtaining the refund. If the assessee has made excess payment, the same can be adjusted towards the liability for subsequent months. The essence of this provision is to help the assessee who has made excess payment to utilize such excess amount to pay up the tax liability for other period.

6. From the discussions made above, we are of the considered opinion that the demand cannot sustain and requires to be set aside, which we hereby do. Appeal is therefore allowed with consequential benefits if any, as per law.

(Order dictated and pronounced in the open Court)

(MADHU MOHAN DAMODHAR) **MEMBER (TECHNICAL)**	**(SULEKHA BEEVI C.S.)** **MEMBER (JUDICIAL)**

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