
 सत्यमेव जयते	<b>केंद्रीय कर आयुक्त (अपील)</b> <b>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,</b> केंद्रीय कर शुल्क भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015 टेलीफोन : 079-26305065	 7 <sup>th</sup> Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015 टेलीफैक्स : 079 - 26305136
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क फाइल संख्या : File No : V2(ST)0217/A-II/2016-17/1460 to 1464  
 ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-EXCUS-001-APP-081-17-18  
 दिनांक Date : 25-09-2017 जारी करने की तारीख Date of Issue 10-10-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-02/22/AC/2016-17 Dated 29.11.2016  
 Issued by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता  
Name & Address of The Appellants

**M/s. ASE Capital Markets Ltd.**  
**Ahmedabad**

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-  
 Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

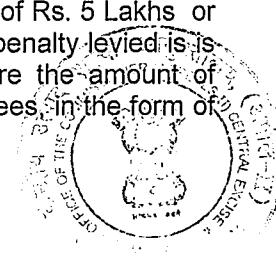
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी.- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax.& interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees. in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फॉर्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल हैं -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

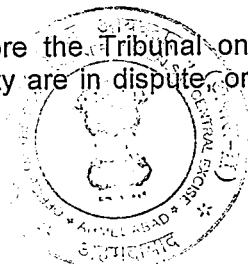
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.



ORDER IN APPEAL

This appeal has been filed by M/s. ASE Capital Markets Limited. Kamdhenu Complex, Opp. Sahajanand College, Panjra Pole. Ambawadi, Ahmedabad 380 015 [for short 'appellant'] against OIO No. SD-02/22/AC/2016-17 dated 29.11.2016 passed by the Assistant Commissioner, of the erstwhile Division II, Service Tax Commissionerate, Ahmedabad [for short adjudicating authority'].

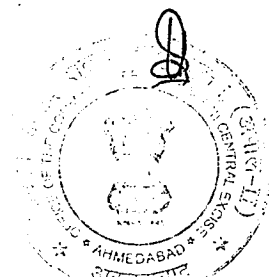
2. Briefly the facts are that a show cause notice dated 11.4.2011 was issued to the appellant based on a CERA objection, demanding service tax under Business Auxiliary Services in respect of VPN charges, LAN recovery charges, ISDN charges, lease line charges, PTSN charges recovered from their customers/small sub brokers. The notice therefore, demanded service tax of Rs. 2,95,219/- for the period from April 2005 to March 2006 along with interest and further proposed penalties under sections 76, 77(a) and 78 of the Finance Act, 1994.

3. Vide the aforementioned impugned OIO dated 29.11.2016, the notice was adjudicated wherein the adjudicating authority confirmed the demand along with interest and also imposed penalty on the appellant.

4. It is against the aforementioned impugned OIO that the appellant has filed this appeal raising the following averments:

- (a) the appellant is registered with the department under the category of Stock broker services and bank and other financial services;
- (b) the appellant denies all the allegation/observations raised in the notice and states that the notice is not sustainable;
- (c) that various service income where service are for the members of the society can be classifiable as "club or association service";
- (d) that as per the classification rules, the appellant service can be classifiable under the supply of tangible goods service and not under the category of BAS;
- (e) that the appellant was charging such charges from the client in the form of reimbursement of expenses;
- (f) that there was no service tax on such reimbursement value: that service tax is levied on reimbursement of expenses but it is w.e.f. 1.4.2015 while the period under dispute is April 2007 to September 2007
- (g) that they would like to rely on the case of JJ Intercontinental Consultants & Technocrats P Limited[2013(29) STR 9(Del)];
- (h) that the department was aware regarding the practice from the beginning and hence extended period is not invocable; that they would like to rely on the case of Nizam Sugar Factory [2008(9) STR 314];
- (i) penalty cannot be imposed under section 78, 76 and 77 of the Finance Act, 1994;
- (j) that the issue involved is interpretation of statutory provisions and hence no penalty cannot be imposed;
- (k) that section 80 is applicable in the present case.

4. Personal hearing in the case was held on 7.9.2017. Shri Vipul Kandhar, CA appeared on behalf of the appellant and reiterated the grounds of appeal. He further stated that the tax was demanded on reimbursable charges, collected on behalf of the members. He also submitted additional submissions. On going through the additional submissions, I find that it is a repetition of the grounds already mentioned in the appeal.



5. I have gone through the facts of the case, the appellant's grounds of appeal, and the oral submissions made during the course of personal hearing.

6. I find that the only question to be decided is whether the appellant is liable to pay service tax under *Business Auxiliary services* [BAS] on VPN charges, LAN recovery charges, ISDN charges, lease line charges, PTSN charges, recovered from their customers/small sub brokers.

7. I find that the adjudicating authority in the impugned OIO, has held that the appellant is liable for service tax under BAS. The summary of the findings of the adjudicating authority, is as under:

- that the taxability of the said income is not under dispute w.e.f. 1.4.2006, since the appellant has paid service tax on such charges recovered during 2006-07 to 2009-2010;
- that the tax has not been paid for the period from 1.4.2005 to 31.3.2006, as the appellant contends that the services were classifiable under *supply of tangible goods* and not under BAS;
- that the present case, however, is not a case where the appellant has supplied tangible goods for use without transferring right of possession and effective control, etc;
- the appellant has not produced any evidence to prove that the amount received on which tax is demanded has been collected towards reimbursement of expenses; that the appellant has not satisfied the conditions under Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, & hence the contention that these charges collected were reimbursement of expenses is not a tenable argument.

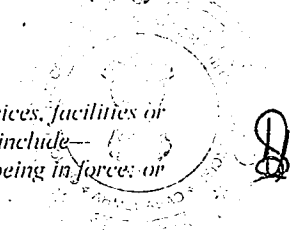
8. The appellant, I find, has in his grounds questioned the classification of services. The adjudicating authority has classified the services under BAS, but the appellant has stated that the services fall under '*Club or association services*' and under '*Supply of tangible goods*'. The appellant himself is not clear as far as classification goes. Hence, I would first like to discuss the classification of the said service.

8.1 The adjudicating authority in para 13.4.8 of the impugned OIO, has clearly given his findings as to why the services would not fall under *supply of tangible goods* services. The nomenclature itself suggests that the tax would be levied under this service only in case of supply of tangible goods on which no legal right of possession and effective control, is transferred. In this case, though the appellant claims that this is supply of tangible goods, he has not mentioned as to what/which tangible goods, were supplied. The argument of the appellant, therefore, is not legally tenable and is therefore rejected. Further, though the said service was taxable w.e.f. 16.5.2008 only, the appellant has paid service tax on these charges, from 2006-07. The argument therefore is clearly an afterthought.

8.2 Secondly, the appellant has claimed that the services would fall under '*club or association*' services and that charges collected on behalf of the members were reimbursable charges. The contention that it would fall under club or association services, is not a correct argument since, the service, brought into effect from 16.6.2005, vide clause 25(a) by the Finance Act, 2005, included the following

*'(25a) "club or association" means any person or body of persons providing services, facilities or advantages, for a subscription or any other amount, to its members, but does not include—*

*(i) any body established or constituted by or under any law for the time being in force; or*



- (ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or  
 (iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature; or  
 (iv) any person or body of persons associated with press or media:

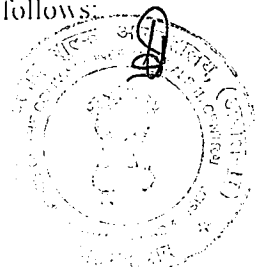
This definition was in vogue during the period of present dispute.

8.2.1 The allegation against the appellant is that he has collected VPN charges, LAN recovery charges, ISDN charges, lease line charges, PTSN charges, from their customers/small sub brokers but has not discharged service tax under BAS. Now, under section 12(1) of the Securities and Exchange Board of India Act, 1992, every broker and sub broker has to get himself registered with the SEBI so as to enable himself to get authorized to carry out sale/purchase of shares. Since the appellant is established and constituted under the said law, he gets excluded from the definition of 'club or association' in terms of 25(a)(i) supra. Even otherwise, a 'sub-broker' is a person, who is not a trading member of a Stock Exchange, but who acts on behalf of a trading member i.e, broker, as an agent or otherwise for assisting investors in dealing in securities through such trading members. All sub-brokers are required to obtain a Certificate of Registration from SEBI under the aforementioned Act of 1992, failing which they are not permitted to deal in securities. SEBI has directed that no Trading Member shall deal with a person who is acting as a Sub-Broker unless he is registered with SEBI and it shall be the responsibility of the trading member to ensure that his clients are not acting in the capacity of a Sub-Broker unless they are registered with SEBI as a Sub-Broker. So the relation between the broker and the sub broker is not of a club or association of members but of a principle and agent/client. Hence, the argument that the services would be classifiable under 'club or association services', is not a tenable argument and is therefore rejected.

8.3 In view of the foregoing discussion, I uphold the findings of the adjudicating authority, classifying the service rendered by the appellant to be falling under BAS.

9. The appellant has thereafter argued that the charges collected from the client were in the form of reimbursement of expenses; that there was no service tax on such reimbursement charges; that service tax is levied on reimbursement of expenses only w.e.f. 1.4.2015 while the period under dispute is April 2007 to September 2007; that they would like to rely on the case of JJ Intercontinental Consultants & Technocrats P Limited[2013(29) STR 9(Del)]. The argument of the appellant is flawed as far as the period of dispute is concerned. The dispute is not pertaining to 2007, but as is mentioned in para 5 of the notice dated 11.4.2011, it pertains to the period 2005-2006. Further, as far as reimbursement of expenses is concerned, the adjudicating authority, in his findings in para 13.4.9, has clearly recorded that no evidence was produced to prove that the charges collected were towards reimbursement charges. I find that the appellant has not produced any records before me to substantiate his arguments, except for reiterating the submissions made before the original adjudicating authority. Without documentary evidence, the merit of the averment, cannot be discussed. However, after having said so, I find that the section 67 of the Finance Act, 1994, as it stood at the material time, stated as follows:

"67. Valuation of taxable services for charging service tax



**"67. Valuation of taxable services for charging service tax**

*For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.*

*Explanation 1. - For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes, -*

- (a) the aggregate of commission or brokerage charges by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;*
- (b) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;*
- (c) the amount of premium charged by the insurer from the policy holder;*
- (d) the commission received by the air travel agent from the airline;*
- (e) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;*
- (f) the reimbursement received by the authorized service station from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer; and*
- (g) the commission or any amount received by the rail travel agent from the Railways or the customer.*

*But does not include -*

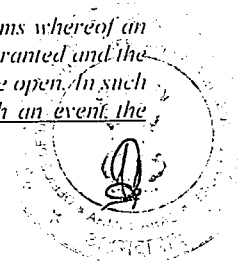
- (i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telephone or telex or for leased circuit;*
- (ii) the cost of unexposed photography film, unrecorded magnetic tape or such other storage devices, if any, sold to the client during the course of providing the service;*
- (iii) the cost of parts or accessories, or consumable such as lubricants and coolants, if any, sold to the customer during the course of service or repair of motor cars, light motor vehicle or two wheeled motor vehicles;*
- (iv) the airfare collected by air travel agent in respect of service provided by him;*
- (v) the rail fare collected by rail travel agent in respect of service provided by him;*
- (vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;*
- (vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service; and*
- (viii) interest on loan.*

*Explanation 2. - Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.*

*Explanation 3. - For the removal of doubts, it is hereby declared that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service."*

The ambit of Section 67, though very wide, has both inclusions and specific exclusions. The reimbursement charges, as averred by the appellant, do not find a specific mention in the exclusion portion supra. Therefore, the argument of the appellant is not tenable. Thereafter, Section 67 of the Finance Act, 1994 was substituted by the Finance Act, 2006, and vide notification No. 12/2006-ST dated 19.43.2006, the Service Tax (Determination Of Value) Rules, 2006, was brought into force. Therefore, the reliance of the adjudicating authority on Rule 5(2) of the rules, *ibid*, is not correct. Accordingly, the reliance of the appellant on the case of JJ Intercontinental Consultants & Technocrats P Limited[2013(29) STR 9(Del)], wherein the Hon'ble Delhi High Court struck down Rule 5(1), *ibid*, is not relevant to the dispute at hand, since the present dispute is pertaining to a period prior to the introduction of the Service Tax Valuation Rules, 2006. Even otherwise, department has filed an appeal before the Apex Court challenging the verdict of the Hon'ble High Court of Delhi, *ibid*, which has been admitted by the Apex Court [JJ Intercontinental Consultants & Technocrats P Limited[2013(29) STR 9(Del)]. It is worthwhile to mention that the Hon'ble Supreme Court in the case of West Coast Paper Mills [2004(164) ELT 375], had held as follows:

*14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.*



In view of the foregoing, the averment of the appellant that no service tax is liable to be paid on account of the fact that these were reimbursable expenses, is rejected in view of the aforementioned findings.

10. Lastly the appellant has contended that extended period is not invocable in this case. I find that the dispute pertains to the period from 2005-2006, for which the notice was issued on 11.4.2011, by invoking the extended period. Section 73 as was in vogue during the period of dispute, permitted invocation of extended period of five years. in case the short levy/short payment of service tax was a result of

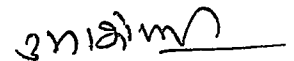
- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

Needless to state that had CERA not pointed out this fact, the short payment would have never seen the light of day. I find that the elements needed for invocation of extended period is clearly present in the present dispute and therefore, this is a fit case for invocation of extended period. Accordingly, given the facts of the case, I do not find any reason to interfere with the penalty imposed on the appellant.

11. In view of the foregoing, the impugned OIO is upheld and the appeal is rejected.

12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

12. The appeal filed by the appellants stands disposed of in above terms.

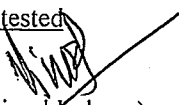


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date 25.09.2017

Attested

  
(Vinod Lukose)  
Superintendent,  
Central Tax(Appeals),  
Ahmedabad.

By RPAD.

To,

M/s. ASE Capital Markets Limited,  
Kamdhenu Complex,  
Opp. Sahajanand College,  
Panjra Pole, Ambawadi,  
Ahmedabad 380 015



Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division VI, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
- ✓ 5. Guard File.
6. P.A.

