

रजिस्टर्ड डाक ए.डी. द्वारा

दूरभाष : 26305065

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क  
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,  
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : V2(ST) 14/RA/A-II/2015-16 2084 to 2089

ख अपील आदेश संख्या Order-In-Appeal No. AHM-SVTAX-000-APP-00113-16-17

दिनांक Date : 29.09.2016 जारी करने की तारीख Date of Issue 05/10/16

श्री उमा शंकर,, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

ग \_\_\_\_\_ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं  
\_\_\_\_\_ दिनांक : \_\_\_\_\_ से सृजित

Arising out of Order-in-Original No. AHM/SVTAX/000/ADC/009/15-16 Date : 20.07.2015

Issued by ADDITIONAL Commissioner, Service Tax, Ahmedabad

घ प्रतिवादी का नाम / Name & Address of the Respondent

M/s. Tradex Polymers Pvt 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 :-

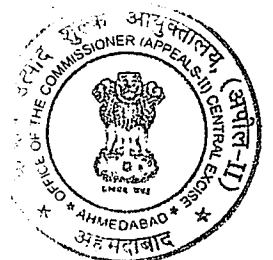
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू  
मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016  
The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal  
(CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, 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।  
स्टे के लिए आवेदन- पत्र के साथ रूपए 500/- 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 accompanied 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 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

*A. Jais*



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(iii) वित्तीय अधिनियम, 1994 की धारा 86 ली उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34 के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) 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; बशर्त 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 है -

- (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 बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जाएँ एवं अपील को लागू नहीं होंगे।

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

1. Revenue has filled this appeal against M/s Tradex Polymers Pvt Ltd, 3/C, Centre Point, Panchvati, Ellisbridge, Ahmedabad (hereinafter referred to as 'respondent') against Order-In-Original No. AHM-SVTAX-000-ADC-/009/15-16 dated 20.07.2015 (hereinafter referred to as "impugned order") passed by the Additional Commissioner, Service Tax, Ahmedabad (hereinafter referred to as "Adjudicating Authority").

2. The facts of the case are as under:-

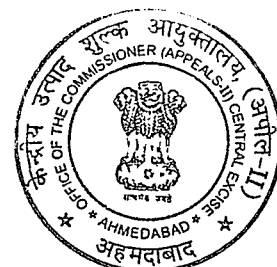
(i) The respondent is registered with Service Tax under the category of 'Business Auxiliary Service' and holding Service Tax Registration No. AAFT7279HST001. The respondent acted as Del Credre agent who fetches the buyers for the goods sold by the Principals Viz. M/s Reliance Industries Ltd as well as M/s IPCL. The respondent identified buyers for the goods sold by their Principals and was receiving commission from their Principals was discharging the service tax liability on the commission earned from the principals earlier i.e., till 30.6.2012 as 'Business Auxiliary Services'. In the negative list regime effective from 1.7.2012 also, respondent has paid service tax on the commission earned from principals considering their activity a 'Service' in terms of Section 65B(44) of the Finance Act, 1944. Hence, as far as tax liability on the commission earned from principals is concerned, there is no dispute for the period under dispute, i.e., from July-2012 to March-2012. Dispute is regarding taxability on amount what he is collecting from customers and giving to Principle. i.e. dispute is regarding taxability on what he is retaining. Following is type of retaining i.e extra remuneration

2.1 (a) Early bird incentive- if payment is made within credit period of 14 days. Customers makes full payment but incentives are given to respondent. (b) cash discount- if payment is made in advance then cash discount is given to respondent but same is not passed on to the customers (c) Discount charges- Respondent undertakes payment to the principals for failure of customers. Discount charges are basically late payment/overdue interest charges/late payment charges recovered from the buyers if payment not made within the credit period.

2.2 Details of Early Payment Incentive (EPI) and Discounting Charges and Service Tax short paid / not paid for the period from July-2012 to March-2013 by M/s. Tradex Polymers Pvt. Limited, Ahmedabad.

(Amount in Rs.)

Period	Particulars	Amount in Rs.	Rate of Service Tax	Service Tax Payable
July-2012 to March-	Early Payment Incentive (EPI)	1,77,61,824	12.36%	21,95,362



2013	Discounting Charges	1,51,64,726	12.36%	18,74,360
Total ---→		3,29,26,550		40,69,722

3. The respondent was liable to pay service tax of 40,69,722/- Show Cause Notice dated 02.09.2014 was issued & same was adjudicated by the Adjudicating Authority impugned OIO wherein in it is stated that-

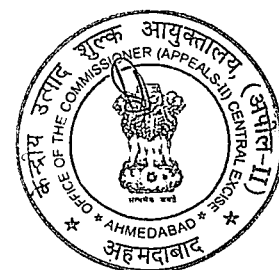
3.1 That the issue of leviability of service tax on early payment of cash discount is well settled in favour of the noticee. In both the Orders-in-Appeal, i.e., OIA No. AHM-STVTAX-000-APP-042-14-15 dated 21.05.14 and OIA No. AHM-STVTAX-000-APP-117-14-15 dated 13.08.14, confirmation of service tax demand and penalties has been set aside by relying on the CESTAT, Ahmedabad's Order No.A/2277/WZB/AHD/2011 dated 21.12.2011. Para 3 of the CESTAT's order has been specifically relied and quoted in the OIAs and the same is being reproduced hereunder for ease of reference -

*"the appellant are distributors and they get commission from their principals on which they are discharging Service Tax liabilities under the category of 'Business Auxiliary Service'. At the same time, the appellants are also collecting the amount due to the Principal and remit the amount back to the Principal after retaining an amount as early payment incentive. Revenue authorities are of the view that such early payment incentive retained by the assessee is taxable as the same has to be passed on to the purchaser of the goods. We do not find any merit in the arguments raised by the lower authorities on this context. Retaining early payment incentive is not any service rendered but a discount to the assessee. We find that the decision of this Tribunal in the case of P. Gautam & Co. has laid down the ration that any incentive/ cash discount which has been given will not be covered for liability of Service Tax under "Business Auxiliary Service"*

3.2 That the Hon'ble Tribunal decided the issue in the favour of noticee by applying the ratio of its decision in the case of P Gautam & Co. vs CST, Ahmedabad - 2011(24) STR 447 (Trib.-Ahmd.) that any incentive/ cash discount will not be covered for service tax liability under Business Auxiliary Service..

3.3 That the said orders of the Hon'ble CESTAT and Commissioner (Appeals) have been accepted by the department. In this regard, it is pertinent to mention that the adjudicating authority should not ignore the orders passed by the higher appellate forums as noted in the decision rendered by the Hon'ble High Court of Gujarat in the case of Claris Life-sciences Ltd reported in 2013 (298) ELT 45.

3.4 vide the impugned order Adjudicating authority has held that said service provided of Rs.3,29,26,550/- during the period from July-2012 to March-2013 as "not taxable" under the category of 'Business Auxiliary Service' as defined under Section 65(19) of the Finance Act,1994. Adjudicating authority dropped the Service Tax



demand of Rs 40,69,722/- under Section 73(2) of the Finance Act, 1994, along with interest under Section 75 *ibid*. The penalties under Section 76 and 77 *ibid* were also not imposed under the impugned order. Being aggrieved, the revenue has preferred the present appeal on the grounds interalia mentioned as under:-

4.1 CESTAT, Ahmedabad's Order No.A/2277/WZB/AHD/2011 dated 21.12.2011.is not accepted by revenue on merit but on low monetary limit as per the existing instruction of Board vide F. No. 390/Misc/163/2010-JC dated 20.10.2010 wherein it stated as "such cases shall not have any precedent value"

4.2 Tribunals decision in case of P. Gautam &Co. V/s CST , Ahmedabad rendered in final order No. A/1595-1596/WZB/AHD/2011 & S/1207-1208/WZB/AHD/2011 dated 06.09.2011 reliance on following decision of tribunal is made wherein it is held that the discount/incentives received by assessee from the print media will not be liable for service tax under the category of advertising agency service.

- (i) Kerala Publicity Bureau reported in 2007 (10) STT equivalent citation 2008 (9) 101 (Tri-Bang)
- (ii) Euro RSCG Advertising Ltd reported in 2008 (STT) 232 (CESTAT-Bang) equivalent citation 2007(7)STR (Tri-Bang)
- (iii) Marketing Consultants & Agencies Ltd reported in 2007 (6) 318 (Cestat-Bang) equivalent citation 2006 (4 )STR (Tri-Bang)

4.3 Revenue is arguing that in above three cases demand is not made on "Business auxiliary service" but issue is regarding commission, Incentive or bulk discount obtained by Advertising agency from print media. In all three cases demands were confirmed by including value of commission, incentive or bulk discount in taxable value of Advertising agency.

The early payment discount or cash discount is nothing but extra remuneration for service provider therefore it falls under category of "Business Auxillary Service" as defined under section 65 (19) of FA 1994 which is taxable service defined at sub-clause (zzb) of clause (105) of Section 65 of the Act. Definition is as under-

*"any service provided to client by commercial concern in relation to Business Auxillary service"*

5.0 Hearing in the matter was granted and held on 04.07.2014 which was attended by Shri Nirav Shah, Advocate and Shri Pradeep Parekh, Manager on behalf of the respondent who submitted citation 20169316)ELT 612-Guj on precedence on cases accepted on lower monetary grounds. He put forth a copy of OIA No.AHM-



SVTAX-000-APP-117-14-15 dated 13.08.2014 passed in their own case on identical issue but for previous period. As stated in hearing they submitted written submission dated 11.07.2016 where by respondent is relying on following three judgments-

- (i) 2014 (34) STR 416- Respondent's own case
- (ii) M/s Claris Life Science Ltd.- 2013(298) ELT 45
- (iii) M/s Manglore Refinery and Petrochemicals Ltd- 2016(42)STR (Kar.)

### Discussion and finding

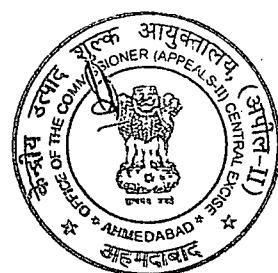
6. I have carefully gone through the facts of the case, impugned order, the grounds of appeals, and the submissions made during the personal hearing and written submission made by respondent.

6.1 Respondent are mediator of transaction and in the process they earn EPI and cash discount of advance payment. Said benefits are not passed on to customers. Sometimes if customer fails to make payment in credit period then respondent themselves make payment on for customers and recover late payment charges (discounts) from customers. Issue is whether respondents earnings on such EPI , Cash discounts on Advance payment and Discounts (late payment charges) is chargeable to service tax under the category of 'Business Auxilliary Service' or otherwise.

6.3 The demand is barred by the principle of *res-judicata*. The aforesaid issue has been conclusively decided in favour of the respondent in their own case

6.5 On going through the impugned order, I find that the Adjudicating Authority has dropped the Service Tax demand under the category of 'Business Auxilliary Service' in respect of early payment incentive and cash discount received by the respondent.

6.6 I find that the respondent has put forth a copy of OIA No.AHM-SVTAX-000-APP-117-14-15 dt. 12.08.2014 passed in their own case. I find that for the earlier period on the same issue, on being filed an appeal by the respondent against Order-In-Original No.05/STC-AHD/ADC(AS)2013-14 dated 07.06.2013, an Order-In-Appeal No. AHM-SVTAX-000-APP-042-14-15 dated 19/21.05.2014 has been passed in favour of the respondent. Further, the respondent t has contended that the Hon'ble Tribunal has decided the issue in their own case vide Order No. A/2277/WZB/AHD/2011 dated 21.12.2011 and the Adjudicating Authority was bound to follow the said Order of the



Hon'ble Tribunal.

7. I find merits in the contention of the respondent The Hon'ble CESTAT, Ahmedabad has decided the issue in favour of the respondent vide Order *supra*. The relevant portion is reproduced as under:

"3. We find that it is not disputed that the appellants are distributors and they get commission from their principals on which they are discharging Service Tax liability under the category of 'Business Auxiliary Service'. At the same time, the appellants are also collecting the amount due to the Principal and remit the amount back to the principal after retaining an amount as early payment incentive. Revenue authorities are of the view that such early payment incentive retained by the assessee is taxable as the same has to be passed on to the purchaser of the goods. We do not find any merit in the arguments raised by the lower authorities on this context. Retaining early payment incentive is not any service rendered but a discount to the assessee. We find that the decision of this Tribunal in the case of P. Gautam & Co. has laid down the ration that any incentive / cash discount which has been given will not be covered for liability of Service Tax under 'Business Auxiliary Service'.

8. On going through the impugned order, I find that respondent has submitted the said Order of the Hon'ble CESTAT before the adjudicating authority. Adjudicating Authority of impugned order accepted the reliance placed by the respondent on the grounds that the said Order of the Hon'ble CESTAT was accepted by the Department on the grounds of monetary limit.

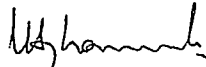
9. Even if the Department had accepted the Order on monetary limit lower adjudicating authority was duty bound to follow the Order passed by the Hon'ble CESTAT. The review mechanism is available for the Department, if it is found that the order passed by the lower Authority is not acceptable on merits. It is not open for the Adjudicating Authority to ignore the Orders passed by the higher appellate forums. My views are supported by the decision rendered by the Hon'ble High Court of Gujarat in the case of Claris Lifesciences Ltd reported in 2013 (298) ELT 45.

"7. Having heard learned Counsel for the parties, we are of the opinion that the approach adopted by the adjudicating authority was wholly impermissible in law. At the outset, we may record that we are conscious that such order is appealable in terms of statutory appeals provided under Central Excise Act, 1944. However, we find that the adjudicating authority committed serious error in disregarding binding precedent and that there are absolutely no disputed facts. We would, therefore, not insist that the petitioners once again follow the same gamut of taking the appeal route. ....




8. The adjudicating officer acts as a quasi judicial authority. He is bound by the law of precedent and binding effect of the order passed by the higher authority or Tribunal of superior jurisdiction. If his order is thought to be erroneous by the Department, the Department can as well prefer appeal in terms of the statutory provisions contained in the Central Excise Act, 1944."

10. In light of the above discussion, appeal is disposed off in above terms.

  
(UMA SHANKER)  
COMMISSIONER (APPEAL-II)  
CENTRAL EXCISE, AHMEDABAD

ATTESTED

  
(R.R. Patel)  
SUPERINTENDENT (APPEAL-II),  
CENTRAL EXCISE,  
AHMEDABAD.

By R.P.AD.

To,  
M/s Tradex Polymers Pvt Ltd,  
3/C, Centre Point,  
Panchvati, Ellisbridge,  
Ahmedabad - 380 007.

Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Additional Commissioner, Service Tax, Ahmedabad.
4. The Assistant Commissioner, Service Tax, Division -III, Ahmedabad.
5. The Assistant Commissioner (Systems), Service Tax (HQ), Ahmedabad.
6. PA to Commissioner (Appeals-IV), Central Excise, Ahmedabad.
7. Guard File.

