

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)199/A-II/2015-16 / 3301-3306

ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-157-16-17

दिनांक Date : 25.11.2016 जारी करने की तारीख Date of Issue 05/12/16

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 SD-04/14/AC/2015-16 Dated 23.02.2016

Issued by Assistant Commissioner, Div-IV, Service Tax, Ahmedabad

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

M/s. Cadila Pharmaceuticals 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:-

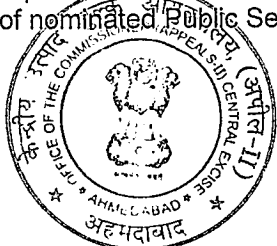
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी 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 रूप 5 लाख या उससे कम है वहाँ रूप 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहाँ रूप 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 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.



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(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 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. यथारंशोधित 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 (सीस्टैट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 13 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 अर्ज़ी 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

M/s. Cadila Pharmaceuticals Ltd., Cadila Corporate Campus, Sarkhej Dholka Road, Bhat, Dholka HO ,Ahmedabad- (*hereinafter referred to as 'appellants'*) have filed the present appeals on 31.03.2016 against the Order-in-Original number SD-04/14/AC/2015-16 dated 23.02.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-IV, APM mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

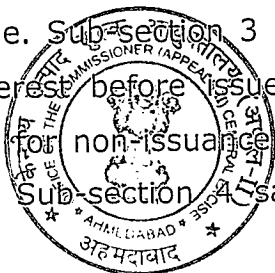
2. The facts of the case, in brief, are that the appellants were engaged in providing taxable service and holding Service Tax registration number AAAC C6251E ST001. During Course of Audit it was pointed out that Appellant has not discharged duty liability for F.Y. 2012-13 as a recipient under the category of Sponsorship Service under rule 2(1)(d)(C) of Service Tax Rule. During audit itself service Tax of Rs. 4,31,364/- arrived on sponsorship service of Rs. 34,90,000/- was paid along with interest of Rs. 77,645/- vide BOB challan dated 12.08.2013.

3. SCN dated 08.12.2015 issued was adjudicated whereby demand of Rs. 4,31,364/- with interest of Rs. 77,645/- was confirmed and appropriated. Penalty of Rs. 10,000/- u/s 77(2) for not disclosing correct amount in ST-3 return and penalty of Rs. 2,15,817/- u/s 78(1) for suppression of facts.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 31.03.2016 before the Commissioner (Appeals-II) wherein it is argued by appellant that-

I. SCN has been issued on account of non payment of penalty u/s 73(4A). Finance act 2015 has omitted said sub-section 4A and 4B of section 73. SCN has been issued on 08.12.2015 which is after the Finance Act came to force. Thus at the time of issuing notice, the said provisions are not in statue, therefore provisions are not in statue. In absence of such penalty provisions penalty can not be imposed.

II. Sub-section 4A was applicable in case where sub-section 3 & 4 were applicable. Sub-section 3 provides for case where service tax is paid with interest before issue of notice. In such situation, the section provides for non-issuance of show cause notice or non imposition of penalty. Sub-section 4 says that in case of fraud, collusion, mis-



statement, suppression etc sub-section 3 will not apply. It is only when sub-section 4 was applicable that possible question applying sub-section 4A, then prevailing would apply. Circumstances narrated in sub-section 4 were absent and therefore there was no need to issue notice.

- III. Appellant was eligible to take credit of tax paid as reverse charge. When demand in is revenue neutral obviously appellant has no malafide intension.
- IV. Appellant company is paying substantial amount of tax regularly hence there can not be intension to evade meager sum of service tax. Non-disclosure or non-intimation of facts can not lead to any presumption as to intension to evade tax. Moreover there is no intention to evade the duty and no suppression of facts hence no penalty can be levied under section 78. Moreover extended period can not be invoked as no intension to evade duty and no intension to suppress the facts are established.
- V. Matter is revenue neutral and appellant had immediately paid the tax with interest. Mandate of section 77(3) is absolute and no penalty is called for. Therefore this is fit case to exercise discretion u/s 80 and penalty , therefore should be waived.

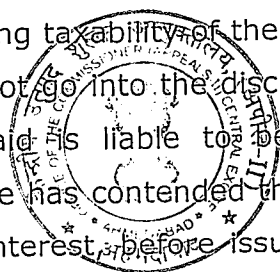
DISCUSSION AND FINDINGS

5. Personal hearing in the case was granted on 14.09.2016. Shri S.J. Vyas, Advocate appeared before me and reiterated the grounds of appeal. They stated that matter is revenue neutral. Extended period is not available. Tax with interest is deposited before notice. Penalty may be set aside.

6. I have carefully gone through the facts of the case on records; grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing.

7. Short question to be decided is whether or not penalty can be imposed when tax along with interest is paid before issue of notice.

8. There is no dispute regarding taxability of the service and the noticee has accepted their liability, I do not go into the discussion of the same and find that the amount already paid is liable to be appropriated against the demand. However, the noticee has contended that since they have paid the amount of service tax with interest before issue of the SCN, they are not



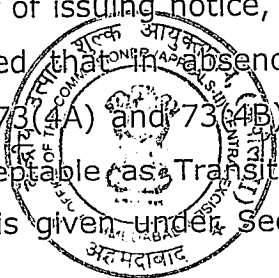
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liable to penalty as provided under section 73(3) of the Finance Act, 1994. It is also contended by the noticee that it was due to non communication of marketing department to the taxation department of company, they failed to pay service tax

9. Appellant's contention that since duty with interest is paid before issuance of notice there was no requirement to issue the notice as matter is deemed to be concluded as per section 73(3) is acceptable as section 73(3) is applicable where there is no fraud, no suppression or no mis-statement of facts. Suppression of facts can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty when fact were known to both the parties, by one to do what he is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assesses to find wilful suppression. My view is supported by judgement in case of Pushpam Pharmaceutical Company v. Collector of central excise Bombay [1995 Supp (3) SCC 462]

10. Matter under instance appeal is revenue neutral so there can not be intension to evade duty. My view is supported by Hon'ble Gujarat High Court decision in the case of Gujarat Glass Pvt. Ltd [2013 (290) E.L.T. 538 (Guj. HC)]. In absence of intension to evade duty only provisions contained in Section 73(3) are applicable and provisions of Section 74(4A) can not be enforced. Moreover appellant are paying hefty duty so there can not be any intension to evade such small amount of duty under instance case. Having paid the entire Service Tax liability with interest, the lower authorities should not have issued any Show-Cause Notice for imposition of penalty. Appellant request to conclude proceeding in the instance case ought to have acceded by department in light of section 73(3). Provisions of Section 73(3) are very clear and the decision of the Tribunal in the case of Krishna Security & Detective Services [2011 (24) S.T.R. 574 (Tri. - Ahmd.)] also lay down the ratio that no penalty can be imposed if the Service Tax liability and interest thereof stand deposited under the Section 73(3)

11. Appellant has contended that Finance act 2015 has omitted said sub-section 4A and 4B of section 73 and SCN has been issued on 08.12.2015 which is after 14.05.2015 i.e the Finance Act 2015 came to force. Thus at the time of issuing notice, the said provisions are not in statue. It is further contended that in absence of such penalty provisions [i.e. omission of section 73(4A) and 73(4B)] penalty can not be imposed. This contention is not acceptable as Transitory provisions for erstwhile section 73(4A) and 73(4B) is given under Section 78B in finance act 2015. Therefore for the



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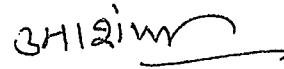
period prior to 14.5.2015 the provisions of the Section 74(4A) can be enforced since it was not omitted with retrospective effect. But in instance case provisions of Section 74(4A) can not be enforced as no intentional suppression found.

12. As per the 73(4A) provision, where short payment is noticed in the course of departmental audit of the accounts of the assessee, or investigation or verification by the anti-evasion or intelligence wing of the department, and the facts are captured in the accounts of the assessee, the assessee apart from paying service tax short paid, along with the interest leviable there on, is liable to pay 1% of service tax not paid, per month of default, to the maximum extent of 25% of the service tax not paid, to close the proceedings without service of a notice.

13. In view of above discussion, I conclude that since no intension to evade duty established provisions of section 73(4A) can not be resorted to , moreover this being case covered under section 73(3) no any penalty under finance Act, 1994 and Service Tax Rules is imposable. I set aside the all penalty imposed under section 76, 77 and 78 of Act.

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

14. The appeals filed by the appellant stand disposed off in above terms.


(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED


(R.R. PATEL)

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

To,

M/s. Cadila Pharmaceuticals Ltd.,
Cadila Corporate Campus,
Sarkhej Dholka Road,
Bhat, Dholka, HO ,Ahmedabad



Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, service tax, Ahmedabad
- 3) The Additional Commissioner, C.Ex, Ahmedabad
- 4) The Dy./Asst. Commissioner, Service tax, Div-IV, APM Mall, Ahmedabad.
- 5) The Asst. Commissioner(System), Service tax. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.



