

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)170/A-II/2015-16 | 201-206

ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-198-16-17

दिनांक Date : 23.12.2016 जारी करने की तारीख Date of Issue 14/02/17

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-02/16/AC/2015-16 Dated 29.10.2015

Issued by Asstt. Commr., STC, Div-II, Service Tax, Ahmedabad

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

M/s. Axomatic Infosolution 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 :-

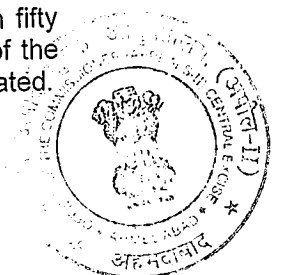
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल  
हॉस्पिटल 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.



(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 A219 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 35फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) 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 रुपए 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 अर्ज़ों 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 Cenval Credit taken;
- (iii) amount payable under Rule 6 of the Cenval 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. Axomatic Info Solution, 801, Sapath-II, Opp. Rajpath Club, S.G.Highway, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number SD-02/16/AC/2015-16 dated 29.10.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Asst.Commissioner, Service Tax Div-II, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. Briefly stated the facts of the case are as under:-

(I) . During the course of Audit, it was observed that-

(a) Reconciliation Books of Accounts vis-a-vis ST-3 Returns noticed short payment of Service Tax of Rs.73,467/- on the differential taxable value of Rs.5,95,419/- for the period 2007-08 to 2008-09.

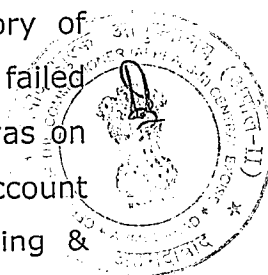
(b). The appellant did not pay service tax of Rs.90,674/- on the commission/incentives income totally amounting to Rs.7,95,785/- received as being a stockiest of M/s Ingram Micro(India) Pvt. Ltd. for period 2007-08 to 2010-11.

(c), Cenvat Credit of Rs.1,01,180/- wrongly taken by the appellant as the said services do not qualify as 'Input Service' as defined under Rule- 2 of the Cenvat Credit Rules,2004.

(II) Order-in-Original No. SD-01/06/AC/Axomatic/13-14 dated 08.07.2013 confirmed the demand with interest of Service Tax of Rs. 73,467/- and Rs.90,674, and demand of wrongly availed Cenvat Credit of Rs.1,01,180/-. Penalty were imposed under section 76, 77 and 78.

3. appellant filed an appeal with Commissioner Appeal (Appeal-IV) who upheld the OIO confirming the wrong availment of credit of Rs. 1,01,180/- but remanded case back to original authority for service tax demand of Rs. 38,425/- and Rs.90,674/-.. Brief details as below-

I. with regard to the confirmation of demand of Service Tax of Rs. 73,467/- on the taxable value of Rs.5,95,419/- under the category of "Commercial Coaching and Training Service", Adjudicating Authority has confirmed the demand Rs. 73,467/- under the category of 'Commercial Coaching & Training Services' as the said appellant failed to establish with evidences that the differential taxable value was on account of dividend income and job work charges and not on account of income taxable under the category of 'Commercial Coaching &



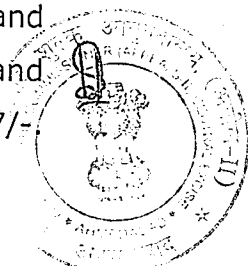
Training Services'. Commissioner appeal directed to differential taxable value of Rs.5,95,419/- on which Service Tax demand of Rs. 73,467/- has been confirmed, and to decide the issue a fresh in light of above observation .

- II. With regard to demand of Service Tax of Rs.90,674/- on the taxable value of Rs.7,95,785/- under the category of 'Business Auxiliary Services', the appellant has claimed that they have paid Service Tax of Rs.38,425/- vide Challan dated 03.03.2012 on the taxable value of commission of Rs.4,83,035/- received during the year 2010-11, therefore Commissioner Appeal remanded the case back to original adjudicating authority to re-quantify the demand , however on merit the issue was upheld. It is pertinent to note that appellant has preferred appeal to CESTAT, herein it is contended that service tax is payable on merit itself.
4. Original adjudicating came out with fresh OIO (impugned OIO) wherein it is held as below-

- I. Adjudicating authority after calling and comparing reconciliation figures from Range Superintendent and from appellant came to conclude that net taxable income of Rs. 47,54,172/- shown is inclusive of service tax of Rs. 4,49,410/-. Therefore ex-duty taxable value as per audit should be Rs. 43,04,762/-. Appellant has reported ex-duty taxable value as Rs. 39,01,997/-. So actual difference between appellant books of record and audit party figure works out to be Rs.( 47,54,172/- - 4,49,410/-) i.e. 4,02,765/- and not Rs. 5,95,419/- alleged in SCN. On further scrutinizing it was noticed that 4,02,765/- includes following-

Sr.	Income head	amount	total
1	Export service Income- call center job work-taxable	3,76,371/-	4,02,765/-
2	Call center job work ( not taxable)	21427	
3	Job work (not taxable)	4607	

Sr. no. 2 and 3 are not taxable under service tax. Difference of figures shown in Own records and in ST-3 is due to out Export service income-call center job work income of Rs. 3,76,731/- which appellant has not included in ST-3. As appellant has not produced the Export invoice and foreign inward remittance for said income of Rs. 3,76,731/-, demand of Rs. 46,575/- was confirmed out of original demand of Rs. 73,467/- Demand was confirmed with interest and penalty u/s 76,77 and 78.



II. Net amount of Rs. 61,429/- has been paid vide challan dated 03.03.2012 under head "Business auxiliary services" which is inclusive of service tax of Rs. 11,676/-. Thus the basic component of service tax liability paid through above challan was Rs (61,429- 11,676) i.e. Rs. 49,753, which is actual service tax liability towards commission income of Rs. 4,83,035/- received in 2010-11. Rs. 4,83,035/- does not include the incentive income of Rs. 3,73,062 in 2010-11 on which they were required to pay tax of Rs. 38,425/- as has been alleged in SCN. Therefore deduction of Rs. 38,425/- from original confirmed amount of Rs. 90,674/- can not be granted for said challan. Whole demand of Rs. 90,674/- was confirmed with interest and penalty u/s 76,77 and 78.

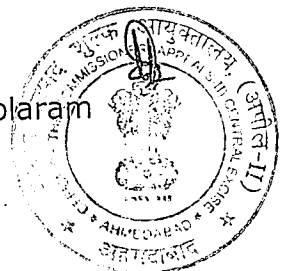
5. Being aggrieved with the impugned order, the appellants preferred an appeal on 29.02.2016 before the Commissioner (Appeals-II) wherein it is contended that-

I. Adjudicating authority has not accepted the contention regarding demand of Rs. 46,575/- of the appellant on ground that appellant has not produced the documentary evidences in the form of export invoices and foreign inward remittance etc. nor the same has been declared in ST-3. Appellant stated in appeal memo to submit the said documents along with memo, however same were not attached. Appellant requested to ignore the non declaration of value in ST-3 as procedural lapse.

II. Demand of 2011-12 is Rs. 38,425/- ,pertains to taxable value of Rs. 3,73,063/-. Said taxable value of Rs. 3,73,063/- is included in taxable value of Rs. 4,83,035/- shown in P & L A/c for 2010-11. This figure of 3,73,062/- is not shown separately in any other records. However for entire amount Rs. 4,83,035/- (which includes value of Rs. 3,73,062/- allegedly charged to service tax) shown as income in year 2010-11, the service tax of Rs. 49,753/- is already paid by along with interest of Rs. 11,676/- making total of Rs. 61,420/-. In this way appellant has already paid service tax of Rs. 38,425/- attributed to the taxable value of Rs. 3,73,062/- included in the total value of Rs. 4,83,035/-.

III. Penalty under both section 76 and 78 can not be imposed w.e.f. 16.05.2008.

6. Personal hearing in the case was granted on 26.12.2016. Shri Tolaram Soni, CA, appeared before me and reiterated the grounds of appeal.

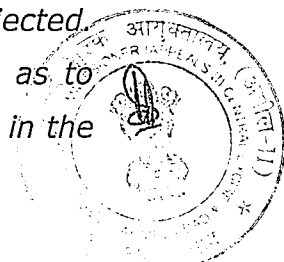


## DISUSSION AND FINDINGS

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. Regarding issue at para 5(I) above, I observe that one of the reasons for confirming Rs. Rs. 46,575/- is that the value Rs. 3,76,731/- ( though exempted being export service income) has not been declared/included in ST-3 therefore the same is considered as taxable service value. If there be any difference between Books of account's value and value declared in ST-3, then the value taken in Books of account's should be considered. Error committed in declaring true value in ST-3 may be ignored; however appropriate penalty may be imposed. My view is supported by ratio of judgments in following case -

- I. Refund should be granted on the basis of CENVAT a/c and not on the basis of closing balance in returns. In support of argument, judgment in case of Serco Global Services Pvt. Ltd [2015(39) STR 892 (Tri. Del.)] is cited.
- II. In case of Broadcom India Research Pvt. Ltd [2016(42) STR 79 (Tri. Bang.)] ground of rejecting the refund claim was CENVAT credit shown in ST-3 does not tally with amount of refund claim. The relevant extract of the judgment is reproduced as - *"The next ground is that Cenvat credit shown in the ST-3 returns does not tally with the amount claimed in the refund claims. In my opinion, the refund claim is not based on ST-3 returns and ST-3 return is nothing but a report of transactions that have taken place over a period covered by the returns. On the ground that the figures in ST-3 returns were not correct or there was a substantial difference, refund claim cannot be rejected. For the purpose of consideration of refund claim, the relevant documents on the basis of which credit was taken, nature of service and its nexus and utilization of the service for rendering output service are relevant and merely because there was some mistake in the ST-3 returns, substantive right of assessee for refund cannot be rejected. Therefore, I do not consider it necessary to consider the issue as to whether figures in ST-3 returns tallied with the amounts claimed in the refund claims or not."*



Moreover substantial benefits, like export benefits, should not be denied for minor procedural lapses. . My view is supported by following judgments-

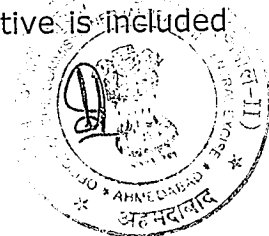
- I. Wipro Limited Vs. Union of India [2013] 32 Taxmann.com 113 (Delhi High Court)
- II. Kothari Infotech Ltd V/S Commissioner of Central Excise, Surat - [2013] 38 taxmann.com 298 (Ahmadabad - CESTAT)
- III. Mannubhai & Co. Vs. Commissioner of Service Tax (2011)(21)STR(65)- CESTAT (Ahmadabad)
- IV. M/S Mangalore Fertilizers & Chemicals Vs Deputy Commissioner 1991 (55) ELT 437
- V. CST Delhi vs. Convergys India Private Limited 2009 -TIOL -888-CESTAT -DEL-2009 (16) STR 198 (TRI. - DEL)
- VI. CST Delhi vs. Keane Worldzen India Pvt. Ltd. 2008 - TIOL -496 - CESTAT -DEL: 2008 (10) STR 471 (Tri. - Del)

I further find that second ground for confirming duty of Rs. 46,575/- is that appellant has not produced before adjudicating authority, the export invoices and inward remittance proofs for income of Rs. 3,76,731/- being income of Export service income. I find that same are not produced before me also , therefore I am unable to extend benefits to appellant. In absence of said documents I up hold the OIO in this issue.

8. Regarding issue at para 5(II), following two observations are made-

- I. Adjudicating authority has concluded that appellant had received income of Rs. 3,73,063/- as incentive on which service tax of Rs. 38,425/- has not been paid in 2010-11 and SCN is for the same. Appellant has also received commission income of Rs. 4,83,035/- [i.e Rs (61,429- 11,676)] in 2010-11 on which service tax i.e. Rs. 49,753 is paid through above challan of Rs. 61,429/-. Rs. 11,676/- is interest. SCN is not commission income. In nut shell received two separate income of Rs. 3,73,063/- as incentive and of Rs. 4,83,035/- as commission income.
- II. Appellant has argued that income of Rs. 3,73,063/- received as incentive is included in commission income of Rs. 4,83,035/-. Therefore appellant are not required to pay tax again on income of Rs. Rs. 3,73,063/-.

I find that appellant has not produced any documentary evidence to substantiate that income of Rs. 3,73,063/- received as incentive is included



in commission income of Rs. 4,83,035/-. In absence of documentary evidence I uphold the impugned OIO for this issue.

Appellant has further submitted that after amendment of Finance Act, 2008 w.e.f 16.05.2008 there were no two penalty provision can be invoked simultaneously under section 76 & 78 of finance Act, 1994. The said OIO passed after amendment of Finance Act, 2008 aforesaid penalty provision may be dropped. I hold that penalty under section 76 for demand attributed to period prior to 16.05.2008 is upheld and rest of the penalty under section 76 for demand attributed to period after 16.05.2008 is set aside. Appellant has suppressed the facts from revenue and had the audit being not conducted taxable income would have gone un-noticed. I uphold the impugned OIO imposing penalty under section 78 and 77 of FA , 1994. I uphold the recovery with appropriate interest under section 75 of FA, 1994.

11. In view of above, appeal filed by the appellants is partially allowed for penalty as discussed above.

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

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

*Umasankar*

(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED

*R.R. Patel*  
(R.R. PATEL)

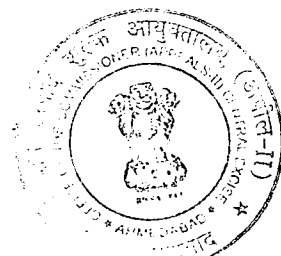
SUPERINTENDENT (APPEAL-II),  
CENTRAL EXCISE, AHMEDABAD.

To,

M/s. Axomatic Info Solution,  
801, Sapath-II,  
Opp. Rajpath Club,  
S.G.Highway, Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax ,Ahmedabad-.





- 3) The Additional Commissioner, Service Tax, Ahmedabad
- 4) The Asst. Comm., Service Tax Div-II, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

