

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)085/A-II/2016-17/4688-93

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-208-16-17

दिनांक Date : 24.01.2017 जारी करने की तारीख Date of Issue 02/02/17

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

Passed by Shri Uma Shanker Commissioner (Appeals-II)

G. Jale

ग _____ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं

_____ दिनांक : _____ से सृजित

Arising out of Order-in-Original No AHM-SVTax-000-ADC-021-15-16 Dated 29.03.2016 Issued
by ADC STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Edelweiss Broking 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, 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर 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 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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 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 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 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 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 Central Credit taken;
- (iii) amount payable under Rule 6 of the Central 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.

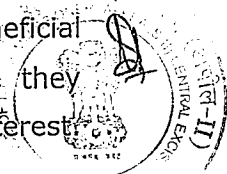


Order-In- Appeal

This order arises on account of an appeal filed by M/s. Edelweiss Stock Broking Ltd. (appellants merged with M/s. Edelweiss Financial Advisors Ltd. and the resultant company emerged was named M/s. Edelweiss Broking Ltd.), 8th Floor, Abhishree Avenue, Nehrunagar, Ambawadi, Ahmedabad (hereinafter referred to as the "the Appellants" for sake of brevity) against Order-in-Original No. AHM-SVTAX-000-ADC-021-15-16 dated 30.03.2016 (hereinafter referred to as the "impugned order" for the sake of brevity) passed by the Additional Commissioner, Service Tax, Ahmedabad (hereinafter referred to as the "Adjudicating Authority" for the sake of brevity).

2. Briefly stated the facts of the case are that the appellants were engaged in providing service under the category of 'Stock Broker Services' and 'Banking and Finance Services' as defined under Section 65 of the Finance Act, 1994 (hereinafter referred to as "the Act") and held Service Tax Registration number AABCA9956FST001(after amalgamation, the new registration number is AABCE9421HST001). During the course of audit and verification of their financial records, it was observed that in the column of 'Misc. income' shown in the profit and loss account for the year 2010-11, an amount of ₹87,53,092/- was received by the appellants as stamp duty. They collected the stamp duty amount from their clients during the process of sale/purchase of equity shares but the said amount was not paid to the exchequers of the respective state governments. Thus believing that the said amount was additional consideration received by the appellants, a show cause notice, dated 16.10.2015, was issued to them. The said show cause notice was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority considered the entire amount of ₹87,53,092/-, collected as stamp duty, to be taxable and confirmed the demand of Service Tax of ₹9,01,568/- under Section 73 of the Finance Act, 1994. He also ordered for appropriation of the Service Tax amount of ₹8,17,378/- already paid by the appellants. The adjudicating authority also ordered the appellants to pay interest thereon under Section 75 of the Act. He also imposed penalties under Section 77 and Section 78 of the Act.

3. Being aggrieved with the impugned order, the appellants filed the present appeal before me. In their appeal, they contended that they had collected ₹87,53,092/- as stamp duty which was eventually not paid to the credit of state governments on account of failure of collection mechanism in various states. The said amount was written back as stamp duty no longer payable. They agreed the fact that on such collection Service Tax was required to be paid. Accordingly, on receipt of the show cause notice, they paid the Service Tax on the said amount taking cum duty benefit along with interest and reduced penalty of 15% following the Circular number 137/46/2015-ST dated 18.08.2015. However, the adjudicating authority, vide the impugned order, has denied the cum duty benefit to them along with the beneficial provisions of reduced penalties of 15%. On receipt of the impugned order, they appellants paid, under protest, the differential Service Tax amount along with interest.



In view of the above, the appellants have requested for consequential relief by setting aside the impugned order as per the Circular number 137/46/2015-ST dated 18.08.2015.

4. Personal hearing in the case was granted on 06.01.2017. Shri keyur A. Pate, the manager of the appellants and Shri Yash Shah, Chartered Accountant, appeared before me and reiterated the contents of appeal memo.

5. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum and written submissions made by the appellants. Sub clause 105 of section 65 of the Finance Act, 1994 states that "taxable service" means any service provided or to be provided-

(a) to any person by a stock broker in connection with the sale or purchase of securities listed on a recognized stock exchange;

(zzzzg) to any person, by a recognized stock exchange in relation to assisting, regulating or controlling the business of buying, selling or dealing in securities and includes services provided in relation to trading, processing, clearing and settlement of transaction in securities;

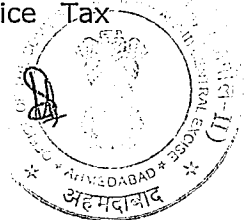
In a letter dated 8th March 2010, addressed to the commissioner (Service Tax), CBEC, New Delhi, the Additional Director General, DGST, Mumbai, from F. No. V/DGST/30-Misc-52/2009 has opined that charges collected as NSE, BSE, NSDL, CSDL charges being the liability of the broker/sub broker seem to be liable to be included in the assessable value as the value of services given by the broker, including reimbursements of other charges" and delayed payment charges."

In the clarification issued from F. No.B1/4/2006-TRU dated 19.04.2006, it is mentioned that Value for the purpose of charging service tax is the gross amount received as consideration for provision of service.

All expenditures or costs incurred by the service provider in the course of providing a taxable service forms integral part of the taxable value and are includible in the value.

Vide Board circular F.N.187/107/2010-CX.4 Dated 17th September 2010 it has been clarified that the stock brokers are required to include turnover charges, NSE/BSE /NSDL/ CDSL transaction charges, DEMAT charges & SEBI Fees recovered by them in the taxable value for valuation purpose since these are the liability of the stock broker and they are not acting in the nature of pure agent.

However, stamp duty and security transaction tax, are the liability of the buyer/seller of securities and the broker pays the same acting as a pure agent the same are not includible in the taxable amount in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006.



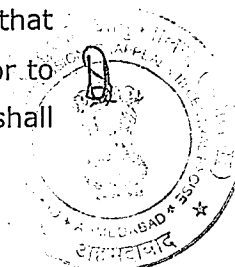
In the above case, the appellants have collected the stamp duty amount from their clients but did not deposit it in the exchequer of the respective state governments and shown the said amount as income in their profit and loss account. The appellants have accepted their mistake and on receipt of the show cause notice paid Service Tax on the amount on cum duty basis.

Now the basic question arises before me is whether to accept the contend of the appellants or otherwise.

6. As per this system of taxation, the tax borne by the consumer of services is collected by the assessee and remitted to the government exchequer. Section 66 of the Finance Act, 1994 (hereinafter referred to as 'Act') provides that there shall be levied Service Tax at appropriate rate of the value of taxable service. Non recovery of Service Tax is an offence under Section 73 of the Act. If any person comes to know the liability of levying service tax on the services provided by him whether he is liable under Section 73 for non levying of service tax. What would be the relief to the service providers in such cases? The Delhi tribunal, in the case of Panther Detective Services Vs. Commissioner of Central Excise, Kanpur 2006 -TMI - 647 - CESTAT, NEW DELHI, held that the only relief in regard to valuation that the appellants would be entitled to treat the total receipts as inclusive of service tax. It is accordingly ordered that the Revenue shall recompute the tax amount in these appeals treating the total receipts as cum-tax.

In Bhagawati Security Services Vs. Commissioner of Central Excise, Meerut - I 2006 (3) STR 763 (Tri. Del), the appellants have not raised any Service Tax bill to their service receivers. They have paid Service Tax calculated on these invoices they have not received any payment of this from their clients. The tribunal found that there was a force in the appellant's contention that if Service Tax is to be paid, it has to be worked out on the basis of gross amount received by them as being inclusive of service tax.

In Commissioner of Central Excise V. Maruti Udyog Ltd., - 2002 (141) ELT 3 (SC), the Supreme Court granted the cum-duty benefits to the assessees. In many a case the said judgment was cited in favor of the assessees. The main contention put forth in these cases by the Revenue was that the provisions of Central Excise cannot be made applicable to Service Tax. The Service Tax is on the value of taxable services rendered and therefore service tax has to be collected on that value only and the value of taxable services cannot be said to include the tax also. Explanation (2) was inserted to Section 67 of the Act with effect from 10.9.2004 which provides that if the gross amount charged by the service provider is inclusive of Service Tax the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged. The Finance Act, 2006 omitted the above said explanation and inserted clause 2 to Section 67 with effect from 18.04.2006 which provides that where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of Service Tax payable, the value of such taxable service shall



be' such amount as with the addition of tax payable, is equal to the gross amount charged.

In Gem Star Enterprises (P) Ltd., Vs. Commissioner of Central Excise 2007 (7) STR 342 (Tri. Bangalore), the appellants were not disputing the liability towards Service Tax (as in this case). They only requested to treat the amount received by them from their customers as cum-tax amount and to re-compute the tax liability. The Revenue did not appreciate the stand of the appellants on the ground that Explanation 2 to Sec. 67 of the Finance Act, 1994 was inserted only 10.9.2004 and the same cannot be made applicable in the present case. The Tribunal did not agree with the department. As this principle is applied in Central Excise cases in the light of 'Maruti Udyog Ltd.,' (Supra), the same principle is applied here also.

In Bellary Computers V. Commissioner of Central Excise (Appeals), Mangalore - 2007 -TMI - 2305 - CESTAT, BANGALORE, there was a request from the appellants that they had not collected any Service Tax from their customer. Therefore, they requested to give them the cum-duty benefit. In other words, there was a request from the appellants that while calculating the duty liability gross amount collected for services should be treated as including the Service Tax. The Tribunal remanded the matter to the original authority.

In FAQ issued by the CBE & C & DGST during November 2007, one question and answer was on cum-tax which is reproduced as follows:

How does one work out the Service Tax liability and pay the same to the Government in case the customer or a client pays only the value of the service amount but not the service tax amount mentioned in the bill?

Ans: Service Tax is payable on amount realized. In the given situation, the amount so realized from the client would be treated as gross amount inclusive of Service Tax and accordingly the value of taxable service and Service Tax liability are worked out as follows:

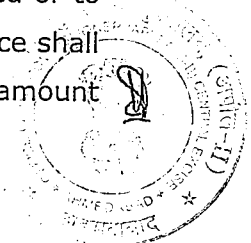
For Example - Value of taxable services (AV) = ₹1,000/-

Amount Billed = ₹1000/- + ST 123.60 = ₹1123.60

Amount paid = ₹1000/-

Treat ₹1000/- as gross amount inclusive of service tax.

In the case of M/s. Viraj Travel Agency Vs. the Commissioner of Service Tax, Ahmedabad, the Hon'ble CESTAT, West Zonal bench, Ahmedabad proclaimed that where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of Service Tax payable, the value of such taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.



Thus, in view of the discussion held above, I consider that the appellants are eligible to avail the benefit of payment of Service Tax on cum duty basis and have rightly paid the Service tax amount of ₹8,17,378/-.

7. Regarding their second plea about payment of penalty @ 15% following the Circular number 137/46/2015-ST dated 18.08.2015, I would like to enlighten the concerned parties that the Central Board of Excise and Customs (CBEC) had issued a clarification regarding the provisions of Section 73, 76 and 78 of the Finance Act, 1994 and Section 11AC of the Central Excise Act, 1944 (CEA) after amendments were made vide the Finance Act, 2015. This CBEC clarification very clearly says that in the cases involving the extended period of limitation, assessee can now make a written request for waiver of issuance of SCN, on payment of prescribed tax / duty, interest and 15% penalty. In this regard, CBEC has placed reliance on the Supreme Court's (SC) ruling in Virgo Steels. In Virgo Steels case (supra), the Hon'ble Supreme Court had concluded that when specifically the assessee has waived its right for a notice, it could not take a stand that proceedings initiated against it, were void for want of a notice under Section 28 of the Customs Act, 1962. Although this decision is in relation to section 28 of the Customs Act, 1962; it clarifies that the principles laid down are equally applicable to SCNs issued under other statutes. Thus, in this regard, CBEC now clarifies that an assessee can waive the requirement of a written SCN. CBEC now clarifies that Section 12 of CEA is now being made applicable to Service Tax Vide section 83 of the Finance Act, 1994. If the grounds on which the Department feels that there has been short / non-payment of tax / duty are intimated to the assessee orally with its quantification and the assessee indicates in writing that he has been informed about such grounds and he accepts the grounds and the quantification and is waiving the requirement of a written SCN, then a written SCN need not be issued. CBEC clarifies that in case the assessee makes the written request for waiver of written SCN, the thirty day period can be computed from the date of receipt of such a letter by the Department. Also, there is no bar on an assessee making the payment of tax / duty, interest and reduced penalty of 15% even before the date of receipt of such a letter by the Department.

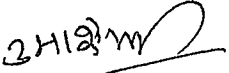
Thus, in view of the circular mentioned above, the appellants have paid the Service Tax (on cum duty basis) along with interest and penalty @ 15%. After they received the impugned order, they paid the differential amount under protest. This shows that the intent of the appellants was not malafide. They have confessed before me that they have paid the cum duty tax along with interest and 15% penalty one day late. Looking to the spirit of the circular and bonafide of the appellants, I accept the plea of the appellants and condone the delay of one day of making the payment.

8. In view of the above, I allow the appeal filed by the appellants and set aside the impugned order to the extent of discussion held in paragraph 6 and 7.

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




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


(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTA) 25/01/17

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

To,

M/s. Edelweiss Broking Ltd.,
8th Floor, Abhishree Avenue,
Nehrunagar, Ambawadi,
Ahmedabad-380 015

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Additional Commissioner, Service Tax, Ahmedabad.
- 4) The Dy./Asst. Commissioner, Service Tax, Division-II, Ahmedabad.
- 5) The Asst. Commissioner(System), Service Tax Hq, Ahmedabad.
- 6) Guard File.
- 7) P. A. File.

