

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)22/A-II/2016-17

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-33-16-17

दिनांक Date : 10.06.2016 जारी करने की तारीख Date of Issue 16/06/16

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 MP/18/ST/DA/2010-11 Dated 30.12.2010

Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Rajvi Stock 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 :-

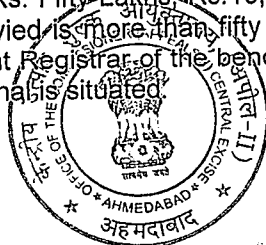
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 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. 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 35फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 83 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 अर्जी 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**

This order arises on account of an appeal filed by M/s. Rajvi Stock Broking Ltd., Opp. Natraj Cinema, Ashram Road, Ahmedabad (hereinafter referred to as the 'the Appellants' for sake of brevity) against Order-in-Original No. MP/18/DC/ST/DA/10-11 dated 30.12.2010 (hereinafter referred to as the "impugned order" for the sake of brevity) passed by the Deputy Commissioner, Service Tax, Division-IV (now Division-II), 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 are 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 hold Service Tax Registration No. AACCR7199AST001. It was observed that the appellants had not paid Service Tax on certain amount received on account of their service like NSE/BSE transaction charges which forms integral part of their service viz. 'Stock Broker Service'. The appellants were not including these charges in the gross amount received towards rendering of taxable services considering it as non-taxable amount. However, it was observed that they were charging and collecting such amount in their billing/ contract notes from their clients. The appellants, vide their letter dated 10.07.2009, provided the details of the amount collected by them by way of NSE/BSE transaction charges during the period from 01.04.2008 to 15.05.2008 and stated that they had not paid any Service Tax on such amount received by them. During the period from 01.04.2008 to 15.05.2008, the appellants had collected an amount of ₹ 4,65,638/- on account of NSE/BSE transaction charges. The amount of Service tax not paid on the above charges worked out to ₹ 57,554/-. In view of the non-payment of Service Tax, a show cause notice was issued to the appellants on 04.09.2009. The adjudicating authority, vide the impugned order, confirmed the demand of Service tax of ₹ 57,554/- under Section 73(1) of the Act holding the said value as part of their taxable services and ordered to pay interest thereon under Section 75 of the Act. He also imposed penalties under Section 76 and Section 78 of the Act.

3. Being aggrieved with the impugned order, the appellants filed an appeal along with stay application before the then Commissioner (Appeals-IV) on 25.11.2011. The then Commissioner (Appeals-IV), vide OIA number 321/2011(STC)/K. ANPAZHAKAN/Commr.(A)/Ahd. dated 21.12.2011, rejected the appeal, without going to the merits of the appeal, on the ground of limitation as the appeal was filed by the appellants after more than eleven months from the date of serving the impugned order.

4. Being aggrieved with the impugned order, the appellants filed an appeal before the Hon'ble CESTAT, West Zonal Bench, Ahmedabad. The Hon'ble CESTAT, vide



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order number A/10033/WZB/AHD/2013 & M/10159/WZB/AHD/2013 dated 26.12.2012, restored back the appeal to the Commissioner (Appeals) with direction to conclude the appeal on the merits of the case after following the principles of natural justice. Accordingly, the appellants filed the present appeal before me and as per the order of the Hon'ble CESTAT, I take up the matter afresh exclusively on merit. The appellants, in their grounds of appeal, contended that they deny that they had contravened the provisions of Section 68, 70 and 73(a) of the Act and thereby are not liable for any penal action. They stated that the NSE/BSE charges are collected under statutory obligation and not liable to be included in the gross value of taxable service provided or to be provided. They further stated that they have claimed reimbursement of NSE transaction charges on actual basis. These charges, so collected, are not a charge for the services rendered and therefore, cannot be said that they are part of brokerage. The NSE charges are fixed and levied by the stock exchange. The appellants also prayed that penalty under both Sections 76 and 78 of the Act cannot be simultaneously imposed and requested to delete the penalty under Sections 76 of the Finance Act, 1994.

5. Personal hearing in the case was granted on 24.05.2016 and Shri Vipul Khandhar, Chartered Accountant, appeared before me and reiterated the contents of appeal memo and tabled before me additional written submission.

6. 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/ST/2006 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.



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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.

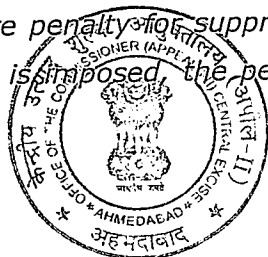
However, stamp duty and security transaction tax, are the liability of the buyer/seller of securities and the broker pays the same acting as a pure agent the same are not includible in the taxable amount in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006.

All other charges by whatever name called recovered by the broker from the buyer/seller of securities are includible in the taxable value in terms of Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006.

From the above it is clear that in case the expense is the liability of the service provider it has to be included in the taxable value.

7. In view of the above, I first of all uphold the levy of Service Tax as confirmed by the adjudicating authority vide the impugned order. Regarding the interest under Section 75 of the Finance Act, 1994, I uphold the same as the appellants have failed to pay up the Service Tax and is rightly invoked under the impugned order. As regards simultaneous imposition of penalty under Section 76 and 78 of the Finance Act, 1994, the appellants have argued that same is not permissible as per the judgments in the cases of The Financers vs. CCE, Jaipur, The Commissioner of Central Excise, Ludhiana vs. Pannu Property Dealer, The Commissioner of Central Excise, Chandigarh vs. City Motors and The CCEC, Chandigarh vs. M/s. Cool Tech. Corporation. In view to the argument of the appellants I would like to quote the judgment of CESTAT, Ahmedabad in the case of M/s Powertek Engineers vs CCE Daman. In this case the view of the Hon'ble CESTAT is as below;

*"By their very nature, Sections 76 and 78 of the Act operate in two different fields. In the case of Assistant Commissioner of Central Excise v. Krishna Poduval - (2005) 199 CTR 58 = 2006 (1) S.T.R. 185 (Ker.) the Kerala High Court has categorically held that instances of imposition of penalty under Section 76 and 78 of the Act are distinct and separate under two provisions and even if the offences are committed in the course of same transactions or arise out of the same Act, penalty would be imposable both under Section 76 and 78 of the Act. We are in agreement with the aforesaid rule. No doubt, Section 78 of the Act has been amended by the Finance Act, 2008 and the amendment provides that in case where penalty of suppressing the value of taxable service under Section 78 is imposed, the penalty for failure to pay service tax*



under Section 76 shall not apply. With this amendment the legal position now is that simultaneous penalties under both Section 76 and 78 of the Act would not be levied. However, since this amendment has come into force w.e.f. 16th May, 2008, it cannot have retrospective operation in the absence of any specific stipulation to this effect. However, in the instant case, the appellate authority, including the Tribunal, has chosen to impose the penalty under both the Sections. Since the penalty under both the Sections is imposable as rightly held by Kerala High Court in Krishna Poduval (supra), the appellant cannot contend that once penalty is imposed under Section 78, there should not have been any penalty under Section 76 of the Finance Act. We, thus, answer question no. 3 against the assessee and in favour of the Revenue holding that the aforesaid amendment to Section 78 by Finance Act, 2008 shall operate prospectively. **In view of the above, penalties can be simultaneously imposed under Section 76 and 78 of Finance Act, 1994 for the period prior to 16.05.2008 before its amendment when proviso to Section 78 was added.**

In view of the facts and discussions hereinabove, I find that the period involved in the present case is from 01.04.2008 to 30.09.2008. Therefore, I order the appellants to pay penalty under Sections 76 and 78 of the Act from 01.04.2008 to 15.05.2008 and from 16.05.2008 to 30.09.2008, I hold that imposition of penalty under Section 76 *ibid* is not sustainable in the eyes of law and hence I drop the same.

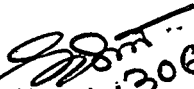
8. In view of above, I modify the impugned order to above extent and reject the appeal filed by the appellants.



  
(UMA SHANKER)

COMMISSIONER (APPEAL-II)  
CENTRAL EXCISE, AHMEDABAD.

ATTESTED

  
(S. DUTTA) 130616

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

To,

M/s. Rajvi Stock Broking Ltd.,  
Opp. Natraj Cinema, Ashram Road,  
Ahmedabad-380 009

**Copy to:**

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

