::आयुक्त (अपील-III) का कार्यालय,केंद्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS-III), CENTRAL EXCISE,
द्वितीय तल, केन्द्रीय उत्पाद शुल्क, भवन / 2nd Floor, Central Excise, Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – - 360001
Tele / Fax No.: 0281 – 2477952/2441142 Email : cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No	दिनांक / Date
	V2/40 /GDM/2016	36/ST/AC/2015-16	22.04.2016

ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-003-2017-18

आदेश दिनांक / Date of Order:	25.04.2017	जारी करने की तारीख / Date of issue:	27.04.2017

श्री उमा शंकर, आयुक्त (अपील-III) द्वारा पारित /
Passed by **Shri Uma Shanker**, Commissioner (Appeals-III)

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम द्वारा उपरनिखित जारी मूल आदेश से सृजित /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :-

घ **अपीलकर्ता**/ प्रतिवादी का नाम एव पता / Name & Address of the **Appellant**/ Respondent :-

M/s. Intermark Shipping Agencies P. Ltd., 2, 1st Floor, Ajanta Commercial Centre, Plot No. 277-278 Ward 12-B, Gandhidham - Kutch, .

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीले सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, ओ-20, न्यू मेंन्टल हॉस्पिटल कम्पाउंड, मेघाणी नगर, अहमदाबाद-380016, को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad: 380016, in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गई प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहा उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहा संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहा सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहा संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायर की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फार्म S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दायर करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्कमांगा कर माँग के 10 प्रतिशत (10%), जब माँग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि 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 है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, 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, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 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.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) अंतिम उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा तत्पश्चात पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदनों के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के सबूत के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the O/O and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम है तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा है तो रुपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की सिक्षा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
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.

(G) उच्च अपीलीय प्राधिकारी को अपील प्रस्तुत करने से संबंधित व्यापक, विस्तृत और संशोधनम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

M/s. Intermark Shipping Agencies Pvt. Ltd. 2, 1st floor, Ajanta Commercial Centre, Gandhidham (Kutch) (hereinafter referred to as 'the appellant') has filed the present appeal against the Order-in-Original No.36/ST/AC/2015-16 dated 22.04.2016 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Gandhidham (hereinafter referred to as 'the lower adjudicating authority').

2. Briefly stated facts of the case are that during the period from April – 2013 to March – 2014, the appellant had received amount of Rs.36,26,497/- as brokerage services, which appeared to be liable to service tax under the category of "Steamer Agents Services" appeared to be taxable service as per Section 66B of the Finance Act, 1994 (hereinafter referred to as the "Act"). Therefore, a show cause notice No.IV/15-02/ST/ADJ/2015-16 dated 27.01.2015 was issued to the appellant proposing recovery of service tax of Rs.4,48,235/- alongwith interest and penal actions, which was decided by the lower adjudicating authority, who vide impugned order, confirmed service tax demand alongwith interest under Section 73 & Section 75 of the Act and also imposed penalties under Section 76 & Section 77 of the Act.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the following grounds:

(a) As per definition of taxable service, services provided by steamer agent to shipping agent are considered as taxable service. On bare reading of definition, to prove levy of service tax, following two conditions must be fulfilled simultaneously:

(i) The service must be provided or to be provided to shipping lines by steamer agent; and

(ii) The service is in relation to ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services.

In the present, they were appointed as sub-agent by their principal M/s Freight Connection, the steamer agent. Thus, they were acting as a sub-agent to the steamer agent and not providing any service to the shipping line as required for taxing the service under the service category of 'steamer agent service'. In fact, brokerage is not at all their income and it does not form a part of their revenue. It is merely deducted from the freight collected on behalf of Steamer Agent for their brokers, hence actually brokerage is income of their brokers, which is credited collectively in their

liability side and then passed on to the various brokers. For better understanding the nature of transaction, the process flow for the "Brokerage income" can be understood as under:

(i) Freight connection is a steamer agent of various foreign shipping lines.

(ii) Freight connection has appointed them as its sub-agent.

(iii) Various brokers give booking of export cargo to the appellant.

(iv) On the basis of cargo booked by various brokers, they submit the claim of brokerage to Freight Connection on behalf of brokers.

(v) In turn, Freight Connection submits the claim of the same amount of brokerage to its principals i.e. foreign shipping lines.

(vi) When the brokerage is credited by Freight Connection, it is directly and fully passed on to them and in turn the same is passed on by them to various brokers.

(vii) It is important to understand that the brokerage credited is in nature of liability for them as well as Freight connection and not an income for any services rendered. It does not form part of their income and they are bound to pass on the brokerage received to the various brokers.

(viii) It must be noted that for brokerage, there is no provision of service by them as a broker and hence by no stretch of imagination it can be claimed as their service income. Therefore, the chargeability of service tax itself fails.

(b) As per Board's Circular No B43/1/97-TRU dated 06.06.1997 and definition of Steamer Agent under Section 65(100) of the Act, it is clear that when a Steamer Agent was performing any service in connection with Ship's husbandry or the services like Booking, Advertising or Canvassing for cargo or container feeder service for or on behalf of a Shipping Line, the activities and services were liable for service tax. Hence, it is very much clear from the above circular that service tax cannot be levied on the reimbursement of expenses and in the circular itself states that the brokerage paid on export cargo is reimbursable expense on which service tax should not be levied.

(c) Relying upon the following decisions, they contended that circulars issued under Section 37B of the Central Excise Act, 1944 are binding to the Department:

- Ranadey Micronutrients [2002-TIOL-184-SC-CX]
- Usha Martin Industries [2002-TIOL-400-SC-CX]
- Dhiren Chemical Industries [2002 (139) ELT 3 (SC)

(d) The term 'service' has been defined under Section 65B(44) of the Act as per which it means "any activity carried out by one person to another person for consideration" and it would be taxable. Hence, in the absence of any "consideration", the amount of brokerage received on behalf of brokers cannot fall within the ambit of definition of 'service'. Therefore, brokerage received will not be taxable. It is also contended that Cir no.96/7/2007-ST dated 23.08.2007 was not applicable in their case.

(e) Further, as per the definition of service as defined in section 65B(44) of the Act, service would be taxable only if provided or agreed to be provided within the taxable territory. The Central Government vide Notification No. 28/2012-ST dated 20.06.2012 had notified the Place of Provision of Services Rules, 2012 to determine the place of provision of service. Thus, if the place of provision of service is outside the taxable territory, service tax would not be levied on the same. In the present case, they were appointed as sub-agent of the Freight Connection who provides service in relation to export shipment. Thus, it can be said that the service is provided in relation to transport of goods which are exported outside India. Thus, as per Rule 10 of the Place of Provision of Services Rules, 2012, since the place of destination of goods is outside the taxable territory, service tax would not be levied as taxable territory is outside India.

(f) That earlier show cause notice was issued demanding service tax under the category of 'Business Auxiliary Services' whereas now department is demanding the service tax under the category of 'Steamer Agent service'. As the SCN is the fundamental base for adjudicating the case, the demand as confirmed in the impugned notice under the service category of 'steamer agent service' needs to be set aside. They relied upon the decision in the case of Brindovan Beverages (P) Ltd. [(2007) 213 ELT 487 (SC)].

(g) Notwithstanding above, they also argued for benefit of Section 67(2) of the Act and their eligibility of Cenvat credit of such input services, whose expenses were paid by them. Further, the brokerage amount received is in the nature of reimbursement and hence, the same cannot form part of the value of taxable service in view of the judgment in case of Intercontinental Consultants & Technocrats Pvt. Ltd. [2013 (29) S.T.R. 9 (Del.)].

4. Personal hearing in the matter was held on 24.03.2017. Shri Abhishek Doshi, Chartered Accountant appeared on behalf of the appellant and reiterated the grounds of the appeal.

5. I have carefully gone through the facts of the case, impugned order, appeal memorandum and submissions made by the appellant at the time of personal hearing. The limited issue to be decided in the present appeal is whether the amount received by the appellant from their principals is liable for service tax, or otherwise.

6. The undisputed fact of the case is that the appellant was receiving certain amount of freight as brokerage from their principal M/s Freight Connection India Pvt. Ltd., a steamer agent. The appellant's argument is that they were acting as a sub-agent to the steamer agent and brokerage income was actually income of their brokers, which was credited collectively in their liability side and then passed on to the brokers. The appellant has also placed reliance upon Board's Circular No B43/1/97-TRU dated 06.06.1997 and Section 65B(44) of the Act to contend that no services were provided by them and the amount received was not a consideration and a reimbursement amount.

7. I find that the primary and core issue raised is with regard the actual nature and character of the activities undertaken by the appellant. I further observe that that vide Board's Circular No B-43/1/97-TRU dated 06.06.1997, it was clarified that in respect of steamer agent service, reimbursements of expenses were not chargeable to service tax. This circular was issued mainly to sort out cascading effect on service tax and was more administrative in nature. However, on realizing that large number of circulars had lost their relevance long back due to amendment in law, the Board, vide Circular No.96/7/2007-ST dated 23.08.2007, superseded the earlier circulars including the said circular dated 06.06.1997 and issued clarifications on the technical issues related to taxation of services under the Act. Relevant clarification with regard to sub-contractor or sub-agent, issued by the Board vide circular dated 23.08.2007 is as under:

999.03 / 23.08.07	A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.	A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.

8. From the above, it is clear that under the CENVAT regime, which applies to service tax also, the provider of taxable services has to discharge the service tax

liability and if such services are used as input services by other service provider or manufacturer of the goods down the line, they can avail input service credit on the service tax paid by the input service provider. There is no exemption for input service or input service provider under the law. The entire scheme of invoice based Central Value Added Tax, which is in force, envisages payment of tax at each stage of taxable event and availment of credit of tax so paid at the subsequent stage. If this tax regime, which is in force, has to be given any meaningful effect, then it is mandatory that the service tax liability is discharged as and when taxable services are rendered by the service provider. The appellant does not come up with any evidence to show that they were in fact receiving payment as reimbursement as claimed by them. Further, as per Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, only expenditure incurred by the service provider as a 'pure agent' of the recipient of service shall be excluded from the value of the taxable services. In order to claim expenditure incurred by the service provider as reimbursable expenditure, certain legal parameters as ingrained in the sub-rule 2 of Rule 5 have to be followed, which is reproduced below for better understanding of the fact:

> *"(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-*
>
> *(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;*
>
> *(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;*
>
> *(iii) the recipient of service is liable to make payment to the third party;*
>
> *(iv) the recipient of service authorises the service provider to make payment on his behalf;*
>
> *(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;*
>
> *(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*
>
> *(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and*
>
> *(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.*
>
> ***Explanation 1.*** *- For the purposes of sub-rule (2), "pure agent" means a person who -*
>
> *(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*
>
> *(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*
>
> *(c) does not use such goods or services so procured; and*
>
> *(d) receives only the actual amount incurred to procure such goods or services."*

From the records, I find that the appellant has not fulfilled the above criteria for treating them as pure agent. Therefore, the pleadings of the appellant fail on this count.

9. On the issue of cum tax benefit under Section 67(2) of the Act, I find that the appellant admittedly did not charge service tax from their clients in which case the Supreme Court judgment in the case of *Amrit Agros* [2007 (210) E.L.T. 183 (S.C.)] is directly applicable wherein it has been held that *"unless it is shown by the manufacturer that the price of goods includes Excise duty element, no question of excluding the duty from the price would arise in computing the assessable value of excisable goods"*. In fact, Section 67(2) of the Act allows cum-tax benefit only if the gross amount charged for the service is inclusive of service tax payable. In the light of the admitted fact that the price charged by the appellant did not include any service tax, the cum-tax benefit cannot be extended to them.

10. In view of above, I do not find any infirmity in the impugned order and the appeal filed by the appellant is rejected.

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

11. The appeal filed by the appellant stands disposed off in above terms.

उमाशंकर

(उमा शंकर)
आयुक्त (अपील्स - III)

By R.P.A.D.

To,
M/s. Intermark Shipping Agencies Pvt. Ltd. 2,
1st floor, Ajanta Commercial Centre,
Gandhidham (Kutch).

Copy to:

1) The Chief Commissioner, Central Excise, Ahmedabad.
2) The Commissioner, Central Excise and Service Tax, Gandhidham.
3) The Assistant Commissioner, Service Tax Division, Gandhidham.
4) The Dy./Asst. Commr. (Sys.), C. Ex., H.Q., Gandhidham – for uploading on website.
5) The Superintendent, Service Tax Range, Gandhidham.
6) PA to Commissioner (Appeals-III), Central Excise, Ahmedabad.
7) Guard File.