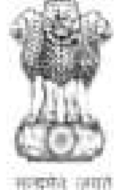
1146

::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com



रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/211/RAJ/2016	03/ST/2016	30.06.2016
	V2/22/EA2/RAJ/2016	03/ST/2016	30.06.2016

6100 TO 6184

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

RAJ-EXCUS-000-APP-112-TO-113-2017-18

आदेश का दिनांक / Date of Order:	02.11.2017	जारी करने की तारीख / Date of issue:	03.11.2017

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित 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 एवं पता /Name&Address of the Appellant & Respondent :-
M/s. Inext Freight Forwarders, "Shree Ram", 78, Aaradhna Society., Air Port Road.,Rajkot - 360 007

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 अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका , द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa 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 गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग 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 जहां 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 नियमवाली, 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, जहां सेवाकर की मांग, ब्याज की मांग 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 जहां 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 दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र 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 दर्ज 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 शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग 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 "मांग किए गए शुल्क" में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट 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-35B 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) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि 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 आवेदन 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 साक्ष्य 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 OIO 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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 लिखा 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 filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 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 संबंधित मामलों को सम्मिलित करने वाले नियमों की और 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 दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम 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-APPEA L::

M/s. Inext Freight Forwarders, 78, Shree Ram, Aaradhana Society, Airport Road, Rajkot (hereinafter referred to also as "the appellant") has filed Appeal No. V2/211/RJT/2016 against the Order-in-Original No. 03/ST/2016 dated 30.06.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. The Department has also preferred Appeal No. V2/22/EA2/RJT/2016 against the impugned order on the ground that the adjudicating authority failed to impose penalty under Section 78 of the Finance Act, 1944 on the appellant.

3. Since these two appeals have been filed against the same Order, take up both appeals to be decided simultaneously.

3.1 Briefly stated the facts of the case are that the Appellant is holder of Service Tax Registration for providing taxable services under the category of "Clearing & forwarding services". The Audit of records of the appellant revealed that the freight income towards Ocean Freight and Freight Expenses were shown under the head of direct income and direct expenses respectively; that the differential income was the excess amount charged by the appellant to their customers towards the Ocean Freight being recovered from their customers and paid them to their respective container lines; that the appellant was required to pay service tax on that differential income, however, they did not agree to the objection and replied that the income was the difference of the amount received by them from their customers and the amount they paid to the container lines towards Ocean Freight i.e. freight towards the containers for export on behalf of their clients/customers. The appellant also contended that they were working as 'Pure Agent' and the differential income was towards the trading activity only; that they are not a commission agent of any of the container lines.

3.2 It was found that the appellant was not receiving the same (exact) amount from their customers, which they paid to the container lines towards Ocean Freight; that the appellant was receiving higher amount from their customers, than the amount paid to the container lines, which resulted in differential income to the appellant; that they were not falling under definition of "pure agents' and the activity carried out by them cannot be termed/treated as 'trading activity', as it involved neither purchase and sale of goods, nor payment of Sales tax / VAT on such activity; that therefore services provided

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by them fell under the meaning of "Business Auxiliary Service" as defined under Section 65 (19) of the Finance Act, 1994.

3.2 Thus, Show Cause Notice No. V/16-15/SCN/AC/ST/15-16 dated 13.04.2016 was issued by the Department to the appellant for the period 2014-15, which was adjudicated by the lower adjudicating authority vide impugned order, and demand of Service Tax of Rs. 4,53,926/- was confirmed under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act"), along with interest under Section 75 of the Act and penalty of Rs. 45,392/- was imposed under Section 76 and penalty of Rs. 10,000/- under section 77(1)(a) of the Act for not obtaining Service Tax Registration under the BAS category. However, penalty proposed under Section 78 of the Act was dropped.

4. Being aggrieved with the impugned order, the appellant preferred the appeal *interalia* on the following grounds :-

(i) The appellant contended that Ocean Freight is not liable to service tax prior to introduction of the Negative List, while there were specific taxable categories for inclusion of transportation of goods by air, rail or road within the ambit of service tax, there was no specific taxable category for ocean transportation of goods by a vessel/ship; that they have added mark-up on Ocean Freight amount that they have paid to shipping line and the same way shipping line has also added mark-up on Ocean Freight amount that they have paid to another shipping line or ultimate shipping vessel; that none of the shipping lines charge, service tax on the differential element of Ocean Freight in invoice raised to the party; that in turn, when they bill to their clients in respect of Ocean Freight and no service tax is charged; that they book the vessel space and sell it in piecemeal manner to exporters or forwarders; that when a shipping line (which is not the owner of the shipping vessel) charges Ocean Freight, which included an element of profit, over and above what it paid to the vessel owner, the same is not liable to Service Tax; that the subsequent sale of such space by the forwarder to an exporter cannot be termed as "Business Auxiliary Service"; that there is no suppression or mis-statement with intent to evade service tax payment on the said amount.

(ii) To charge Service Tax under "Business Auxiliary Services", it is mandatorily required to prove that the appellant was acting as an agent; that if the relationship between parties is on a principal to principal basis, no taxation is attracted under BAS category; that only if the procurement of goods or services, which are inputs for the client, is done in the capacity of an agent acting on behalf of a principal, then the same is chargeable under "Business

Auxiliary Service"; that however, if the same was done on a principal to principal basis, there is no question of charging Service Tax under "Business Auxiliary Service"; that they have not acted as agent of shipping line or exporter; that there could also be a chance of incurring loss in buying and selling of space, as sometimes it could be possible that buying rate for the shipping line is more then the selling rate.

(iii) That they were not procuring any sorts of goods or services which are inputs for the client to attract the provisions of Section 65(19)(iv) of the Act.

(iv) That in the post Negative List regime, Ocean Freight to qualify as service, the place of provision of services shall be the destination of goods; that in their case of export cargo, the place of provision of services is outside the taxable territory.

(v) The appellant has also relied on various case-laws in support of their view point without specifying as to what are the relevant points of each case laws :-

- DHL Lemuir Logistics Pvt. Ltd. – 2010 (17) STR 266 (Tri.-Bang.)
- Gudwin Logistics – 2010 (18) STR 348 (Tri.-Ahmd.)
- Bax Global India Ltd. – 2008 (9) STR 412 (Tri.-Bang.)
- Euro RSCG Advertising Ltd. – 2007 (7) STR 277 (Tri.-Bang.)
- Kerala Publicity Bureau – 2008 (9) STR 101 (Tri.-Bang.)
- Skylift Cargo Pvt. Ltd. – 2010 (17) STR 75 (Tri.-Chen)
- Margadarsi Marketing (P) Ltd. – 2010 (20) STR 195 (Tri.-Bang.)
- Baroda Electric Meters Ltd. – 1997 (94) ELT 13 (SC)
- International Clearing & Shipping Agency – 2007 (5) STR 107 (Tri.-Chen)

(v) The appellant also contended that they acted in good faith and under bonafide belief that Ocean Freight is not liable to service tax and therefore pleaded not to impose penal provision under the Act and rules there under, as they had not suppressed the taxable value of service chargeable to tax with willful act or omission or with guilty mind. The appellant relied on following case-laws in this regard :-

- Motor World – 2012-TIOL-418-Karnataka HC
- Tamilnadu Housing Board – 1994 (74) ELT 9 (SC)
- Dalveer Sing – 2008 (9) STR 491 (Tri.-Del.).

(vi) The appellant further contended that the impugned order is against law, contrary to the facts on record and passed with complete non-application of mind; that they have dealt on a principal to principal basis i.e. on their own account and therefore no Service Tax on Ocean Freight is leviable and all the person with whom they had dealt were exporters and all the shipments were sent out of India.

4.1 In light of aforesaid submissions, the appellant requested to allow their appeal and set aside the impugned order.

5. The Department preferred appeal against the impugned order on the ground that while demand of Service Tax has been confirmed, the adjudicating authority has failed to impose penalty under Section 78 of the Act. The Department has contended that imposition of penalty under Section 76 of the Act equal to ten percent of tax confirmed is incorrect, as the provisions of Section 76(1) of the Act would come into play only when there is no element of invocation and confirmation of the extended period time.

6. Personal Hearing in both the appeals were held when S/Shri Vishal T. Gohel, Proprietor and Mahesh Bhatt, C.A. appeared on behalf of the appellant, and reiterated the grounds of appeal and submitted that they have undertaken activity of providing Ocean Freight to the exporters from place in India to outside India on principal to principal basis and hence no Service Tax was leviable. The Department was represented by Shri S. L. Surana, Superintendent, GST & Central Excise, Range-II, Division-I, Rajkot, who reiterated the grounds of appeal filed by the Department. S/Shri Gohel and Bhatt submitted various email correspondences with their client exporters, as well as with Shipping lines to establish that they worked on principal to principal basis and not as agent of shipping line; that CBEC had issued Circular No. 197/7/2016-Service Tax dated 12.08.2016 wherein at Para No. 2.2 and Para No. 3.0 it has been clearly stated that no service tax was leviable, if they were acting on principal to principal basis; that the appeals may be decided on the basis of material facts of the case, as per the above circular.

6.1 Shri Surana, Superintendent representing the Department submitted that the Commissioner(Appeals) vide OIA No. RAJ-EXCUS-000-AOO-144-16-17 dated 20.01.2017 had decided this issue in favour of the Department once; that no other circular has been subsequently issued by the CBEC. In his written submissions dated 16.08.2017, it has been *inter alia* submitted that the adjudicating authority has rightly confirmed the demand under the head of Business Auxiliary Service for the excess amount of ocean freight charged by the appellant over and above, the amount actually paid by them to the Shipping lines; that the appellant had collected amount from its client exporters by way of charging additional amount in the name of Ocean Fright and the same is rightly covered under the definition given under section 65(19) of the Act; that the contention of the appellant that they were acting on principal to principal basis, it was countered by the Departmental representative by submitting that the service tax was charged and confirmed

on the differential amount, in excess of what was paid to the Shipping line; that, the adjudicating has rightly confirmed the demand of the service tax on excess amount collected in the name of Ocean Freight along with interest.

6.2 The appellant submitted a written submission dated 21.09.2017, wherein they, *inter alia*, submitted email correspondences for the financial year under appeal as proof of doing business of freight forwarders on principal to principal basis and reiterated the submissions made earlier and in Appeal Memorandum

Findings :-

7. I have carefully gone through the facts of the case, the impugned order, both appeal memorandums and the submissions made by the appellant, as well as the Department at the time of personal hearing.

7.1 The issues to be decided in the present appeals are :-

(i) Whether the appellant was undertaking the work on principal to principal basis or as agent of shipping lines ;

(ii) Whether Service tax is payable on the differential amount/ Mark-up value under Business Auxiliary Services;

(iii) Whether penalty is imposable under Section 78 of the Act or only under Section 76 of the Act or not imposable at all; and

(iv) Whether penalty imposable under Section 77 of the Act.

8. I find that the appellant has heavily relied upon CBEC Circular No. 197/7/2016-ST dated 12.08.2016 in their grounds of appeal, as well as during personal hearing. I would like to reproduce the relevant portion of the said Circular dated 12.08.2016, which is as follows :-

> *"2.0 It may be noted that in terms of rule 10 of the Place of Provision of Services Rules 2012, (hereinafter referred to as 'POPS Rules, 2012', for brevity) the place of provision of the service of transportation of goods by air/sea, other than by mail or courier, is the destination of the goods. It follows that the place of provision of the service of transportation of goods by air/sea from a place in India to a place outside India, will be a place outside the taxable territory and hence not liable to service tax. The provisions of rule 9 of the POPS Rules, 2012, should also be kept in mind wherein the place of provision of intermediary services is the location of the service provider. An intermediary has been defined, inter alia, in rule 2(f) of the POPS Rules, 2012, as one who arranges or facilitates the provision of a service or a supply of goods between two or more persons, but does not include a person who provides the main service or supplies the goods on his own account. The contents of the succeeding paragraphs flow from the application of these two rules.*
>
> *2.1 The freight forwarders may deal with the exporters as an agent of an airline/carrier/ocean liner, as one who merely acts as a sort of booking agent with no responsibility for the actual transportation.*

It must be noted that in such cases the freight forwarder bears no liability with respect to transportation and any legal proceedings will have to be instituted by the exporters, against the airline/carrier/ ocean liner. The freight forwarder merely charges the rate prescribed by the airline/carrier/ocean liner and cannot vary it unless authorized by them. In such cases the freight forwarder may be considered to be an intermediary under rule 2(f) read with rule 9 of POPS since he is merely facilitating the provision of the service of transportation but not providing it on his own account. When the freight forwarder acts as an agent of an air line/carrier/ocean liner, the service of transportation is provided by the air line/carrier/ocean-liner and the freight forwarder is merely an agent and the service of the freight forwarder will be subjected to tax while the service of actual transportation will not be liable for service tax under Rule 10 of POPS.

2.2 ***The freight forwarders may also act as a principal who is providing the service of transportation of goods, where the destination is outside India****. In such cases the freight forwarders are negotiating the terms of freight with the airline/carrier/ocean liner as well as the actual rate with the exporter.* ***The invoice is raised by the freight forwarder on the exporter.*** *In such cases where the freight forwarder is undertaking all the legal responsibility for the transportation of the goods and undertakes all the attendant risks, he is providing the service of transportation of goods, from a place in India to a place outside India. He is bearing all the risks and liability for transportation. In such cases they are not covered under the category of intermediary, which by definition excludes a person who provides a service on his account.*

3.0 It follows therefore that ***a freight forwarder, when acting as a principal, will not be liable to pay service tax when the destination of the goods is from a place in India to a place outside India****."*

[Emphasis supplied]

8.1 It is claimed by the appellant that Paras No. 2.1, 2.2 and 3, describe the activity as carried out by them and therefore, due consideration is required to be given before arriving at any decision. In view of the facts of this case including that the invoice are raised by the in the name of exporters, by additing their mark-up.

8.2 On the other hand, the lower adjudicating authority, while confirming demand of has invoked the provisions of Section 65(19) of the Act pertaining to Business Auxiliary Service. The adjudicating authority has especially relied upon the provision of procurement of goods or services which are inputs for the clients and also definition of "Commission Agent" provided under Section 65(19) of the Act. It is observed by the adjudicating authority that differential amount in transportation of exported goods is based on the commercial factors. While confirming the demand, the adjudicating authority has given his findings at para 20 of the impugned order as under :-

> *"20. .... the present case is relating to demand of Service Tax on the differential amount that is commission which is clearly falls under the BAS. Notwithstanding above, I find that M/s. Inext Freight Forwarders have provided services to support the*

business of their clients. They have charged amounts from their clients in excess of what they pay to the shipping lines in the category of container ocean freight. I find that ocean freight is the actual freight incurred towards transportation of cargo by sea, thus the amount paid by M/s. Inext Freight Forwarders to the shipping lies qualifies as ocean freight. I find that the extra mount collected as mark-up over the basic ocean freight by M.s, Inext Freight Forwarders, is not an element of ocean freight, as it pertains to the service element over and above the actual cost of transportation/freight also. M/s. Inext Freight Forwarders is providing services to the exporters, including the service of procurement of bulk space to support the business of clients/exporters. It is also found that the extra amount collected by the notice from their clients, viz exporters is the consideration which they received in lieu of services provided by them and said consideration they received is the value of taxable services provided by them...."

8.3 The appellant has also relied on a decision of the Hon'ble CESTAT in the case of Karam Freight Movers reported as 2017 (4) GSTL 215 (Tri-Deli) wherein, it is held as follows :

"11. On the second issue regarding the service tax liability of the respondent under BAS, we find that the impugned order examined the issue in detail. It was recorded ***that the income earned by the respondent, to be considered as taxable under any service category, should be shown to be in lieu of provision of a particular service. Mere sale and purchase of cargo space and earning profit in the process is not a taxable activity under Finance Act, 1994****. We are in agreement with the findings recorded by the original authority. In this connection, we refer to the decision of the Tribunal in Greenwich Meridian Logistic (I) Pvt. Ltd. vs. CST, Mumbai – 2016 (43) STR 2w15 (Tri-Mumbai). The Tribunal examined similar set of fact and held that the appellants often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. It is a transaction between principal to principal and the freight charges or consideration for space procured from shipping-lines.* ***The surplus earned by 11 ST/2644/2012-ST [DB] the respondent arising out of purchase and sale of space and not by acting for client who has space or not on a vessel. It cannot be considered that the respondents are engaged in promoting or marketing the services of any "client".***

12. In the present case it was recorded that the respondent was already paying service tax on commission received from airlines/ shipping lines under business auxiliary service since 10.09.2004.

The original authority recorded that the show cause notice did not specify as to who is the client to whom the respondent is providing service. Original authority considered both the scenario, airline/ shipping lines as a client or exporter/ shipper as a clinet. In case the respondent is acting on behalf of airlines/ shipping lines as client, it was held that they are covered by tax liability under BAS. ***Further, examining the issue the original authority viewed that commission amount is necessarily to be obtained out of transaction which is to be provided by the respondent on behalf of the client, that is, the exporters. The facts of the case indicated that the mark-up value collected by the respondent from the exporter is an element of profit in the transaction.*** *The respondent when acting as agent on behalf of airlines/shiplines was discharging service tax w.e.f. 10.09.2004.* ***However, with reference to amount collected from exporters/ shippers the original authority clearly recorded that it is not the case that this amount is a commission earned by the respondent while acting on behalf of the exporter and 12 ST/2644/2012-ST [DB] said mark-up value is of freight charges and are not to be considered as commission.*** *Based on these findings the demand was dropped. We do not find any impropriety in the said finding. The grounds of appeal did not bring any contrary evidence to change such findings. Accordingly, we find no merit in the appeal by Revenue. The appeal is dismissed."*

[Emphasis supplied]

8.3.1 The above decision establishes that mark-up value of freight charges, cannot be considered as "commission". The impugned order has not brought any evidence to consider that the mark-up value is commission obtained from Shipping lines for acting as their agent. The lower adjudicating authority has held that the appellants has provided service to the shipping lines. As noted above, the appellant has not acted in the instant case as agent of shipping line, as they have not received any commission from shipping lines but entire amount from the exporters.

8.3.2 As regards the issue, whether any service has been provided by the appellant to exporters, it is seen from Para No. 7 of the impugned order that the demand is under the category of Business Auxiliary Service on the differential amount as Commission. The appellant has charged full amount to the exporter i.e. the cost of providing space, plus their profit margin (mark-up). If at all, the appellant has provided any service to the exporters, then service tax was required to be demanded on the amount charged from exporters and not only on the differential amounts.

8.4 The conjoint reading of CBEC's Circular dated 12.08.2016 *supra* and the recent judgement of the Hon'ble CESTAT in the case of M/s. Karam Freight Movers *supra* cited by the appellant, I find that the appellant had acted on principal to principal basis by booking space for containers/export goods and while handling the exporters. It is undisputed fact that the appellant had earned profit in form of mark-up while selling space in respect of Ocean freight to their client exporters, however mark-up value earned by the freight forwarder cannot be considered as "commission" and no Service Tax can be made payable on that amount under Business Auxiliary Service.

8.4.1 I agree that in few cases the appellant could incur losses also, when the space bought by the appellant from shipping lines could not be used fully by them in any particular month and therefore to visualize such mark-up as "Commission" and to charge Service Tax on such profit under the category of Business Auxiliary service as defined under Section 65(19) of the Act is not correct, legal and proper as clarified by CBEC Circular dated 12.08.2016 and also held by CESTAT in the case of Karam Freight Movers referred to above.

8.4.2 I also find that the commission agent is to make bills/invoices between buyers and sellers or service provider and service recipient, whereas in this case, the appellant were booking space slot well before the space was sold to their clients and that too in the appellant's own name on principal to principal basis and therefore it cannot said that the appellant has acted as agent to attract Service Tax under BAS category by any stretch of imagination only to make them liable to service tax under the category of Business Auxiliary Service.

8.5 In view of the above facts and legal provisions, I find that the appellant has sufficiently made out that no service tax is exigible on their mark-up income, generated on account of selling of space. CBEC Circular dated 12.08.2016, as well as the decision in the case of M/s. Karam Fright Movers *supra*, have overwhelming settled the issue in favour of the appellant. I, am, therefore, of considered view that confirmation of the demand of Service Tax, considering the mark-up income as 'commission' under category of Business Auxiliary Service is not correct, legal and proper.

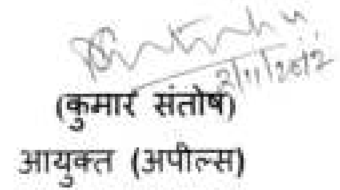
9. Since the appellant is not liable to pay Service Tax in the matter, payment of interest under Section 75 of the Act and imposition of penalty under Section 76 or under Section 78 of the Act does not arise. Accordingly, the appeal filed by the Department for imposition of penalty under Section 78 of the Act cannot survive.

9.1 Penalty has been imposed under Section 77 of the Act on the ground that the appellant has failed to comply with provisions of Service Tax Registration, Valuation, filing of correct returns, issuance of correct invoice, non filing of ST-3 Returns, however no instances of not filing of ST-3 Returns have been mentioned in the impugned order. Therefore, imposition of penalty under Section 77 of the Act is also not correct, legal and proper.

9.2. In view of above legal position and facts of the case, I set aside the impugned order and allow the appeal filed by the appellant and reject the appeal filed by the Department.

९.३. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है ।

9.3. The appeals filed by the appellants stand disposed off in above terms.



(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.
To,

M/s. Inext Freight Forwarders, 78, Shree Ram, Aaradhana Society, Airport Road, Rajkot.	मेसर्स इनेक्स्ट फ्रेघ्त फोरवारदेर्स, ७८, श्री राम, आराधना सोसाइटी, एयरपोर्ट रोड, राजकोट.

Copy to:

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3) The Assistant Commissioner, GST & C. Excise, Division-I, Rajkot.
4) The Jurisdictional Superintendent, GST, Div-I, Rajkot.
5) Guard File.