



CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/3 & 393 /2007 & ST/81 & 90/08- CU[DB]
ST/CO/145/08

Date 09/05/2012

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S JSEL SECURITIES LTD.

STOCK EXCHANGE BUILDING, JAWAHARLAL
NEHRU MARG, MALVIYA NAGAR, JAIPUR
M/S JSEL SECURITIES LTD.

Appellant

Vs
Respondent

C.C.E. JAIPUR-I

I am directed to transmit herewith a certified copy of **Final order No. ST/A/363- 366/2012 CU[DB]** dated 07.05.12
passed by the Tribunal under **Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax**


Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C.E. JAIPUR-I
NCRB, STATUE CIRCLE, JAIPUR.

2. Adv. / Consult
MR.JATIN MAHAJAN ADV
157 3RD FLOOR VINOBA PURI
LAJPAT NAGR - II NEW DELHI - 24

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file


Assistant Registrar
(Customs Appeal Branch)

P.T.O.

14. M/S Raj Kumar Singh. - St/363/07
12, Vidyut Abhiyanta Colony.
C-Block, Malviya Nagar
Jaipur.

15. Bipin Garg, Adv.
B-1/209-A Vasant Kunj
New Delhi -

16. M/S LSE Securities Ltd - St/81890/08
Stock Exchange Building.
Feroze Gandhi Market -
Ludhiana

17. CCE Ludhiana
Central Excise House 'A'
Block, Rishi Nagar
Ludhiana. - Ok.

18. Mr. J.K. Mittal, Adv.
A-15 3rd floor
Priyadarshini Vihar
Delhi - 92

**CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM,
NEW DELHI-110066**

COURT NO. II

**Service Tax appeal No. 3 & 363/2007, 81, 90/2008
With Cross Objection No. 145/2008**

Date of Hearing: 19th January, 2012

Date of pronouncement: 07-05-2012

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Service Tax Appeal No. 81/2007

[Arising out of Order-in-Appeal No. 329/ST/Apl./Ldh/2007 dated 29.10.2007 passed by the Commissioner of Central Excise (Appeals), Jalandhar, Chandigarh]

M/s.LSE Securities Limited

Appellant

Vs.

CCE, Ludhiana

Respondent

Service Tax Appeal No. 90/2007

[Arising out of Order-in-Appeal No. 329/ST/Apl./Ldh/2007 dated 29.10.2007 passed by the Commissioner of Central Excise (Appeals), Jalandhar, Chandigarh]

CCE, Ludhiana

Appellant

Versus

M/s. LSE Securities Ltd.

Respondent

ST/C.O./145/2007

[Arising out of Order-in-Appeal No. 329/ST/Apl./Ldh/2007 dated 29.10.2007 passed by the Commissioner of Central Excise (Appeals), Jalandhar, Chandigarh]

Present for the Assessee : Shri J.K. Mittal, Advocate
Present for the Revenue : Shri Amresh Jain, SDR

ST/3 of 2007

[Arising out of Order-in-Original No. 08-09/JPR-I/2006/Service Tax dated 11.7.2006 passed by the Commissioner of Central Excise, Jaipur-I]

M/s. JSEL Securities Limited Appellant

Versus

CCE, Jaipur-I Respondent

Present for the appellant : Shri Jatin Mahajan, Advocate
Present for the respondent: Shri B.L. Soni, SDR

ST/363 of 2007

[Arising out of Order-in-Appeal No. 86 (GRM)ST/JPR-I/2007 dated 13.4.2007 passed by the Commissioner (Appeals), Central Excise, Jaipur]

Shri Raj Kumar Singh Appellant

Versus

CCE, Jaipur Respondent

Present for the appellant : ~~Shri Mayank Garg~~, Advocate
Present for the respondent : Shri K.P. Singh, SDR

**Coram: Hon'ble Shri D.N. Panda, Judicial Member;
Hon'ble Shri Rakesh Kumar, Technical Member**

FINAL ORDER NO. ST/A/363-366/12- Cus.**Per D.N. Panda:**

This bunch of appeals were filed by the following assesseees and Revenue against levy of service tax on stock broking service and other consequences of law followed under Finance Act, 1994 (hereinafter referred to as "the Act") in respect of impugned orders mentioned against each:-

<u>Appeal No.</u>	<u>Party's name</u>	<u>OIO No. & Date</u>	<u>OIA No. & Date</u>
ST/3/07	JSEL vs. CCE, Jaipur	09/JPR-I/ 2006/Service Tax dt. 11.7.2006	---
ST/363/07	Raj Kumar Singh vs. CCE, Jaipur	4/ST/JP-I /2007 dt. 19.1.2007	86/GRM/ ST/JPR-I /2007 dt. 13.4.07
ST/81/08	LSE Securities vs.	79/CE/JC /LDH/ 2006 dt. 23.8.06	329/ST/ Appl/Ldh /2007 dt. 29.10.07
ST/90/07	CCE, Ludhiana vs. LSE Securities Ltd.	-do-	-do-

2. While assessee is in appeal No. ST/81/2008 Revenue has filed appeal No. ST/90/2008 against LSE Securities and against appeal of Revenue, assessee (LSE Securities) has filed Cross Objection which is registered as ST/CO/145/2008. Revenue's appeal against Order-in-Appeal dated 29.10.2007 is against waiver of penalties.

APPEAL NO. ST/3/2007

3.1 Appeal No. ST/3/2007 filed by Assessee is against adjudication order passed by the learned Commissioner on 24.7.2006 giving rise to levy of service tax of Rs. 7,45,634/- followed by interest and penalty on the receipt of Rs. 52,44,951/- and Rs. 60,42,324/- for the period 5.10.2000 to 13.5.2003 and 14.5.2003 to 9.9.2004 respectively on account of receipt of Stock Exchange "turnover charge" which were contended to have been paid to Bombay Stock Exchange/Jaipur Stock Exchange under the provisions of the Act.

3.2 Challenging the Adjudication Order dated 11.7.2006 it was submitted by Shri Mahajan, learned Counsel on behalf of the appellant M/s. JSEL Securities Ltd. that "turnover charges" recovered by the appellant were paid to Bombay Stock Exchange (BSE)/ Jaipur Stock Exchange (JSE) and that shall not form part of assessable value of taxable service provided and not liable to service tax. According to appellant, that such charges were collected for paying to the respective Stock Exchanges and were not the considerations of the appellant for providing stock broking service. This was a statutory levy under SEBI guidelines as required under SEBI Act, and were collected under the instructions of stock exchanges and SEBI.

3.3 Stock Exchanges are empowered to make laws, and by-law as well as Rules and regulations as per Section 8 & 9 of

Securities Contract Act, to regulation trade in securities. Any charge collected in terms of such Regulations made, shall not form part of assessable value of the appellant because such charges were collected separately and shown in the contract notes as well as in the invoices for payment to concerned stock exchanges.

3.4 Explaining further, Shri Mahajan submitted that "turnover charges" are type of charges which although are collected by the appellant, those were bound to be paid back to SEBI through Stock Exchanges under SEBI guidelines and Stock Exchanges Regulations. Such charges have gone to the stock exchanges, without a single paise out of that went to the pocket of the appellant. It was further submitted that the liability to pay service tax, if any on turnover charges, would arise in the hands of stock exchanges only because service tax is payable by service provider which are stock exchanges.

3.5 It was further submitted that turnover charges by its name itself was not commission or brokerage at all received by Appellant and when the appellant was not benefited out of collection of such charges, there cannot be levy of service tax on such collected amount under the Act since that does not form part of assessable value of taxable service. The appellant collected the charges as a pure agent according to Valuation Rules of taxable service for which that is not liable to service tax at all. The adjudication made to tax such charges

therefore, fails. So also, when turnover charges have no nexus or connection with the brokerage, that did not go to the pocket of the appellant, not having title of the appellant over the same.

3.6 Lastly, it was argued by Shri Mahajan that the adjudication was time barred for no wilful suppression made. The question involved in the adjudication being interpretation of law, the appellant cannot be made liable to service tax and extended period of limitation shall not apply. Similarly, penalty was also not imposable for the reasonable belief of the appellant that no tax liability arose in its case for the impugned period and it was also governed by provisions of Section 80 of Finance Act, 1994.

ARGUMENTS ON BEHALF OF APPELLANT IN APPEAL NO. ST/90 & 81/08 & C.O./145/08

4.1 Shri J.K. Mittal, learned Advocate appearing on behalf of appellant M/s. LSE Securities Ltd. in appeal No. ST/81/09 filed by the assessee and ST/90/08 filed by Revenue as well as in C.O./145/08 against appeal of Revenue, submitted that show cause notice dated 28.3.2006 demanding service tax for the period December, 2000 to March, 2004 invoking taxing entry under Section 65(105) (a) dealing with "stock broking service" was unwarranted when the appellant was registered with the authority since 11.7.2000 and paying service tax on brokerage

and commission under the said taxing entry and that was well within the knowledge of the Appellant.

4.2 According to the appellant, the dispute involved in appeal is levying of service tax on stamp duty, BSE charges and SEBI fees which were deposited by the appellant with the authority under different statutes. The demand of service tax of Rs. 15,14,554/- was raised in adjudication followed by penalties and interest. But penalties imposed under Section 76 & 78 of the Act were dropped by first appellate authority, invoking extended period of limitation. Revenue is in appeal against immunity granted to the assessee from penalty. Revenue has challenged decision of the appellate authority who held that the assessee had bona fide belief of no liability but deposited service tax before issuance of show cause notice and decision relating to penalty in Hindustan Steel vs. State of Orissa – 1972 (2) ELT J159 (SC) and Sumit Industries Ltd. vs. CCE, Surat – 2004 (164) ELT 375 (S.C.) was applicable. It was also grievance of Revenue in their appeal that once detection of evasion was made, the appellate authority should not have leniently considered the issues relating to waiver of penalties. But he should have confirmed the same. According to learned Counsel, such contention of Revenue has no basis when no liability arose due to bar of limitation and assessee had bonafide belief of no arise of liability as well as no deliberate suppression of facts made as found by learned

appellate authority below. So also it was plea of assessee that where interpretation of law is involved and confusion occurs, no penalty shall be levied and extended period cannot be invoked.

4.3. Shri Mittal, learned Advocate submitted that when the show cause notice dated 28.3.2006 was issued after two years from the date of initiation of inquiry, that vitiates the adjudication and no penalty was leviable. That was rightly considered by the learned first appellate authority. To support his contention he relied on the decision in the case of Gammon India Ltd. vs. CCE, Goa – 2002 (146) ELT 173 (Tri.-Mumbai) affirmed by thy Hon'ble Supreme Court as reported in 2002 (146) ELT A313 (SC), Mohan Bakers Pvt. Ltd. vs. CCE, Kolkata-IV – 2008 (221) ELT 308 (Tri.-Kolkata) affirmed by the Hon'ble Calcutta High Court as reported in 2009 (241) ELT A23 (Cal.) and Giriraj Industries vs. CCE, Kolkata-II 2009 (242) ELT A84 (Cal.).

4.4 It was also contended on behalf of the Appellant LSE Securities that stamp duty, BSE charges, SEBI fees are statutory charges which are remitted to SEBI as well as other authorities under respective laws. These charges are not includible in gross value of taxable service provided not being consideration of appellant and not subjected to service tax.

4.5 It was further argued that levy of service tax on stock broker was intended to be made by Section 67 of the Act and

that section under went amendment from time to time. When the service tax was levied for first time on stock broker service in the year 1994, there was a separate clause for taxing the value of taxable service under Section 67 which read as under:

W.e.f. 01.07.1994 to 15.7.2001

The value of taxable service:-

“(a) in relation to service provided by a stock-broker, shall be the aggregate of the commission or brokerage charged by him on the sale or purchase of securities from the investors and includes the commission or brokerage paid by the stock-broker to any sub-broker”

W.e.f. 15.07.2001 to 17.04.2006

Section 67 was substituted by a new section w.e.f. 16.07.2001, which read as under:

“the value of any taxable service shall be the gross amount charged by the service provider for such service rendered by him.

Explanation. – For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes, -

- (a) the aggregate of commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;

(b)"

4.6 It was further submitted by the learned Counsel for the appellant that although Section 67 of the Act has undergone amendment in the year 2006 significantly, that has no relevance to the present appeal because the period under dispute is December, 2000 to March, 2006 which is prior to amendment. Inviting attention to the budget speech of the Hon'ble Finance Minister in Parliament on 28.2.1994, learned Counsel submitted that in Para 8.7, legislature made its intention clear to impose service tax on brokerage/commission charged by stock brokers in relation to their services. Accordingly, other than the brokerage and commission nothing was intended to be taxed under law. Therefore, adjudication is confined to the brokerage/commission received by stock brokers and nothing beyond that was to be included in assessable value for taxation.

4.7 It was further argument on behalf of the appellant that speech by Hon'ble Finance Minister provides guides to interpret the law relating to imposition of service tax on stock broking service. To submit so, he relied on the decision of Apex Court in the case of K.P. Varghese vs. ITO, Ernakulam & Anr. – AIR 1981 SC 1922 : (1981) 4 SCC 173 : (Para 8). It was further submitted that a receipt which is not covered by charging section cannot be brought to tax. Therefore, following the decision in the case of Baroda Electric Meters Ltd.

vs. CCE – 1997 (94) ELT 13 (SC): (1997) 11 SCC 697 and following the ratio in the case of Indian Oxygen Ltd. vs. CCE – 1988 (36) ELT 723 (SC): 1988 (Supp.) SCC 658, the charges realised by the appellant not being its consideration, should be free from taxation. When the taxing entry of Section 65(105)(a) of the Act made clear what is to be taxed, machinery provision of law should not bring an unintended receipts to the jaws of taxation. He relied upon the decision of Apex Court in the case of CCE, Pondicherry vs. Acer India Ltd. – 2004 (172) ELT 289 (SC) to buttress his claim. Also to support his argument, learned Counsel relied on Board's Instruction M.F. (D.R.) Circular No. 32/3/2000-CX, dated 20.12.2000, Master Circular No. 96/7/2007, dated 23.8.2007, and Instruction F. No. 137/25/2011-ST, dated 3.8.2011. It was further submission of learned Advocate that what that is received by stock exchanges having been taxed in terms of entry 65(105)(zzzg) w.e.f. 16.5.2008 that recognises that the aforesaid three receipts made by the appellant were not its receipts but the receipts of the stock exchanges. Therefore, following instructions in F. No. 137/57/2006-CX-4 dated 18.5.2007 in terms of Para 4 thereof, it was clarified by the Board that service provided by stock exchange not hitherto taxed were intended to be taxed w.e.f. 16.5.2008. To support such contention, he relied on the decision on Steel City Securities Ltd. v CCE&C, Hyderabad-II 2009 (14) STR 479

(Tri.-Bang.) and First Securities Private Limited v. CST, Bangalore 2007 (7) STR 690 (Tri.-Bang.) and CCE, Indore v M/s. Indira Securities Final Order No. ST/337-339/11). According to him, once the issue has been settled in favour of the assessee, service tax cannot be levied by repetitive litigation by Revenue. Also following National Litigation Policy as conveyed through Instruction F. No. 390/Misc./163/2010-JC, dated 20.02.2010, it was conveyed that Government shall not file Appeal for the matter which is covered by a series of judgments of the Tribunal and the High Courts. Thus no contrary view can be taken by Tribunal to tax the appellant on the aforesaid legal position.

4.8 It was also submitted on behalf of Appellant that Board issued Instruction No. 187/107/2010-CX.4, dated 17.09.2010. Examining the issue on the basis of department's letter dated 13.4.2010 concluding that except the Stamp duty and STT, all other charges are includable in the value of taxable service. Such clarification flows from legislative intent of section 67 of the Act changed w.e.f. 28.04.2006 as well as the Service Tax (Determination of Value) Rules, 2006 introduced to value taxable services. It implies that Board has accepted that prior to 28.04.2006, the impugned charges were not includible in the value of taxable service. Disputes were going on across the country and for the period from December 2000 to March

2004, the appellant has been made to suffer for confusion in taxation.

4.9 When show cause notice was issued without appreciating registration status of the appellant w.e.f. 11.7.2000 that vitiates the adjudication and no tax is collectible. So also penalty is not leviable under Section 78 of the Act. There did not exist element of section 73 of the Act to issue show cause notice. Appellant relied on the decision in the case of UOI vs. Rajasthan Spinning & Weaving Mills – 2009 (238) ELT 3 (SC) [Para 18] to support his contention. According to Appellant, when inquiry against it was conducted, statements were recorded from its officers on 25.5.2004, 21.4.2005, 17.2.2005 and 10.3.2005. That clearly shows extended period of limitation should not have been invoked on 28.3.2006 which was the date of notice. All question raised by investigation having been answered by the Appellant, extended period of limitation is not applicable as is held by Supreme Court in the case of CCE, Chandigarh vs. Punjab Laminates Pvt. Ltd. – 2006 (202) ELT 578 (SC). The appellant having immediately replied on 24.5.2004 to the enquiring officer explaining details of each receipt made by it for different periods leaving no scope for invoking extended period, the show cause notice invoking extended period is ~~bad~~. The appellant was under bona fide belief that what was not due to it but was collected on behalf of BSE, SEBI, and other statutory authorities shall

not form part of its gross value of consideration received. Remittance of the collected amount was made to the concerned statutory authorities which is not in dispute. The appellant discharged entire tax liability on the brokerage received and nothing remained unpaid by it to the service tax authorities. Therefore, extended period of limitation is not invokable following the decision of Apex Court in the case of CCE, Aurangabad vs. Bajaj Auto Ltd. – 2010 (260) ELT 17 (SC) (para 12,15 & 16); Jaiprakash Industries Ltd. vs. CCE, Chandigarh – (2003) 1 SCC 67: 2002 (146) ELT 481 (SC) and Continental Foundation Jt. Venture v. CCE, Chandigarh-I – 2007 (216) ELT 177 (SC).

4.10 It was further argument that when a levy was under dispute and under series of confusion to the tax payers, no mala fide can be attributed to it following instruction No. 187/107/2010-CX-4 dated 17.9.2010 of Board. When the appellant discharged its tax liability on the brokerage/commission, period of limitation cannot be extended in such circumstances following the decision in See Steel City Securiteis Ltd. vs. CCE&C, Hyderabad-II – 2009 (14) STR 479 (Tri.-Bang.), First Securities Pvt. Ltd. vs. CST, Bangalore – 2007 (7) STR 690 (Tri. – Bang.) and CCE, Indore vs. M/s. Indira Securities Final Order No. ST/337-339/11, CCE, Pune vs. Telco Ltd. – 2006 (196) ELT 308 (Tri.-Mumbai) and

Rajhans Metals (P) Ltd. vs. CCE, Rajkot – 2007 (8) STR 498 (Tri.-Ahm.).

4.11 It was also argued on behalf of appellant that when learned Commissioner (Appeals) found that liability of the appellant arose from 15.5.2003, in that circumstance, he should have ignored the demand of Rs. 11,20,638/- pertaining to the period beyond 14.5.2008 which was barred by limitation.

4.12 Lastly, arguing against appeal of Revenue (ST/90/2008) it was vehemently objected that in view of the aforesaid submissions, Revenue's appeal being time barred and devoid of merit is not entertainable in absence of application for condonation of delay. When the first appellate authority passed order on 29.10.2007 appeal should have come to Tribunal from Revenue within 3 months thereof. But appeal was filed by it on 11.2.2008. Accordingly, that is time barred. Moreover, the Committee of Commissioners did not form an opinion to seek remedy of appeal applying section 86 of the Act. Revenue's reliance on the decision in Surat-I vs. Neminath Fabrics Pvt. Ltd. – 2010 (256) ELT 369 (Guj.) is of no relevance because that case was under Excise Law touching removal of goods without invoice, which is not the case in the present appeal. It was further argued by Shri Mittal that he opposes appeal of Revenue through Cross objection filed by

Assessee on the aforesaid ground argued by him as stated herein before.

APPEAL NO. ST/363/2007

5.1 Appeal No. ST/363/2007 is filed by the Assessee is against order-in-appeal dated 30.3.2007 upholding levy of service tax of Rs. 30,907/- followed by interest and penalty on DEMAT charges received by the Assessee.

5.2 Learned Counsel appearing of behalf of Shri Raj Kumar Singh has challenged the appellate order on the ground that "Demat" charges collected from investors does not belong to to the appellant for which levy of service tax of Rs. 30,907/- followed by penalty under Section 76 & 78 of the Act as well as interest on the demand was unwarranted. The appellate order is non-speaking and was passed violating principle of natural justice. Nothing was recoverable from the appellant as there was no liability because stock broker service envisages service in connection with sale or purchase of securities to any person and does not cover any other receipt. Demat account is maintained with depository. Stock broker purchases/sells shares on behalf of his client and charges brokerage thereon. Such brokerage is taxable. After transaction of sale/purchase, the delivery of share is routed through Demat account of broker. On such transactions, the depository levy charges. Such charges are levied in different forms i.e.

market stakes, inter-depository charges, custody charges. Since stock broker does transaction of purchase or sale he recovered the Demat charges from his client to pay to depository. Recovery of Demat charges is linked with transfer of shares from Demat account of broker to client or vice versa. Therefore, collection is not at all relevant to the act of sale/purchase of securities. Demat charges by no stretch of imagination can be treated as part of brokerage. The appellant charges brokerage/commission separately in the contract note and Demat charges being payable to depository cannot be treated as value of taxable service.

5.3 It was submitted on behalf of appellant that the adjudication was also time barred for issuance of show cause notice on 17.1.2006 for the period 1.1.2002 to 30.9.2005. No penalty was imposable when demand was time barred.

5.4 Learned Counsel also adopted the arguments of Shri Mittal, learned Advocate who argued in appeal No. ST/81/2008 and other appeals to submit immunity from levy of tax and penalty.

ARGUMENTS ON BEHALF OF REVENUE

6. Learned D.R. appearing on behalf of Revenue submitted that services taxed by concerned adjudication order imposed tax on the gross receipts finding the same to be relatable to the service provided by the appellant concerned and that cannot be detached from the gross value to ^{make} the same tax free.

According to Revenue, what that is integral part of service provided forms part of gross value following the decision of Tribunal in Naresh Kumar case – 2008 (11) STR 578 (Tri.-Kol.). The concerned recoveries made by the said broker contribute to the value addition to the service provided which needs appreciation. Relying on para 4 of decision of Tribunal in the case of Shriram Insight Sales Broker Ltd. – 2009 (14) STR 86 (Kol.) it was submitted that when the turnover charges are collected by share broker that was part of service charge. Similarly relying on the Larger Bench decision in the case of Bhagwati Traders – 2011 (24) STR 290 (TriL-LB) it was submitted that when the expenses reimbursable are taxed under service tax law, the realisation made by share broker cannot be excluded from gross value for taxation.

7. Placing Section 67 of the Act, learned D.R. argued that by Explanation I appended to Section 67 it was made clear by legislature that value of taxable service would include the aggregate of commission or brokerage charges by broker on sale or purchase of security including the commission or brokerage paid by the stock broker to any Sub-broker. Therefore, any amount charged by stock provider in relation to stock broking is required to be included in taxable value for levy of service tax.

8. Contending against the time bar aspect pleading of the assesseees, it was submitted by Revenue that when the

assesseees did not disclose entire receipts to Revenue the decision of Hon'ble High Court of Gujarat in the case of Niminath Fabrics (P) Ltd. – 2010 (256) ELT 369 (Guj.) brings them to the fold of levy of tax which has escaped originally. Accordingly, not only tax should be levied, penalty should also be levied.

9. Opposing the contention of Revenue, it was submitted on behalf of the assessee in Rejoinder that Revenue's appeal is without review order on opinion and Revenue cannot invoke extended period without appreciating facts and circumstances, including Budget speech making clear that service tax was not imposed on any receipt other than commission or brokerage. Whatever information was sought it was provided during investigation. There was no suppression. The interim order passed in Shriram Insight Broker Ltd. shall not bind the Division Bench while drawing conclusion in appeal. The appellants are entitled to the benefit of Apex Court judgement in the case of Bajaj Auto – 2010 (260) ELT 17 (S.C.).

10. Heard both sides and gone through different nature of receipts stated before us in these appeals which called for determination as to whether liable to service tax and also have gone through provision of the law with the principle laid down in various citations made before us.

11. In all these appeals, valuation of taxable service provided to an investor by a stock broker in connection with

sale or purchase of securities listed in a recognized stock exchange is in question. While Revenue says that various charges received by stock brokers shall constitute value of taxable service, assesseees oppose such proposition. Charges like Misc. charges, Trade Guarantee Fund (TGF), Investor's Protection Fund (IPF), Stamp duty, Stock Exchange charges, Transaction charges, SEBI fees, Custom Protection Fund (CPF) and Demat charges are intended to be included in value of taxable service by Revenue. But no inclusion thereof is the claim of the assessee. Therefore, the legal question as to whether receipts other than brokerage and commission made by stock brokers shall be liable to tax forming part of gross value of taxable service being common question in all the appeals, such question is dealt first for decision in all the appeals commonly dealt by this order for applying the legal principles to the respective cases.

LEGAL PROVISION FOR VALUATION OF TAXABLE SERVICE PROVIDED BY STOCK BROKERS PRIOR TO 2001 AND IN BETWEEN 2001 TO 2004

12.1 Matters before us fall within the periods before 2001 and after 2001 but before 2004. When service tax was introduced in the year 1994 to tax the service provided to investors by stock brokers in connection with sale or purchase of securities listed on a recognized stock exchange, legislature, up to the year 2001 intended that aggregate of the commission or brokerage charged to the investors by stock broker for sale or

purchase of securities shall be taxed under the charging provision of the Act. So also the commission or the brokerage paid by stock broker to any sub-broker was made liable to tax. Such receipts were measure of value for taxation. The valuation provision incorporated in section 67 of the Act envisaged that aggregate of commission or brokerage only shall be measure of tax. Basis of taxation was provided in express terms and no implied taxation was permitted by law.

12.2 Law is well settled that there is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpreted by expanding its width as to include therein the power to tax by implication or by necessary inference. The judicial opinion of binding authority flowing from several pronouncements of the Hon'ble Supreme Court has settled these principles:

- (i) in interpreting a taxing statute, equitable considerations are entirely out of place. Taxing statutes cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency;

- (ii) before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section; and
- (iii) if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject.

12.3 There is nothing unjust in the taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly. It is well settled that power to tax cannot be inferred by implication; there must be a charging section specifically empowering the State to levy tax. When these are the principles laid down by Apex Court in the case of *State of West Bengal vs. Kesoram Industries Ltd.* – 2004 (10) SCC 201, bringing a strange element to the ambit of tax shall be without authority of law. There was no scope provided by Section 67 of the Act to expend its width to have artificial measure of levy bringing a receipt by implication or inference running counter to the charging provision.

12.4 The scheme of valuation of aforesaid service which was in force till 15.7.2001 underwent amendment by Finance Act, 2001. The amending Act replaced section 67 by Finance Act, 2001, Prescribing levy of tax on the gross amount charged by service provider (stock broker) for the taxable service provided by him. Such aggregate charge was gross value. An

explanation appeared in the amended section declaring that value of taxable service as the case may be shall include certain receipts prescribed by different clauses appearing under section 67. Clause (a) is the relevant clause insofar as that relates to taxable service provided by stock broker and that is under consideration in these appeals. That clause states that aggregate of commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock broker to any sub-broker shall be liable to service tax. Thus, there is no extended meaning of measure of levy even by amended definition of valuation of taxable service.

12.5 Provision of section 67 provides the basis to determine the value of taxable service. No ambiguity persists in section 67 of the Act. No receipt other than commission or brokerage made by a stock broker is intended to be brought to the ambit of assessable value of service provided by stock broker. Charging section in a taxing statute is to be construed strictly. As is often said, there is no equity about tax. If the words used in a taxing statute are clear, one cannot try to find out the intention and the object of the statute [Ref: Govt. of Andhra Pradesh vs. P. Laxmi Devi – (2008) 4 SCC 720 : AIR 2008 SC 1640].

13. Learned Counsels arguing the matter are correct to say that budget speech of the Hon'ble Finance Minister made clear

what was intended to be taxed in respect of service provided by stock broker. It was submission of the learned Counsel Shri Mittal that in so far as stock brokers are concerned, brokerage or commission charged by them only from value of taxable service and that was intended to be taxed by the budget of 1994-95. This was the proposal in Part 'B' of the Budget presented to the Parliament on 28th February, 1994. Reading of the legislative intent from the budget speech and the express legislation in section 67 of the Act does not leave any room for implication of ambiguity. Therefore, express grant of the statute no way leaves scope for implication to make the statutory grant ineffective. Law being well settled that there is no intendment in taxation and the State has to discharge its burden of proof to bring the subject into tax, there is no scope to bring any other element of receipt other than brokerage or commission to the scope of assessable value in respect of service provided by stock brokers.

14. Normally value is derived from the price and value is the function of the price. This is conceptual meaning of value. Section 67 is the sole repository of law governing value of taxable service provided by the stock broker. Any charge on the non-includible elements other than brokerage or commission will result in arbitrary taxation. Similarly receipts not in the nature of commission or brokerage should not be taxed in disguise. The brokerage or commission service

provided by stock broker shall be liable to service tax. That being consideration for taxable service provided, become assessable value of such service. Because tax is compulsory exaction, no subject shall be made liable without authority of law. To the extent authority is vested, only to that extent tax can be imposed. Commission or brokerage charged by stock broker are only liable to tax by express provision of law. Any other exercise of authority beyond that shall make that fatal.

15. The correct assessable value of taxable service usually is the intrinsic value of the service provided since service commands that value only and that should only be taxed without any hypothetical rule of computation of value of taxable service under section 67 of the Act. The other receipts a stock broker ^{makes} are irrelevant for determination of the assessable value of taxable service provided by him. Thus the test is whether a receipt of stock broker is in the nature of commission or brokerage to levy service tax.

**BURDEN OF PROOF FAILED TO BE DISCHARGED BY
REVENUE TO BRING THE RECEIPTS TO CHARGE**

16. The appellants in these appeals received "turnover charges", stamp duty, BSE charges, SEBI fees and DEMAT charges contending that the same was payable to different authorities and claimed that the same is not taxable. But Revenue taxed the same on the ground that such receipt by stock broker was liable to tax. Revenue failed to bring out

whether the turnover charges and other charges in dispute in these appeals received by appellant were commission or brokerage. The character of receipts was claimed by appellants as recoveries from investors to make payment thereof to respective authorities in accordance with statutory provisions of Indian Stamp Act and SEBI guidelines and were not received towards consideration in the nature of commission or brokerage of sale or purchase of securities. While burden of proof was on Revenue to establish that such receipts were in the nature of commission or brokerage or had the characteristic of such nature that was failed to be discharged. The character of commission or brokerage is remuneration for the service of stock broking provided by a stock broker to investors. Therefore, aforesaid charges realized by appellants were not being of commission or brokerage are not taxable and shall not form part of gross value of taxable service. On merit, all the appellants succeed on the fundamental principles of taxation. Therefore, other contentions on merit made in respective appeals are not considered in this order.

TIME BAR

17. It was pleadings of all the appellants that their case do not attract provisions of section 73 of Finance Act, 1994. It appears that the scheme of levy introduced in union Budget of 1994 made clear to impose service tax on commission and

brokerage received by stock brokers from investors. Reliance of appellants on budget speech and different communications of Board as well as various citations make clear that there persisted several confusions between Revenue and appellants in respect of determination of assessable value of taxable service provided by stock brokers. Their bonafide belief appears to be clear when there was no levy on receipts other than commission or brokerage received by stock broker from investors. Suppression of material facts cannot be said to have been made when the commission or brokerage received were disclosed in their service tax returns and taxes were paid thereon. The circumstance in which suppression of fact made willfully to evade duty was under judicial scrutiny of Apex Court. There were two questions before Hon'ble Court in the case of Pushpam Pharmaceuticals Company V. Collector of C. Ex., Bombay - 1995 (78) ELT 401 (SC) as to whether the appellant was bound in the state of uncertainty in law to include the turnover of the two items and if it failed to do so then it amounted to suppression of fact and second whether it was the duty of appellant to keep the Department informed about the turnover of the goods which were not liable to any duty. No rule could be pointed out requiring a manufacturer to disclose the turnover of exempted goods. Even assuming it was, the appellant could not be held guilty of suppression when the law itself was not certain. Hon'ble Court held that

section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.

18. While deciding the matter of *Anand NishiKawa Co. Ltd V. CCE, Merrut* – 2005 (188) ELT 149 (SC). relying on the aforesaid observations in the case of *Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay* [1995 Suppl. (3)

SCC 462], the Hon'ble Court reiterated that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Accordingly when there is no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it is not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act. In *Densons Pultretaknik v. Collector of Central Excise* [2003 (11) SCC 390], Apex Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful mis-statement or "suppression of facts". This view was also reiterated in *Collector of Central Excise, Baroda v. LMP Precision Engg. Co. Ltd.* [2004 (9) SCC 703].

19. In the case of *Continental Foundation Jt. Venture V. Commr. Of C. Ex. Chandigarh - I - 2007 (216) ELT 177 (SC)*, Hon'ble Supreme court held that section 11A of the Act postulates suppression and, therefore, involves in essence *mens rea*. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong

words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct. It was accordingly held that when there is scope for entertaining doubt to take a particular stand that rules out application of Section 11A of the Act.

20. It was further held in the case of Continental Foundation Jt. Venture that as far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'willful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be

suppression or mis-statement of fact, which is not willful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be willful.

Once deliberate suppression of fact is absent, it is impracticable to hold fraud against Revenue and provision of section 73 of the Finance Act, 1994 is not attracted to the cases of the appellants. Accordingly, further discussion on the citations made by both appellants is considered to be redundant. So also no penalty is imposable for no case of section 73 made out against Assesseees.

21. On the aforesaid back ground of law:

- (i) All the appeals of assesseees are allowed, both on merit and time bar, setting aside the impugned orders; and
- (ii) Revenue's appeal is dismissed.
- (iii) Cross objection No. ST/CO/145/2007 filed against Revenue's appeal No. ST/90/2007 has become infructuous not being made on any new ground against first appellate order.

(Pronounced in the Open Court on 7/5/2012)

(D.N. PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER

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