IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

DATE OF HEARING : 12/04/2017.
DATE OF DECISION : 25/04/2017.

Service Tax Appeal No. 132 of 2012

CST, New Delhi	Appellant
Versus	
M/s K&A Securities (P) Limited	Respondent

Service Tax Appeal No. 139 of 2012

M/s Trustline Securities Limited	]	Appellant
(formerly known as	]	
M/s K&A Securities (P) Limited	]	
Versus		
CST, Delhi		Respondent

[Arising out of the Order-in-Original No. 25-ST/PKJ/CCE/ADJ/ 2011 dated 17/10/2011 passed by The Commissioner (Adjudication), Central Excise Commissionerate, New Delhi.]

Appearance

Shri Sanjay Jain, Authorized Representative (DR) – for the appellant/respondent.

S/Shri R.K. Tiwari, Advocate and K.S. Gupta, Consultant – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 53074-53075/2017 Dated : 25/04/2017

Per. B. Ravichandran :-

These two appeals are against order dated 17/10/2011 of Commissioner of Central Excise (Adjn.), New Delhi. Both the assessee/appellant and the Department filed appeal against the said impugned order. The brief facts of the case are that the appellant/assessee are engaged in trading of securities as stock broker and are registered as a Member of National Stock Exchange and Mumbai Stock Exchange. They were registered with the Service Tax Department under the category of stock broking, banking and other financial services and business auxiliary service. Certain enquiries were carried out by the officers, to verify the correctness of payment of service tax by the appellant/assessee. After verification of the records, proceedings were initiated against the appellant/assessee by way of show cause notice dated 18/03/2009. The notice proposed a service tax demand of Rs. 1,47,49,209/- for the period 2003-2004 to 2008-2009. The case was adjudicated by the Commissioner (Adjn.) which resulted in the impugned order. The Commissioner confirmed service tax liability of Rs. 52,17,670/- and dropped the demand for the rest of the amount. The main point of dispute is relating to valuation of taxable service rendered by the appellant/assessee. The Commissioner confirmed the differential demand for service tax payable by the appellant/assessee on various heads of income as detailed below :-

	Demand confirmed			**Rs.**
*	Turnover charges of BSE/NSE/SEBI		=	14,17,631/-
*	V-SAT Connectivity/Land Line		=	27,06,333/-
*	Excise Stamp Duty		=	4,50,767/-
*	AMC/Transaction Charges		=	80,978/-
*	Demat/Cheque Book Charges		=	4,40,069/-
*	Best Judgment Asstt. 2003-04		=	46,188/-
*	Service Tax on sub-brokerage 2003-04		=	75,704/-
	TOTAL	Extended period	=	38,00,039/-
		Normal Period	=	14,17,631/-

Penalties under Section 78, 76 & 77 of the Finance Act, 1994 have also been imposed.

2. The learned Counsel for the appellant contested the findings in the impugned order. His submission may be summarized as below :-

(a) the valuation of service provided by the appellant/assessee is in terms of Section 67 of the Finance Act, 1994. Clause (a) of Explanation 1 specified that as regards brokerage service the value will include 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 sub-broker. It is the contention of the appellant/assessee that payments made as pure agent of the client on various account of other charges, like transaction charges to stock exchanges, stamp duty to the Government authorities, Demat charges etc. cannot form part of taxable value of stock brokerage service. These charges have no nexus with the brokerage commission but were paid by the appellant/assessee on behalf of the clients;

(b) the charges paid to stock exchanges were covered by "stock exchange service" taxable w.e.f. 16/05/2008 and the same are not taxable under stock broker service previous to that date. The various amounts on which service tax confirmed, as above, cannot be put under the category of commission or brokerage on sale or purchase of securities. Reliance was placed on the decision of the Tribunal in **LSE Securities Ltd. vs. CE, Ludhiana** reported in **2013 (29) S.T.R. 591 (Tri. – Del.)** and final order No. ST/54021 of 2016 dated 06/10/2016 in the case of **M/s Consortium Securities Pvt. Ltd. vs. CST, New Delhi**. In terms of the said decisions of the Tribunal, these other charges cannot be taxed under brokerage or commission ;

(c) the demand for extended period is not legally sustainable. There is no evidence on record to prove any of the conditions like suppression of facts, mis-statement, collusion, willful fraud with an intention to evade payment of duty. The Tribunal held in **LSE Securities Ltd.** (supra) that extended period is not invokable in such situation. Reliance was also placed on various other decided cases to contest the demand for extended period ;

(d) there is a calculation error in calculating V-SAT/landline connectivity charges. The rate of service tax for the period 2004-2005 and 2005-2006 was 10%, whereas the same is calculated at 12% in the demand.

(e) regarding service tax liability of retained stamp duty amount, it is submitted that there is some dispute regarding the rate of stamp duty and the Delhi Government is yet to decide the correct amount. Accordingly, the same is kept by the appellant pending resolution of the dispute. The said amount cannot be subjected to service tax ;

(f) the best judgment assessment for the year 2003-2004 is in violation of principles of natural justice as the appellant/ assessee was not given due notice regarding the basis of such assessment.

3. The Revenue has filed appeal against the impugned order on the ground that the demand for extended period in respect of turnover charges should not have been dropped by the Original Authority. Further, appropriate penalty under Section 78 attributable to short payment of service tax on this account should have been imposed by the Original Authority.

4. The learned AR contested the appeal filed by the appellant/ assessee. He submitted that the taxable value should be the gross amount received by the appellant/assessee in connection with rendering of taxable services. The appellant/assessee failed to establish that they have collected charges under different heading from their clients to pay for various organizations like Stock Exchange/SEBI. Their claim for the exclusion of these charges on the basis of their acting as pure agent is not sustainable in the absence of clear supporting documentary evidences to that effect. The decision of the Tribunal in **LSE Securities Ltd.** (supra) cannot be made applicable to the present case in the absence of clarity on factual background.

5. We have heard both the sides and perused the appeal records. The appellant/assessee were registered with the Service Tax Department and were discharging tax under various taxable entries. As already noted, the dispute in the present appeal relates to valuation of taxable services. The Revenue contend that the appellant/assessee is collecting "other charges" and did not pay service tax on such charges. The claim made by the appellant/assessee is that these other charges are nothing but transaction charges paid to stock exchange and turnover fee, stamp duty etc. We have perused the impugned order which examined the details of each type of such charges in terms of the claim made by the appellant/assessee. The Original Authority held that the appellant/assessee failed to establish their claim to be as "pure agent" in terms of Rule 5 (2) of Service Tax Valuation Rules. On the excess stamp duty charges collected and retained by the appellant/assessee it was recorded that the amount which is shown as reserve and surplus in the balance sheet cannot be considered as receipt on account of stamp duty and accordingly liable to be added in the gross value for service tax purposes.

6. Regarding short payment of service tax under the category of banking and other financial services, the Original Authority held that Demat charges, settlement charges, cheque book charges are all integral part of gross value in terms of Section 67 of the Finance Act, 1994. Regarding best judgment assessment followed for the year 2003-2004 in terms of Section 72, the

Original Authority held that the ledger indicates the recovery of service tax by the appellant/assessee otherwise not recoverable in their capacity as sub-broker. Accordingly, invoking Section 73A the amount was ordered to be recovered from the appellant/assessee. However, we note there is no proposal in the demand notice invoking provision of Section 73A for recovery of amount.

7. The appellant/assessee claim that the decision of the Tribunal in **LSE Securities Ltd.** (supra) and **Consortium Securities Pvt. Ltd.** (supra) are applicable to their case. The Tribunal in the case of **LSE Securities Ltd.** (supra) observed as below :-

> "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 or 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".

8. While taking note of the observation of the Tribunal, as above, we are aware that the facts of the present case are to be examined before applying the ratio of the above decision. We have perused sample copies of contract note issued by the appellant/assessee to sum up their claims. The said contract note shows various amounts under different headings. The note shows brokerage, net rate, service tax and STT amount, wherever applicable, in respect of each of the transactions carried out by the appellant/assessee on behalf of the client. In the end of the contract note, there is a heading "other charges". The main dispute relates to the tax liability of the appellant/ assessee for receipts under "other charges". The contract note itself does not elaborate the nature of such other charges. The appellant/ assessee claims that the other charges covered the turnover charges, VSAT connectivity charges, stamp duty etc. Categorical documentary evidence to that effect is not on record. Further, we note that the claim of the appellant/assessee to have acted as "pure agent" can be considered only on fulfillment of the conditions mentioned in Rule 5 (2) of the Valuation Rules. The main requirement for exclusion of charges when the

appellant/assessee is acting as a pure agent is the amount collected from client should be passed on actual basis to third party based on a clear prior understanding. There are various conditions under the said Rule 5 (2). Only on fulfillment of all these conditions any consideration received by appellant can be excluded considering transaction under the concept of "pure agent". The evidences to that effect are not presently on record. While the principles laid down by the Tribunal in **LSE Securities Ltd.** (supra) are on the legal basis and the facts as obtained in the appeal under consideration then by the Tribunal. To apply the ratio, we find that the supporting evidence to establish the clear factual basis are to be examined. For this purpose, we find it fit and proper to set aside the impugned order and to remand the matter to the Original Authority for a fresh examination of the supporting evidences submitted/to be submitted by the appellant/assessee. The applicability of ratio of the decision of the Tribunal relied upon by the appellant/assessee is also to be examined. Since, the matter is remanded back to the Original Authority the grievance of the Revenue against the impugned order can also be looked into by the Original Authority while deciding the case afresh.

9. In view of the above discussion and analysis, we set aside the impugned order and remand the case back to the Original Authority for a fresh decision. The appellant/assessee shall be given adequate opportunity to submit their defence before a

decision is taken. The appeals are disposed of in the above terms.

(Order pronounced in open court on 25/04/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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