

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Service Tax Appeal No. 87451 of 2016

(Arising out of Order-in-Original No. 26/STC-V/SKD/16-17 dated 30.06.2016 passed by Commissioner of Service Tax-V, Mumbai)

M/s. National Securities Depository Ltd.

Appellant

4th floor, A Wing, Trade World,
Karnala Mills Compound, Senapati Bapat Marg,
Lower Parel, Mumbai 400 013.

Vs.

Commissioner of Service Tax-V, Mumbai

Respondent

3rd floor, Utpad Shulk Building,
Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

Appearance:

Shri S. Tirumalai, Advocate, for the Appellant

Shri Suresh Merugu, Joint Commissioner, Authorised Representative
for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85598/2020**

Date of Hearing: 09.01.2020

Date of Decision: 08.06.2020

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 26/STC-V/SKD/16-17 dated 30.06.2016 of Commissioner Service Tax – V, Mumbai. By the impugned order, the Commissioner has held as follows:

“5.01 I hold that the services provided by M/s National Securities Depository Ltd to their Depository Participants during the period from 01.04.2004 to 31.03.2009 are classifiable under the category of “Banking and Other Financial Services” as defined under Section 65 (12)(vii) and Section 65 (105)(zm) of the Finance Act, 1994;

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5.02 I, confirm the demand of Service Tax totally amounting to Rs 52,36,20,950/- (Rupees Fifty Two Crores Thirty Six Lakhs Twenty Thousand Nine Hundred and Fifty only) for the period 01.04.2004 to 31.03.2009 in terms of Section 73(2) of the Finance Act, 1994, read with Section 66 and Section 68 *ibid* and Rule 6 of Service Tax Rules, 1994;

5.03 I order for recovery of interest under Section 75 of the Act , at the appropriate rates on the amount of confirmed demand ordered for recovery at Para 5.02 above;

5.04 I impose a penalty of Rs. 500/- (Rupees Five Hundred only) under Section 75A of the Finance Act, 1994.

5.05 I impose a penalty of Rs 52,36,20,950/- (Rupees Fifty Two Crores Thirty Six Lakhs Twenty Thousand Nine Hundred and Fifty only) under Section 78 of the Act. If the Noticee pays the Service tax confirmed, as mentioned in para 5.02 above, along with the interest on delayed payment within 30 (thirty) days from the date of communication of this Order, the amount of penalty liable to be paid by the Noticee under Section 78 of the Act shall be twenty five percent of the service tax payable/ confirmed in para 5.02 above. However, the benefit of reduced penalty under Section 78 of the Act, shall be available only if the said Service Tax confirmed, Interest and the Penalty of twenty five percent of the service tax payable/ confirmed, so imposed under the aforesaid Order, is paid within the period of 30 (thirty) days from the date of communication of this Order.

5.06 I impose penalty of Rs 5000/- (Rupees Five Thousand only) on the Noticee for each failure to file proper periodical returns as prescribed under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 on the due dates and for failure to furnish the list of all accounts maintained by them in relation to Service Tax as required under Rule 5(2) of the Service Tax, 1994, respectively under Section 77 of the Act.

5.07 I, refrain from imposing penalty under Section 76 of the Act, as I have imposed penalty under Section 78 of the Act at 5.05 above.”

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2.1 Intelligence gathered by the officers of Directorate General Of Central Excise Mumbai Zonal Unit to effect that Appellants were not discharging service tax on operational income received on account of transaction fees, custodial fees etc, by wrongly claiming exemption from service tax as per Board Circular No.B.II/1/200/TRU dated 09.07.2001. These amounts received by the Appellants from Depository Participants appeared to be liable to taxation under the category of "*Banking and Financial Services*".

2.2 Acting on intelligence investigation were initiated and relevant details in respect of Operational Income received under various heads namely Annual Fees, Custodial Fees, Transaction Fees, Software License Fees etc. Along with Balance Sheet, Copy of MOU and projects agreements, service tax returns , registration etc., were called for. Statements of various functionaries of Appellants as detailed below were also recorded:-

- Shri Tejas Kulin Desai, Sr Vice President on 15.10.09
- Shri Hiten Pratapral Mehta, Vice President on 22.10.2009

2.3 Investigation made revealed that-

- Appellants' are a "body corporate" being a company incorporated under Companies Act, 1956 to whom the certificate of commencement of business was provided by SEBI.
- Appellants hold securities (like shares, debentures, bonds, Government Securities, units etc.) of investors in electronic form.
- They also provide related to transactions in securities;
- They interface with the investors through their agents called as Depository Participants;
- As per Balance Sheet, Appellants Depository Segment includes providing various services to the investors like dematerialization, re-materialization, transfer and pledge of securities in electronic form through closed user group network of business partners viz issuers/ Registrar & Transfer Agents and Depository Participants (DP);

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- There electronic platform is designed to provide information in relation to securities and enables the DP or their investors to have access to their securities holding at any time;
- Processes of de-materialization/ re-materialization. Pledge, transfer of securities indicate that there is provision of information, transfer of information and data processing through electronic media;
- Appellants are providing “*provision and transfer of information and data processing*” taxable under the category of “*Banking and Financial Services*” as defined by Section 65 (12)(a) of the Finance Act, 1994;
- The amounts charged and recovered by the appellants from the DP's by the Appellant for the provision of these services would be the taxable value on which service tax is liable to be paid;

2.4 After completion of investigations a show cause notice dated 23.10.2009 was issued to appellant asking them to show cause as to why-

- i. the services provided by them during the period from 1.04.2004 to 31.03.2009 to their Depository Participants as mentioned above, should not be classified as “Banking and Other Financial Services” as defined under Section 65(12)(vii) and Section 65 (105)(zm) of the Act;*
- ii. the Service Tax amounting to Rs 52,36,20,950/- (Rupees Fifty Two Crores Thirty Six Lakhs Twenty Thousand Nine Hundred and Fifty only) on the taxable amount of Rs 454,34,55,334/-, as detailed in Annexure –A, should not be demanded and recovered from them under proviso to section 73(1) read with section 66 and section 68 of the said Act under “Banking & Financial Services” category;*
- iii. the interest on the said ST demanded and payable as mentioned above should not be demanded and recovered from them under Section 75 of the Act;*

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iv. Penalty should not be imposed upon them under the provisions of Section 75A of the Finance Act, 1994 for failure to make an application for registration in form ST-1 within the prescribed time as required under Section 69 of the Act read with Rule 4 of Service Tax Rules, 1994;

v. Penalty should not be imposed upon them under the provisions of Section 76 of the Finance Act, 1994 for failure to pay service tax in accordance with the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994;

vi. Penalty should not be imposed upon them under the provisions of Section 77 of the Finance Act, 1994 for failure to furnish prescribed returns as required under Section 70 of the Act read with Rule 7 of Service Tax Rules, 1994 and failure to furnish the list of all accounts maintained by them in relation to service tax as required under Rule 5(2) of the Service Tax Rules, 1994;

vii Penalty should not be imposed upon them under the provisions of Section 78 of the Finance Act, 1994 for suppressing the value of the taxable services with intent to evade payment of service tax;

2.5 The show cause notice has been adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.6 Aggrieved by the impugned order appellants are in appeal.

3.1 We have heard Shri S Tirumalai, Advocate for the Appellant and Shri Suresh Merugu, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submitted that:-

- They have entered into agreement with the Income Tax department for provision of services (non depository segment) and to operate TIN Facilitation centres. For providing these services TIN facilitation Centres have obtained registration with Service Tax department and have paid the service tax due, under the category of Business Auxiliary Services.

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- These services and certain other services in respect of which service tax has been paid have been included in the demand resulting in duplication of demands to tune of Rs 19,81,59,112/-. The submissions made by them on this account have been rejected by the adjudicating authority for the reason that Shri T K Desai, SR V P has described various heads under which the service tax has been paid and did not include the service tax paid under this head.
- They had also produced a Chartered Accountant Certificate dated 25.04.2013 in respect of error in computation of demand in SCN, which has been brushed aside contrary to the decisions in following cases;
 - o Gopikrishna Processors [2007 (218) ELT 529 (T-Del)]
 - o Vijay Leasing & Company [2019 (3 TMI 49 CESTAT HYD)]
- As per the following decisions the same transaction could not have been taxed twice
 - o Speed and Safe Courier Service [2010-TIOL-493-HC-Kerala]
 - o ABN Amro Bank [2018-TIOL-2811-CESTAT-ALL]
 - o Chottey Lal Radhey Shyam [2018-TIOL-300-HC-ALL]
- The entire activity relating to the issue of PAN is a sovereign function and TIN facilitation Centres are only agents who have discharged the tax liability. As per Tribunal decision in case of UTI Technology Services Ltd [2012-TIOL-73-CESTAT-Mum], such services rendered in relation to Sovereign function cannot be taxed under the category of Business Auxiliary Services.
- From perusal of the correspondences with the department prior to registration on 17.11.2003/ 19.04.2004 CBEC Circular F No B-II/2001 TRU dated 09.07.2001, stating that service tax will not be leviable on NSDL or CDSL fee paid to the depositories and received from the customers on actual basis, clearly show that department was fully aware of all facts and hence the demand made by invoking

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extended period of limitation as per proviso to Section 73

(1) is not sustainable as held in following decisions:

- o Anand Nishikawa [2005 (188) ELT 149 (SC)]
 - o Kapoor Lampshade [2016 (337) ELT 14 (P & H)]
 - o Adani Gas Ltd [2019-VIL-239-CESTAT-Ahm]
 - o Macleods Pharmaceuticals [2013 (296) ELT 379 (T)]
 - o Accurate Chemical Industries [2014 (300) ELT 451 (T)]
 - o Raymond Limited [2017-TIOL-449-SC-CX]
- Extended period could not have been invoked in cases of interpretation of law and bonafide belief on their part
- o Microtek Forgings [2016-TIOL-1866-HC-P&H]
 - o Maruti Suzuki India Ltd [2014(307) ELT 625 9SC)]
 - o Super Synotex (India Ltd [2014 (301) ELT 273 (SC)]
 - o Srei Equipment Finance Ltd [2018 (17) GSTL 598 (CAL)]
 - o Bismee India Enterprises [2018 (10) TMI 1560]
 - o Vicco Ltd [2007 (218) ELT 647 (SC)]
 - o Madura Coats [2016 (4) TMI 989 MHC]
- They are governed by Depositories Act, 1996; SEBI (Depositories and Participants) Regulations, 1995 and the Bye Laws and Business Rules of The Appellant in terms of Depositories Act.
- Depository Participants are merely an agent Depositories. There is no service in the nature of Depository Service provided by the Appellant to the DP's. This is because in terms of the charging entry under the FA 1994 namely Section 65(105)(zm) the service is to be rendered to a customer. DP's provide the service to the customer/ client. There is no service in nature of Depository provided to the DP's as they are not customers in terms of the explanation provided under Board Circular F No B-II/2000-TRU dated 9.07.2001.
- "The word "customer" was substituted by the word "any person" from 16.05.2008. In case of Standard Chartered Bank 2015-TIOL-1713-CESTAT it has been held that the understanding in terms of above Board Circular with

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regard to the meaning of the word “customer” should prevail.

- They provide infrastructure to DP's and no depository service is provided to them. Board has vide Circular No 50/11/2002-ST dated 18.12.2002 clarifying that the services of “EASI” provided by CDSL is part and parcel of the depository service and covered under Banking and Other Financial Services.
- Their Business model requires them to recover from the DP's fixed fees as approved by the Bye Laws under SEBI Regulations. The DP's are entitled to charge customers based on the services rendered which shall include the aforesaid fixed fees for depository. The tax is collected on the gross amount charged by the DP's from the customers and the portion relating to the fixed fee is paid by DP's to the Depository.. Such a fee is tax paid and therefore there is no need to tax this once again.
- The SCN dated 23.10.2009, alleges that there services will fall under ambit of 65(12)(vii) which is “provision and transfer of information and data processing”, on the basis of Master Circular No 96/7/2007-ST dated 23.08.2007. This is contrary to circular F No B-II/2001-TRU dated 09.07.2001 and Circular No 50/11/2002-ST dated 18.12.2002, as per which their services were held to be depository services.
- As per CBEC Letter No 137/57/2006-CX.4 dated 18.05.2007 it has been clarified in context of stock exchange services that processing, clearing and settlement services provided by NSE/ BSE/ MCX/ NCDEX/ NSCCL/ BIOSL/ CCIL do not fall under any of the applicable taxable services such as online information and database access or retrieval, business auxiliary service or club and association services. “Provision and transfer of information and data processing’ was considered in the context of stock exchange services and it was clarified that these individual services cannot be categorized as stock exchange services.

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By the same logic there service services cannot be categorized as such.

- Provision and transfer of information should be an independent activity and not be an integral part of some other activity. It is not the principal service provided by them and no independent charges are collected for the same. Even if they are required to pay service tax under the category of Banking and Other Financial Service then the same will be under 65(12)(v) and not under 65 (12)(vii)
- In CMA CGM Global (India) Ltd [2016 (41) STR 292 (T-Mum)] it has been held that it is necessary for levy of service tax to classify the service under a specific clause. Similar view has been in case of United Telecom Ltd [2011 (21) STR 234 (T-Bang)]
- Board Circulars are binding on the department and beneficial circular cannot be withdrawn retrospectively as has been held in case of Ultra Tech Cement [2019-TIOL-1420-CESTAT-Ahm]
- Since the depository participants act as agents for the purpose of depository services and have discharged Service Tax on entire consideration including fees. Tribunal in case of Canara Bank [2012 (6) TMI 274 CESTAT] held that there cannot be any tax liability on these activities. Hon'ble Supreme Court has in the case of The Cement Allocation and Coordination Organization [1971 (9) TMI 161 Supreme Court] held that exemption available to principal will be available to agents also.
- If it is presumed that they are providing the services to Depository Participants then also the same could be only "infrastructure support service" which is in the nature of Business Support Service and not the Banking and Other financial Service.
- Commissioner has erroneously confirmed the demand on the basis of two circular namely Circular No 50/11/2002 dated 18.12.2002 and Circular No 96/7/2007 dated

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23.08.2007. The second circular contradicts the earlier circular with regards to the category of service.

- A vague show cause notice which is not specific and demand confirmed on the basis of such vague show cause notice cannot be sustained as has been held in following decisions:
 - o Brindavan Beverage (P) Ltd [2007 (213) ELT 487 (SC)]
 - o Ballarpur Industries Ltd [2007 (215) ELT 489 (SC)]
- Entire issue is revenue neutral as the service tax paid by them on services provided to DP's will be available as credit to the DP's
- Penalty is imposable when there is deliberate and malafide intention on their part to evade payment of taxes by suppression/ misrepresentation etc. They had filed proper returns on the due dates
- Apart from bald assertion there is no substance to show the fact of wilful suppression. Hon'ble Supreme Court has in the case of Uniworth Textiles Ltd [2013 (288) ELT 161 (SC)] held that the burden to prove suppression etc is on the department.
- They have not collected the service tax from their DP's under bonafide belief that they were not liable to pay any service tax.
- Counsel submitted additional documents as directed by the bench, at time of hearing, in form of ST-3 returns for the period 2004-05 to 2008-09.

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings recorded in the impugned order submitted that-

- The issue involved in the matter is with regards to the services of "*provision and transfer of information and data processing*" and not in respect of the custodial depository services as argued by the appellant counsel;
- The issue is covered by the decision of the tribunal in case of Bank of Baroda [2016 (43) STR 141 (T-Mum)]. In

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similar facts of the case it has been held that the services provided are classifiable under the taxable category of “Banking and Other Financial Services” as *“provision and transfer of information and data processing”*.

- The issue in respect of limitation is squarely covered by the decision in the case of Neminath Fabrics [2010 (256) ELT 369 (Guj)];
- Further tribunal has in case of Star India Pvt Ltd [2015 (380 STR 884 (T-Mum)] it has been held that not filing of the ST-3 return or not declaring the complete particulars of the service rendered on the ST-3 returns, amount to suppression and extended period of limitation as per proviso to Section 73 (1) is invokable.

4.1 We have considered the impugned order along with submissions made in appeal and during the course of argument of appeal and in written submission filed.

4.2 The issue for consideration in the present appeal before us is, “whether the services provided by the appellant to their Depository participants are in nature of “provision and transfer of information and data processing” services taxable under the category of Banking and Other Financial Services as defined by Section 65(12) of the Finance Act 1994.

4.3 Period of demand in the present case is for the period 01.04.2004 to 31.03.2009. Section 65 (12) of the Finance Act, 1994 reads as follows:

Section 65(12). –

“Banking and Other Financial Services” means

(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or any other person namely :-

- (i) financial leasing services including equipment leasing and hire-purchase;*
- (ii) credit card services;*
- (iii) merchant banking services;*

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(iv) securities and foreign exchange (forex) broking;

(v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include case management;

(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

(vii) provision and transfer of information and data processing; and

(viii) banker to an issue services; and

(ix) other financial services, namely, lending; issue of pay order, demand draft, cheque, letter of credit and bill of exchange; transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts.

(b) foreign exchange broking provided by a foreign exchange broker other than those covered under sub-clause (a).

4.4 Appellants do not dispute that they are a body corporate and are covered by the phrase "other body corporate" used in the definition of Banking and Other Financial Services.

4.5 As per para 4.4 of impugned order undisputedly appellants provide following services to the Depository Participants:-

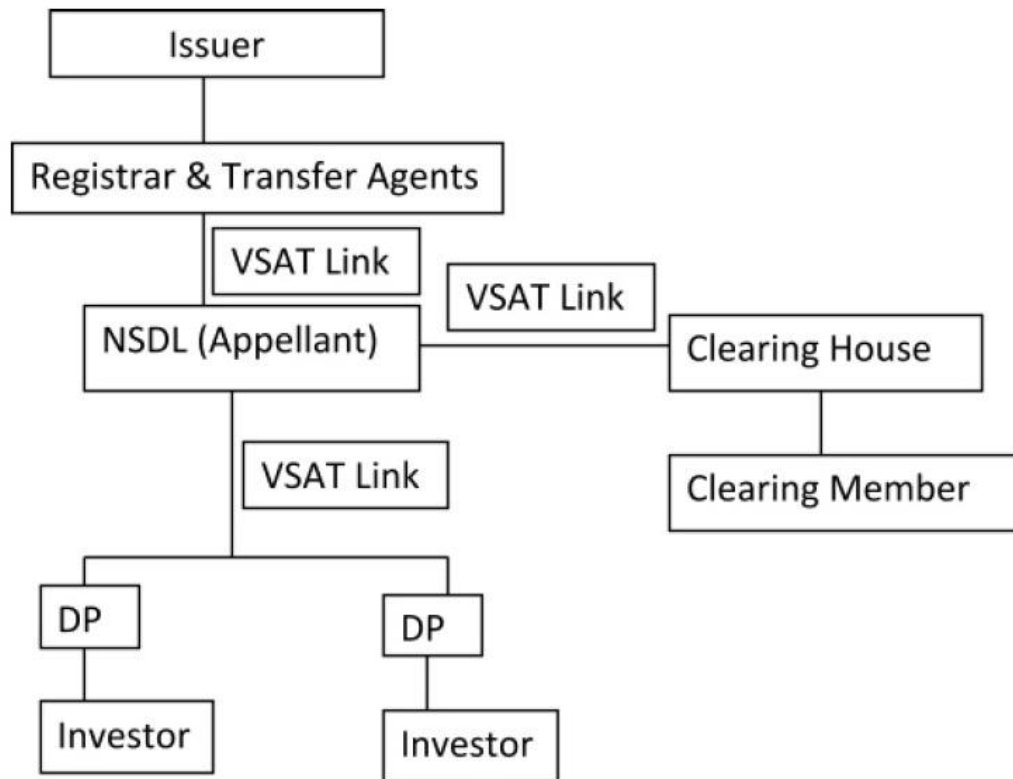
- ☐ De-materialization i.e. converting physical certificates to electronic form;
- ☐ Re-materialization i.e. converting securities in de-mat form to physical certificates;
- ☐ Facilitating repurchase/ redemption of units of mutual funds or debt instruments;

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- ☐ Electronic settlement of trades in stock exchanges connected to NSDL
- ☐ Pledging/ hypothecation of de-materialized securities;
- ☐ Electronic credit of securities allotted in public issues, rights issue;
- ☐ Receipt of non-cash corporate benefits such as bonus, in electronic form;
- ☐ Freezing of de-mat accounts, so that the debits from the account are not permitted;
- ☐ Nomination facility for de-mat accounts;
- ☐ Services related to change of address;
- ☐ Affecting transmission of securities;
- ☐ Instructions to DP over internet through SPEED e-facility;
- ☐ Account monitoring facility over internet through SPEED facility;
- ☐ Other facilities viz holding debt instruments in the same account, availing stock lending/ borrowing facility etc.

4.6 For providing these facilities appellants are electronically linked via satellite to various functionaries such as Depository Participants (DPs), issuing companies and their registrars and transfer agents, clearing corporations/ clearing houses of stock exchanges etc. Appellants in para 3.2.4 of their appeal memo provided the following schematic diagram in respect of the interconnections between them and various functionaries electronically:

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4.7 From the schematic diagram submitted by the appellant, it is quite evident that Appellant's are in fact having an electronic system providing for transmission of data to various participants/ partners in their business. In fact they provide the platform to their Depository Participants (DP's) through which they interact with Investor, Issuer, Registrar and Transfer Agents & Clearing House. For providing these services they charge certain fees from their Depository participants.

4.8 Section 4, 5, 9 & 10 of Depositories Act, 1996 read as follows:

"4. Agreement between depository and participant.

(1) A depository shall enter into an agreement with one or more participants as its agent.

(2)

5. Services of depository.

Any person, through a participant, may enter into an agreement, in such form as may be specified by the bye-laws, with any depository for availing its services.

9. Securities in depositories to be in fungible form.

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(1) *All securities held by a depository shall be dematerialised and shall be in a fungible form.*

(2)

10. Rights of depositories and beneficial owners.

(1) *Notwithstanding anything contained in any other law for the time being in force, a depository shall be deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner.”*

4.9 On their website, Appellants have specifically stated as follows:

Basic Services

Under the provisions of the Depositories Act, NSDL provides various services to investors and other participants in the capital market like, clearing members, stock exchanges, banks and issuers of securities. These include basic facilities like account maintenance, dematerialisation, rematerialisation, settlement of trades through market transfers, off market transfers & inter-depository transfers, distribution of non-cash corporate actions and nomination/ transmission.

The depository system, which links the issuers, depository participants (DPs), NSDL and Clearing Corporation/ Clearing house of stock exchanges, facilitates holding of securities in dematerialised form and effects transfers by means of account transfers. This system which facilitates scripless trading offers various direct and indirect services to the market participants.

Further in FAQ available on their web-site following have been stated:

“How can I avail the services of depository?

*A depository interfaces with the investors through its agents called **Depository Participants** (DPs). If an investor wants to avail the services offered by the depository, the investor has to open an account with a DP. This is similar to opening an account*

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with any branch of a bank in order to utilise the bank's services. Suggestions on how to select a DP are given in Section IV.

Is it possible to give delivery instructions to DP over the internet and if yes, how?

Yes. NSDL has recently launched a facility for delivering instructions to your DP over the Internet , called SPEED-e. The facility can be used by all registered users. Your DP will help you in registering for the facility.

How does SPEED-e work

You can submit delivery instructions electronically, on the SPEED-e website <https://www.speed-e.nsdl.com>, after your DP has authorised you to operate your account through the SPEED-e facility. You can monitor the status of such delivery instructions to ensure that the instructions have been executed.

How can I as de-mat account holder/ clearing member benefit from Speed-e?

The benefit offered by SPEED-e to a demat account holder / Clearing Member is the convenience of conducting demat account transactions using an Internet connection from anywhere at anytime eliminating paperwork. Time and efforts for obtaining delivery instruction forms from your DP and submitting them to the DP everytime you sell securities is saved.

How can I register myself for SPEED-e?

For using the SPEED-e facility it is essential that your DP must be registered with NSDL for this facility. There are two types of users for this facility , one is password based user who logs in with his password and can transfer securities only to three pre-specified broker accounts of his choice. The second is the smart-card based user who is issued a smart card for logging on to the site and can transfer the securities to any account. A password user can visit the SPEED-e website, fill-up the registration form available on the website. The website would allot a registration number and the DP of the client would authorise him for using the facility upon submission of a request with the registration number.

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A smart card user can download the form from the website, fill it and submit the same to its DP. The DP will process the form and enable the client for using the facility. The smart card user will also be issued a smart card reader and a smart card.

What will be the charges for account opening and other depository related services?

NSDL charges the DPs and not the investors. NSDL's charges to its DPs are fixed and are based on the usage of NSDL system. Complete details of NSDL charges as are payable by the DPs are available on NSDL website (www.nsdl.co.in). The DP charges its client for the services offered. The charges that the DP will be charging you for various services are mentioned in the Schedule of Charges which forms a part of the account opening agreement. You may keep a copy of this for your future reference. You can get the details of the charges from the DPs. You can also get a comparative list of DP charges from NSDL's office or from the NSDL website.”

Your DP may revise charges by giving you 30 days notice in advance.”

What precaution does NSDL take to protect the data in its depository system?

The data carries a high importance in the NSDL depository system. NSDL has taken necessary steps to protect the transmission and storage of data. The data is protected from unauthorized access, manipulation and destruction. The following backup practices are adopted to protect the data:

- o Local Backup
- o Remote Backup
- o Disaster Recovery Site

In addition to this, every DP is required to take daily backup, at the end of each day of operation”

4.10 As per the Business Rules of the Appellant, Depository participants are charged fees under various heads such as Entry Fees, Transaction Related Fees (namely Settlement Fees, Pledge

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Fee & Custody Fees) Fee for Dematerialization & Re-Materialization, Security Deposit, Annual Maintenance Fee for Corporate Accounts & Minimum Fee. The business rules make it clear that all such fees will be charged from and paid by the depository participant. Similar fees are charged from issuers. These rules further define the following terms as follows:

“3.1.5 Depository Module (DM) means the software installed at the depository;

3.1.6 Depository Participant Module (DPM) means the software(s) provided by the depository relating to the depository operations deployed and/ or assessed using the User Hardware system. This shall be either the DPM (DP), DPM (CC) or the DPM (SHR). The DPM (DP) shall include the e(DPM) and the Local DPM.

3.1.7 Depository Participant Module (Depository Participant) – [DPM (DP)] means the software relating to the Depository operations relating to the Depository operations installed on the hardware system of the Participant and Depository Participant Module (Clearing Corporation) – [DPM (CC)] means the software relating to the Depository operations relating to the Depository operations installed on the hardware system of the Participant which is a Clearing Corporation.

3.1.8 Depository Participant Module (Issuers/ Registrars) – [DPM (SHR)] means the software installed on the hardware system of the Issuer or its Registrar and Transfer Agent.

3.1.9 Depository System means the hardware, software and telecommunication network established by the Depository to facilitate the operations of the Depository. This shall include the Depository Module, Depository Participant Module, User Hardware System and the hardware installed at the Depository.

3.1.15 User Hardware System (Depository Participant)-(DP) means the hardware set up of the Participant relating to Depository operations and User Hardware System (Clearing Corporation)-(CC) means the hardware set up of the Participant which is a Clearing Corporation relating to Depository operations.

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This shall consist of servers, workstations, router and the communication line linking them to the Depository.

3.1.16 User Hardware System (Issuers/ Registrars)-[UHS (SHR)] means the hardware setup of the Issuer or its Registrar and Transfer Agent relating to Depository operations. This shall consist of servers, workstations, router and the communication line linking them to the Depository.”

Further these Business Rules lay down:

“4.1 Depository System

4.1.1 The User shall carry out transactions relating to the Depository only through the approved User Hardware System located at approved locations of the office of the user. No other workstation, computer system or hardware may be connected to the User Hardware System without the prior approval of the Depository.

4.1.2 Each User shall have a unique identification number provided by the Depository called BP ID which shall be used to identify that User by the Depository and by Other Users.

4.1.3 A User shall have a non-exclusive permission to use the DPM as provided by the Depository in the ordinary course of its business as such User.

4.1.4 The permission to use the DPM shall be subject to the payment by the User of such charges as may be specified by the Depository.

4.1.5

4.1.6 A Participant shall not, by itself or through and other person(s) on its behalf, publish, supply, show or make available to any other person or reprocess, retransmit store or use any information provided by the Depository for any purpose other than in the ordinary course of its business as a User of the Depository, except with the explicit approval of the Depository.

5.3 Fess and Charges

The Participant shall have the discretion to charge any fees to its Clients. Further, the Participant may charge different type of fees

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to its various Clients. In the event of the Client committing a default in the payment of any of the charges within a period of thirty days from the date of demand, without prejudice to the right of the Participant to close the account of the Client, the Participant may charge interest @ not more than 24% p.a. or such other rate as may be specified by the Executive Committee from time to time for the period of such default.

Provided further that the Participant shall file the charge structure every year, latest by 30th April, with the Depository and also inform the depository the changes in their charge structure as and when they are effected.

11.3.6 The Participant shall execute the instructions for Repurchase or Redemption of securities in the DPM (DP).

11.3.7 The Issuer or its Registrar and Transfer Agent shall verify the request in the DPM (SHR), and if in order, confirm the request for Redemption or Repurchase in the DPM (SHR) and pay the proceeds directly to the Client.

11.4.6 The Participant shall execute the instructions for conversion of securities in the DPM (DP).

11.4.7 The Participant shall authorize the ICF, enclose the client details printed from the DPM(DP) and forward it to the Issuer or its Registrar and Transfer Agent.

11.4.8 The Issuer or its Registrar and Transfer Agent shall verify the request in the DPM (SHR), and if in order, confirm the request for ISIN in the DPM (SHR) and provide to the Depository the details of the request for conversion of ISIN.

11.5.6 The Participant shall execute and forward the request electronically for transfer of holdings held in other eligible SGL entity to an account held with the Participant in the DPM System and shall inform the SGL entity name and SGL account number of the other eligible entity to NSDL in such form and manner as may be prescribed.

11.6.7 The Participant shall execute and forward the request electronically for transfer of holdings held in dematerialized form to other eligible SGL entity for transfer to an

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SGL account with other eligible entity, and shall inform the SGL entity name and SGL account number of the other eligible entity to NSDL in such form and manner as may be prescribed.

11.6.9 In case the request was for transfer to an SGL account with other eligible entity, the Depository shall confirm the acceptance of RRF-GS electronically to the Participant, after obtaining approval from RBI.”

4.11 All what has been stated in para 4.8, 4.9 & 4.10, above is stated in the Show Cause Notice. Show Cause Notice also refers to Statements of Shri Tejas Kulin Desai Senior Vice President of Appellant and Shri Hiten Prataprai Mehta, Vice President of Appellant wherein they were confronted with the above and they have stated as follows:

Statement of Shri Tejas Kulin Desai:

5.1. On being asked, Shri Tejas Kulin Desai stated that NSDL is having its Regd Office at 4th floor, A-Wing, Trade World, Kamal Mill Compound, Senapati Bapat Marg, Lower Parel, Mumbai-400013 and branch offices at New Delhi, Pune, Calcutta and Chennai; that NSDL is formed under the Depositories Act, 1996 and the regulatory framework has been notified by SEBI under SEBI (Depositories & Participants) Regulations, 1996; that the Bye-laws and the Business Rules of NSDL govern the functioning and operational procedures of NSDL; that NSDL is a body providing infrastructure to all its DPs and DPs in turn are mandated to provide services to investors; that NSDL is a depository whose depository participants provide 'Depository Service' in respect of securities to its clients.

5.2 On being asked as to how NSDL is providing services to Depository Participants, Shri Tejas Kulin Desai stated that NSDL is having Centralized Data Base along with the closed user group of its depository participants; that these DPs are Banks, Custodians, Public Financial Institutions, Stock Brokers, NBFCs; that there are about 280 DPs all over India; that NSDL maintains securities, consisting of shares, debentures, bonds, commercial papers etc. of the securities holders in dematerialized form. On being asked about the operation and functioning of NSDL, he stated that an investor

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wishing to avail depository related services like Dematerializing physical securities (certificates in paper form), transfer on sale/purchase of securities in demat form, account transfer etc. has to approach a DP and was required to open an account with any DP appointed by the depositories like NSDL; that the Investor would submit his physical securities with the DP where he had opened his account; that the DP would capture the required details in his system and forward the physical documents to the concerned company/registrar; that the electronic data captured by DP would be shown/displayed in the System of the Registrar; that the Registrar would also be connected with NSDL; that the registrar, on receipt of the physical documents, would verify the same and confirm the demat in his system; that the data captured by the DP was transferred to NSDL and stored in its Centralized System; that the demat request could be viewed and confirmed by the Registrar through NSDL system; that on confirmation by the registrar, the investor would get credit of securities in his demat account; that many banking companies and stock broking companies have been appointed as DPs of NSDL; that investors avail depository services from their DPs; that NSDL provides infrastructure to DPs in order to enable them to provide services to ultimate investors; that NSDL does not have specific mandate for DPs as regards their service charges and commercial strategy vis-à-vis their customers and therefore the service charge may differ from one DP to another.

5.3. On being asked about the different charges collected by NSDL from the DPs/Issuers/others, he stated that NSDL is collecting following charges under invoices from DPs /Issuers/others :-(A) **Different types of fees charged** namely (i) fees for steady; (ii) fees for speed facility; (iii) IDEAS fees; (iv) Speed-e fees; (v) Corporate Action Fees; (vi) Fees for change of share registrar (vii) Custody fees; (B) **Fees from TIN Projects**:- (a) e-Return Intermediary Registration; (b) Fees for accepting physical returns; (c) Fees for e-TDS/TCS/AIR upload; (d) Fees for PAN applications; (e) Fees for TIN (processing fees); (f) Fees for e-TDS/TCS/AIR processing charges; (g) Fees for TAN applications; (h) PAN Registration; (i) Fees for processing charges (CBEC); (C) **Fees on MAPIN** (D) **Misc. Income**:- a) Dividend Distribution; b) Exchange Traded Scheme. On being asked Shri Tejas Desai stated that the Operational income shown consists of: (a) Annual fees; (b) Settlement fees i.e. (i) Transaction fees; (ii) Pledge Fees ; (iii) Lending fees ; (iv) Penalty fees; (v) Reversal of erroneous TRF; (c) Remat Fees; (d) Entry Fees; (e) Software Fees; (f) Recovery on A/c of ISDN; (g) Processing charges; (h) IDM Fees; (i) Training fees; (j) Fees for Wan to Wan etc.; that NSDL has not paid service tax on the aforesaid services and the reason for non payment of service-tax was that they were not providing custodial services as defined under 'Banking and other Financial Services'; that NSDL had collected the aforesaid charges/fees under invoices without charging service-tax for the reasons mentioned above.

5.4. Shri Tejas Kulin Desai, inter alia, stated that under '**Banking and other Financial Services**', NSDL have been paying service tax under the head (a) Corporate Action (Benpos); (b) Corporate Action (fees); (c) Custody fees (one time); (d) Corporate action fees (freezing); (e) Corporate action (NSC/KVP); (f) Custody fees; (g) Corporate action fees (unlisted companies); (h) fees for change of share registrar (i) fees for speed (j) fees for steady (k) Corporate action (Delisting co.) (l) Speed fees received in advance (m) fees for Steady received in advance (n) fees received in advance; that NSDL charges DPs transaction charges for every transfer of shares (only on Debits from the Demat account), Demat, Remat, Pledge of securities, etc.;

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Statement of Shri Hiten Prataprai Mehta:

6.1 On being asked about the constitution of NSDL, he stated that M/s. National Securities Depository Ltd., are having Regd Office at 4th floor, A-Wing, Trade World, Kamal Mill Compound, Senapati Bapat Marg, Lower Parel, Mumbai-4000013 and branch offices at New Delhi, Pune, Calcutta and Chennai; that NSDL is formed under the Depositories Act, 1996 and the regulatory framework has been notified by SEBI under (Depositories & Participants) Regulations, 1996; that the Bye-laws and the Business Rules of NSDL govern the functioning and operational procedures of NSDL; that NSDL is a body providing infrastructure to all its DPs and DPs in turn are mandated to provide services to investors; that NSDL is a depository whose depository participants provide 'Depository Service' in respect of securities to its clients; On being asked how NSDL is providing services to Depository Participants, Shri Hiten Desai stated that NSDL is having Centralized Data Base along with the close user group of its depository participants; that these D.Ps. are Bank, Custodian, Public Financial Institution, Stock Brokers, NBFCs; that there are about 280 DPs all over India. NSDL maintains securities, consisting of shares, debentures, bonds, commercial papers etc. of the securities holders, in dematerialized form;

6.2. On being asked what is meant by Depository Participant Module and its use? Shri Mehta stated that DPM means a software relating to the Depository operations installed on the User hardware system; that Depository System means the hardware, software and telecommunication network established by the Depository to facilitate the operations of the Depository; that Depository Module means the software installed at the Depository.

6.3. On being asked about Speed-e and IDEAS facilities, Shri Mehta stated that these are the internet based facilities to enable the investors to submit instructions to DPs/NSDL and view statement of transactions respectively; that Speed-e facility is optional.

6.4. On being asked whether DPs can access securities information (Centralized system) maintained by NSDL electronically, Shri Desai stated that DPs are connected to NSDL and DPM software enables them to access the information maintained at NSDL pertaining to its own clients.

6.5. On being asked which are the fees collected under invoices by NSDL but no Service Tax was discharged on the same, Shri Mehta stated that invoices are raised on DPs for the fees viz., **(a)** Annual fees; **(b)** Settlement fees i.e. (i) Transaction fees; (ii) Pledge Fees; (iii) Lending fees; (iv) Reversal of erroneous TRF; **(c)** Remat Fees; **(d)** Entry Fees; **(e)** Software Fees; **(f)** Recovery on A/c of ISDN; **(g)** Processing charges; **(h)** IDM Fees; **(i)** Training fees; **(j)** Fees for WAN to WAN; etc. that the reason for non payment of service-tax on these fees was that they were not providing custodial services as defined under Banking & Financial Services.

6.6. On being asked as to whether the systems of the DP & NSDL were interconnected and how, Shri Mehta stated that DPs are connected to NSDL through leased line, V-SAT, Modem, ISDN.

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6.7. On being asked as to how the DPs deal with investors and NSDL, Shri Mehta stated that the DP opens demat account of investor who wishes to hold/transact in securities in demat form, accepts demat/remat requests, executes securities transfer instructions submitted by the investor, executes pledge instructions etc. DPs are connected to NSDL through leased line, V-SAT, Modem, ISDN; that the transactions of the demat account holders of the DP are reflected in NSDL central system.

6.8. On being asked as to what is/are the information(s) required to be filled in by the DPs in DPM, Shri Mehta stated that the DP captures the properly authorized instructions provided by the investor in the prescribed formats in the DPM system at its end.

6.9. On being asked as to where and how does the DP fill up such information and what is the mode of passing on the information filled in by the DP to NSDL, Shri Mehta stated that the DP captures the properly authorized instruction provided by the investor in the prescribed formats in the DPM system at its end; that the information is transmitted to NSDL system through leased line, V-SAT, Modem, ISDN.

6.10. On being asked as to how does NSDL become aware about the receipt of information from DPs, Shri Mehta stated that DPs release the transactions for execution on the DPM, which must be completed before the EOD process initiated at NSDL. In case the EOD has been initiated, any release of transactions shall be recorded for the next working day.

6.11. On being asked what does NSDL do with the information received from DPs, Shri Mehta stated that NSDL maintains all records in electronic form and ensures the integrity of DM to ensure that the data is not lost, destroyed or tampered with and in the event of loss or destruction, ensures that sufficient back up of records is available at all time at a different place.

6.12. On being asked as to whether NSDL transfers the information received from DPs to the Issuer, Registrar & Transfer Agent and the reasons for doing so and as to what is meant by Depository Participant Module Issuers/Registrars? Shri Mehta stated that the information pertaining to demat requests of the clients captured by DPs to Issuers/R & T Agents. NSDL also provides reports updating beneficial owners on a weekly basis to the Issuers, Registrars & Transfer Agents as per the agreement executed between NSDL, Issuers and/or the R & T Agents; that DPM (Issuer/Registrars) means the software installed on the hardware system of the Issuer or its Registrar and Transfer Agent.

6.13. On being asked as to whether NSDL receives back any information from the Issuer, Registrar & Transfer Agent and what does that information contain, Shri Mehta stated that no information is received back from Issuer, Registrar & Transfer Agent; that the confirmation of demat/remat request for effecting credit into demat account of the investor is received.

6.14. On being asked as to what information does NSDL system store and reveal, Shri Mehta stated that as per Rule 38 of the SEBI (Depositories and Participants) Regulations, 1996, every depository is required to maintain the following statutory records:

- (a) Records of securities dematerialized and rematerialized,
- (b) the names of the transferor, transferee and dates of transfer of securities,



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setup namely "Desktop as Server", "Entry Level Server without hardware RAID", "Entry Level Server with Hardware RAID" or "High End Server"; that Participants may choose appropriate option depending on anticipated business volume; that the document "Sizing Guidelines for Participants" is provided to help the Participant arrive at an appropriate configuration and the document "Overview of points to be followed for hardware installation & connectivity with NSDL" enlists the steps to be followed by Participant to establish their DPM setup; Shri Mehta explained the specifications of the I.T. setup required by a Participant; Shri Mehta explained that considering the rapidly changing models of Server and Client PCs resulting into improvised processor at a competitive cost, NSDL has empanelled minimum configuration for Server & Client as mentioned in the above table to be used in the setup for NSDL operations; that Participants are free to procure any model of Server & Client, of any hardware brand certified by the Microsoft Operating System with empanelled configuration mentioned in the above table; that Participants are required to procure Router and Modem only from the list of specific models empanelled by NSDL; that NSDL provides the Participants with DPM Application Software;

4.12 All the above business rules of the appellants and the Statements of their Senior Vice President and Vice President show that are providing for "provision and transfer of information and data processing" and these are provided in relation to their depository operations. In our view by providing for provision and transfer of information and data processing in relation to the depository services appellants have provided the "Banking and Other Financial Services" as defined by 65(12)(a)(vii) to the Depository Participants. Depository Participants have in turn utilized these as input services to provide Depository Related services to their users/ clients. Commissioner has in para 1.33 to 1.37 observed as follows:

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1.33 From the above facts, it appeared that NSDL holds securities (like shares, debentures, bonds, Government Securities, units etc.) of investors in electronic form. Besides holding securities, NSDL also provides services related to transactions in securities. NSDL interfaces with the investors through its agents called **Depository Participants (DPs)**. As per the Balance Sheet of NSDL, *Depository Segment* includes providing various services to the investors like dematerialization, rematerialisation, transfer and pledge of securities in electronic form through closed user group network of business partners viz., Issuers/Registrar & Transfer Agents and Depository Participants. It appears that the NSDL system is designed to provide information relating to securities in electronic form. **It further appeared that the platform provided by NSDL is to enable the DPs or their investors to have access to their securities holding at any given point of time electronically.** The processes involved in dematerialization, rematerialisation, pledge, transfer of securities appear to indicate that there is provision of information, transfer of information and data processing through electronic means. The nature of services provided by NSDL, as explained in detail in the preceding paragraphs, appear to indicate that they are providing 'provision and transfer of information and data processing' services which are taxable services under 'Banking and other Financial services' under Section 65 (12) (a) (vii) of the Act. Further, it is not in dispute in this case that NSDL are a 'body corporate', being a company incorporated under the Companies Act, 1956 to whom the certificate of commencement of business was provided by SEBI. **This fact has not been disputed by NSDL** and they have accepted that that NSDL, **being a body corporate**, have provided infrastructure to all their DPs and the DPs, in turn, were mandated to provide services to investors. Therefore, it appears that the services provided by NSDL to their DPs are taxable services under 'Banking and other Financial services' and the amounts charged and recovered from the DPs by NSDL for provision of these services would be the taxable value on which service tax at the appropriate rates appears to be leviable.

1.34 The Central Depository Services Limited (CDSL) has introduced a system called **EASI** (Electronic Access to Securities Information) to assist a CDSL demat account holder to easily adapt to the fast reducing settlement cycle. **EASI** is a Internet-enabled

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services to empower a demat account holder in managing his securities 'anytime-anywhere' in an efficient and convenient manner, all in a state-of-the-art secure environment. EASI enables a 'Demat Account Holder or Beneficial Owner' (BO) / 'Broker or Clearing Member' (CM) to view the holdings and transactions. EASI is a convenient, easy to operate internet based facility, which allows registered Beneficial Owners (BOs) & Clearing Members (CMs) to access their demat account through the internet to check the details of their holdings and/or transactions, anytime anywhere, through CDSL's website. In the light of the above discussions, it appears that the services offered by NSDL to DPs are similar to the services of CDSL, including that of EASI. In NSDL's FAQs mentioned earlier, it is stated that NSDL provides its' services to investors through its agents called depository participants (DPs); that NSDL charges the DPs and not the investors. NSDL's charges to its DPs are fixed and are based on the usage of NSDL system; that NSDL has taken necessary steps to protect the transmission and storage of data.

1.35 This issue has been dealt with in detail in **Circular No. 96/7/2007-S.T., dated 23-8-2007**. In response to a query as to *"Whether depository services and Electronic Access to Securities Information (EASI) services provided by Central Depository Services (India) Ltd., (CDSL) are liable to service tax under Banking and other Financial Services [section 65(105) (zm)]"*, it has been clarified that *"Services provided by CDSL fall within the scope of "provision and transfer of information and data processing". These services are not in the nature of "on-line information and data base access or retrieval services". Therefore, the depository services provided by CDSL including Electronic Access to Securities Information (EASI) for a fee are liable to service tax under Banking and other Financial Services [section 65(105)(zm)]."* Further, earlier also, doubts were raised with the Board as to whether Service Tax is payable on the services rendered by Central Depository Services (India) Limited (CDSL). CDSL was providing depository services in respect of DEMAT stocks to its customers. It had also implemented "Electronic Access to Securities Information" (EASI) to enable the owner to access accounts in the first phase and transact depository business in the second phase of the project. CDSL charged certain fees such as registration fee, annual fee etc. for providing service of EASI. The Board, vide **Circular No.50/11/2002-ST dt.18.12.2002**, clarified that depository service is one of the services covered under the category of 'Banking and other financial services.' The service of 'EASI' provided by CDSL is a part and parcel of depository service and hence covered under the category of "banking and other financial services". **They are liable to pay service tax on all depository service even if service is provided through Internet.** Since the services offered by NSDL to DPs are similar to the services of CDSL, the aforesaid clarifications appear mutatis mutandis applicable to NSDL.

1.36 NSDL have contended that even though they are a body corporate providing

taxable services to their DPs, the value of such service is not liable to service tax on the following grounds:

(a). It was clarified vide instruction F.No.B-II/2000 TRU dated 09.07.2001 that service tax will not be leviable on NSDL or CDSL fee paid to the depositories and recovered from the customers on actual basis.

(b). Board, vide letter No.137 /57 /2006-CX-4 dated 18.05.2007, has clarified that the services provided by the Stock Exchanges and transaction charges recovered by them under different categories of services do not fall under the category of any of the existing taxable services. The activities of NSDL and its status as an infrastructural nodal body is analogous to those of stock exchanges and the services provided by them to the DPs would also not fall under any of the existing taxable services.

1.37 It is observed that the clarification provided vide letter F.No.B-II/2000 TRU dated 09.07.2001 was given in the context of "custodial depository and trust services" [falling under category (v) of Section 65 (12) (a)], not in the context of "provision and transfer of information and data processing" [falling under category (vii) of Section 65 (12) (a)]. In this letter, it was, inter alia, clarified that "Custodial Depository Services" means safe keeping of securities of a client and providing services incidental thereto and includes (a) maintaining accounts of securities of a client; (b) collecting the benefit of rights accruing to the client in respect of securities; (c) keeping the client informed of the action taken or to be taken by the issuer of securities, having bearing on the benefits or rights accruing to the client; and maintaining and reconciling records of the services referred to in sub-clauses (a) to (c). Therefore, the clarification that service tax will not be leviable on NSDL or CDSL fee paid to the depositories and recovered from the customers on actual basis, does not appear to be relevant in the context of the taxable service viz. "custodial, depository and trust services". Similarly, the clarification given vide Board's letter No.137 /57 /2006-CX-4 dt.18.05.2007 in the context of services provided by Stock Exchanges does not appear to be applicable to the depository services provided by NSDL to Depository Participants in view of the Board's clarifications dt.18.12.2002 and 23.8.2007 mentioned above. It is also significant to mention that during the relevant time, the Depository Participants were discharging service tax only on the amounts involving services rendered by them to their investors/clients. **These Depository Participants were not discharging service tax on the fees payable to NSDL as NSDL were liable to pay service tax on the fees collected from the Depository Participants.**

4.13 On the same issue this tribunal has in case of Bank of Baroda [2016 (43) STR 141 (T-Mum)] held as follows:

"7. We find from the impugned order that the appellant is receiving the services from SWIFT, the service involved is transfer of information and also includes data processing. As far as transfer of information, there is no dispute even by the appellant. As regard the provision of data processing the

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messages sent through SWIFT are encrypted and decrypted in SWIFT's central system and thereafter it is re-encrypted before the transaction to the beneficiary SWIFT customer. Thus the message data is processed at both locations to prevent data loss. This clearly shows that the data is processed in the entire process of transferring of messages through SWIFT operating centre.

7.1 *On further perusal of record, we observe that the SCN contended that services provided by SWIFT relate to transmission and exchange of financial messages through SWIFT NETWORK between two users, with SWIFT acting as the carrier of such messages on a day-to-day basis. As per the information available on the SWIFT website, SWIFT provides the proprietary communications platform, products and services that allow their customers to connect and exchange financial information securely and reliably; SWIFT is solely a carrier of messages. It does not hold funds nor does it manage accounts on behalf of customers, nor does it store financial information on an ongoing basis. As a data carrier, SWIFT transports messages between two financial institutions. This activity involves the secure exchange of proprietary data while ensuring its confidentiality and integrity. As per the history of SWIFT available in the said website, SWIFT started the mission of creating a shared worldwide data processing and communications link and a common language for international financial transactions. The services provided by SWIFT involves providing of information related to financial transactions viz. transfer of funds; transfer of information contained in the said message after processing the data contained therein. Data processing in any computer is a process that converts data into information. The data contained in the said financial message when presented for processing is raw data which when processed become useful information for the customers viz. banks, financial institutions, etc., who then use the said processed information to debit and credit the customers accounts accordingly, i.e., funds settlement between the banks. The computer network operating systems, i.e., SWIFT*

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network, installed at BOB, SWIFT Network at Belgium and at the recipient's end, for whom the message is intended, manipulate raw data into information and likewise information systems typically take raw data as input to produce information as output. In the context of data processing, data are defined as numbers or characters that represent measurements from the real world. Measured information is then algorithmically derived and/or logically deduced and/or statistically calculated from the multiple data available from the said messages transmitted from BOB. Information is defined as either a meaningful answer to a query or a meaningful stimulus that can cascade into further queries. More generally, the term data processing can apply to any process that converts data from one format to another. From this perspective, data processing becomes the process of converting information into data and also the converting of data back into information. The terms 'information' and 'data' are not synonyms. Data is defined as raw facts while information is processed data. Information is the thing that one knows and data is the representation of the information. Information has meaning while data does not. Computers work with data and not information. Information is a subject of data. Data is unstructured, lacks context and may not be relevant to the recipient. When data is correctly organized, filtered and presented with context, it can become information because it then has "value" to the recipient. Data which is not information is often called raw data. The terms "data", "computer network", "information" are defined under various provisions of the ACT read with the relevant definitions provided under the Information Technology Act, 2000. From the discussions above, it appeared that to facilitate transmission of financial messages, computer network systems known as SWIFT network are installed at BOB and at the receiver's end, i.e., between all intended sender's and recipient's end and SWIFT network based at Belgium, which acts as the transporter/carrier of messages, receives, processes and transmits data between such intended users. Therefore, it appears that the entire activity of messaging of financial transactions with the intention to transfer funds, confirm receipt

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of such messages, etc., is done exclusively with the objective to retrieve the information contained in the said financial message, process the same and then transfer the processed information to the respective customers, i.e., presenting and recipient banks, financial institutions, etc., as the case may be. After the processing is complete in all respects, such processed data leads to settlement of funds between BOB and the recipient banks. It further appeared that messaging data through magnetic media or through communication backbone leads to data being transferred between two intended users related to the same financial transaction.

7.2 *From the above detailed process involved, it is clear that the activities appear to amount to provision and transfer of information and data processing in relation to banking and other financial services, as defined under the Act and clearly covered under the entry provided in sub-clause (a)(vii) of Section 65(12), i.e., “provision and transfer of information and data processing”.*

7.3 *As regards the contention of the appellant that SWIFT does not fall under the category of ‘banking and other financial institutions’ as SWIFT is not engaged in the business of banking and other financial services, we find that if any person provides the service which is covered under the four corners of definition of “Banking and Other Financial Services”, it shall be taxable. Moreover there is no dispute that the SWIFT is a ‘body corporate’ and covered under the definition of “Banking and Other Financial Services”. As per the plain reading of the definition, apart from ‘banking and other financial institutions’, the category of a person such as ‘body corporate’ and ‘any other person’ are also covered. Therefore, it is not significant as to what is the nature of the person who is providing the service, but if the service is covered under the definition, such service is liable to service tax, even if it is presumed that SWIFT is not involved in “Banking and Other Financial Services”. The service shall remain taxable as the service is clearly covered under the definition of “Banking and Other Financial Services” in clause*

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(vii) of Section 65(12). Moreover the appellant being liable to pay the service tax is 'deemed service provider'. Therefore, the status of the appellant is required to be considered and not the status of service provider who is located outside India. For this reason the appellant is undisputedly the deemed 'banking and other financial institution'. Hence, the submission of Id. counsel does not hold water and it is rejected."

4.14 Thus we find that throughout Appellants were providing for "provision and transfer of information and data processing" and these are provided in relation to their depository operations. Thus the services provided by them to Depository Participants are covered by the definition of Banking and Financial services and are liable to service tax under that category. Appellants have taken the stand that extended period of limitation cannot be invoked as the relevant facts were in knowledge of the revenue and hence they had not suppressed anything from the revenue authorities with the intention to evade payment of tax. They have relied upon various case laws on the subject. From the facts as available on record specifically the correspondences with CBEC, referred to by them we find that the issue involved in those correspondences were in relation to Central Depository Services and not in relation to services of providing for "provision and transfer of information and data processing". Since the services which are subject matter for the present dispute were never disclosed to the concerned revenue authorities hence we are not in position to uphold the contentions raised by the appellant's against invoking extended period of limitation to demand the tax from them. For upholding the invocation of extended period of limitation we rely on the decision Hon'ble Gujarat High Court in case of Neminath Fabrics [2010 (256) ELT 369 (Guj)] and CESTAT in case of Star India Pvt Ltd [2015 (380 STR 884 (T-Mum)].

4.15 Appellants have challenged the quantification of demand on two counts, stated as follows:

- The amount collected by them from the DP's was the gross amount collected and if the tax was to be demanded then

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this amount should be treated as inclusive of Service Tax payable. Thus treating this amount as cum tax amount the tax payable should be computed as per Section 67(2) of the Finance Act, 1994.

- They had paid a certain amount of taxes during the period of dispute. The amounts paid by them towards the tax was also reflected in their ST-3 returns. This tax paid should have been taken into account while determining the tax payable by them.

4.16 Commissioner has dealt the two issues raised by the appellants in para 4.19 and 4.20 of his order. These para's are reproduced below:

"4.19 The noticee have claimed that there is a computation error in the SCN and excess calculation of Rs.20.03 crores towards alleged liability of Service Tax has been made in the SCN. I have gone through the discrepancies pointed out by the noticee in the Annexure (computation statement) attached to the SCN, the computation statement as provided by the noticee and the documents available on record and find that the objections raised by the noticee with regard to the demand amount is bereft of merit. The contention of the noticee that service tax is not leviable on penalties collected by them from their customers is not acceptable since Service Tax is leviable on the gross amount charged by the service provider in terms of Section 67 of Chapter V of the Finance Act, 1994 and penalties collected by noticee form a part of the gross receipts. The noticee has further claimed that Service tax is already paid on 'Fees for E-TDS (AIR) Upload', 'Fees for E-TDS Upload 04-05', 'Fees for E-TDS Upload 05-06', 'Fees for Tin (Pan 45)' 'Fees for Digitisation charge' and 'Fees for Tin (Tan 35)'. In this regard, I have gone through the statement dt. 15.10.2009 of Shri TK Desai, Senior Vice-president of noticee, wherein he has described all the different heads on which Service Tax has. been paid by the noticee. I do not find mention of the heads on which service tax is alleged to have been paid by the noticee in the statement. Therefore, I am not inclined to accept their contention. As

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regards the noticees contention that Service Tax is calculated twice on same item 'Recovery on A/c of ISDN', I find from the data provided by noticee that there are two distinct items 'Recovery on A/c of ISDN (Tin)' and 'Recovery on A/c of ISDN'. Therefore the Service tax calculation is done correctly. The noticee has also contended that 'Dpm Licence fees', 'MS Exchange Licence fees' and 'SQL – Licence fees' are together called 'Software Licence fees' and that the department has erred in taking this amounts once individually and again under the broad heading resulting in doubling of demand. I find from the records that all the four heads find separate mention in the data provided by noticee and therefore the same are correctly reflected in the Annexure to SCN. In view of the above, I find that the computation of demand is correctly done as made out in the SCN.

4.20 Another contention of the noticee is that even if service tax is payable on the value of services rendered, then the liability if any has to be determined as if the value is inclusive of service tax. Cum-tax value is provided for in Section 67(2) of the Finance Act, 1994 which is reproduced below:

Section 67 Valuation of taxable services for charging service Tax

(1)

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3)

(4)

It is not the argument of the noticee that the consideration collected by them is inclusive of service tax nor that is a fact.

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Provisions of Section 67(2) of the Finance Act, 1994 are not applicable to them.”

4.17 We are in agreement with the submissions made by the appellant that benefit of cum tax value and the tax paid by them during the relevant period should have been taken into account while determining the tax payable by them. Larger Bench of Tribunal has in case of Shri Chakra Tyres [1999 (108) ELT 361 (T-LB)] held as follows:

“9.1 We have carefully considered the pleas advanced from both sides, assessable value is required to be determined in terms of Section 4 of the Act. Sub-section 4(4)(d)(ii) envisages deduction of aggregate effective duty payable on the goods under the Act, and all other Acts, if the wholesale price at which goods are sold includes all such excise duties. Wholesale price is the total consideration received by an assessee against sale of excisable goods in wholesale trade. Wholesale price will include the element of duty payable on any goods because such duty forms part of the consideration for sale of the goods according to terms of sale of the goods. If any further demand of duty is created against an assessee and such further demand of duty cannot be passed on to a customer in view of the terms of sale of any goods between the assessee and a customer, the original consideration (including duty, if any) received by an assessee for sale of the goods in wholesale trade, has to be taken as cum-duty price for the purpose of demand of higher duty subsequently. Any hypothetical consideration that the sale price would have gone up had correct duty been paid in the first instance cannot, in our opinion, be made the basis for non-abatement of differential duty from the realised sale price. We have to take into account the facts as they are, not what they might have been. Total duty proposed to be demanded shall have to be abated from the cum-duty price actually received and liable to be received as a consideration for sale of goods. This is the mandate of Sub-section 4(d)(ii). Contention of assessees, as given in examples in para 6.2 above is correct and in conformity with the provisions of Section 4(4)(d)(ii). We take support for

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our view from the Apex Court's judgment in Pravara Pulp (supra). Analysis made by the Tribunal in Express Rubber (supra), relevant portion of which has already been extracted above is apt in our view. We endorse the same."

Same view was expressed by the Hon'ble Apex Court in case of Maruti Udyog [2002 (141) ELT 3 (SC)] in following words

"A reading of the aforesaid Section clearly indicates that the wholesale price which a charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which is included in the wholesale price is to be excluded in arriving at the excisable value. This Section has been so construed by this Court in Asstt. Collector of Central Excise & Others vs Bata India Ltd., [1996] 4 SCC 563, and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realised by the respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty."

4.18 Hence in our view the benefit of "cum tax value" as per section 67(2) of the Finance Act, 1994 should be extended to the appellant's while determining the tax payable. In our view the Commissioner has erred in not extending the benefit of tax

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already paid by the appellant in respect of certain services sought to be taxed again in the present proceedings. Hence the matter for quantification of demands on the above lines need to be remanded back to the original adjudicating authority for de-novo consideration.

4.19 Since we uphold the demand of tax made, we uphold the demand of interest made under Section 75 of the Finance Act 1994. For doing so we rely upon the decisions as follows:

- P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] affirmed by the Hon'ble Supreme Court [2016 (335) ELT 196 (SC)];
- Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
- TCP Limited [2006 (1) STR 134 (T-Ahd)]
- Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]
- Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)].

4.20 Penalty has been imposed by the Commissioner under Section 75A & 77 for various infractions noticed in complying with provision of law. For imposing penalty under these Sections Commissioner has recorded as follows:

"4.22 As regards imposition of penalty under Section 75A of the Act, I find that they failed to apply for registration as required under Section 69 of the Act read with Rule 4 of Service Tax Rules, 1994 and therefore penalty under Section 75A of the Act is rightly imposable.

4.25 As regards proposed penalty under Section 77 of the Act, I find that the noticee have failed to file proper periodical return as prescribed under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 on the due dates and also failed to furnish the list of all accounts maintained by them in relation to Service Tax as required under Rule 5(2) of the Service Tax Rules, 1994. By virtue of the provisions of Section 77 and by the acts of omission by M/s. NSDL as mentioned above, I hold M/s. NSDL liable to penal action under Section 77 of the Act."

Penalties under Section 77 are civil in nature and are imposed for infractions noticed. Hon'ble Supreme Court has in case of

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Gujarat Travancore Agency vs. Commissioner of Income Tax [1989 (42) ELT 350 (SC)], Hon'ble Supreme Court held as under:

4.In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mensrea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 : "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

Since there is no dispute about such infractions as recorded by the Commissioner in his impugned order, penalties as imposed under Section 77(2) are justified.

4.21 While imposing penalty under Section 78 of Finance Act, 1994, Commissioner has observed as follows:

"4.23 As regards proposed penalty under Section 78 of the Act, it is seen from the case records that the noticee had provided the services for a commercial consideration and have deliberately failed to assess and pay Service Tax due on the value received by them on account of these taxable services

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provided. They also did not file periodical ST-3 returns for these taxable services provided which clearly proves that they had avoided payment of Service Tax within the due dates stipulated under STR, which but for the said investigation initiated by DGCEI would not have come to light, thereby making them liable to penalty under Section 78 of the Act. Moreover extended period under proviso to Section 73(1) has been correctly invoked in the subject case. Noticee's reliance, in this regard, on various case laws like: (i) Nizam Sugar Factory vs CCE AP [2006 (197) ELT 465 (SC)] (ii) Dolphin Detective Agency vs CCE Belgaum [2006 (4) STR (25)] (iii) Ugamchand Bhandari vs CCE Madras [2004 (167) ELT 491 (SC)] (iv) Mentha & Allied Products Ltd. [2004 (167) ELT 494 (SC)] wherein the matter is relevant to the Departmental Assessment era of 1991, and other similar judgments are misplaced and not relevant to the subject case. Penalty is punitive as well as preventive measure to act as a deterrent against recurrence of breach of law and also to discourage non compliance of law especially when there has been deliberate avoidance of payment of tax. Penalty prescribed under Section 78 of the Act is for deliberate avoidance of payment of tax. Noticee's case is squarely covered under the provisions of Section 78 of the Act for imposition of penalty. In view of the above, Noticee have no case for non imposition of penalty and as such penalty under Section 78 of the Act is rightly imposable in respect of his case."

Since we uphold the invocation of extended period of limitation in the present case, the penalties imposed under Section 78 cannot be faulted with in view of the above referred decision of the Hon'ble Bombay High Court {para 4.19, supra} and the decision of Hon'ble Supreme Court in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)].

4.22 Thus we summarize our findings in the appeal as follows:

- the services provided by the appellant to depository participants are aptly of "provision and transfer of information and data processing", classifiable under (vii) of

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Banking and Financial Services as defined under Section 65(12) of Finance Act, 1994;

- Extended period of limitation as per proviso to Section 73(1) of Finance Act, 1994, for demanding the service tax is invocable.
- benefit of cum tax value as per sub-section (2) of Section 67 of Finance Act, 1994 is admissible to the appellants and so is also the benefit of the tax already paid as per the ST-3 returns filed by them, hence matter needs to be remanded back to adjudicating authority for re-quantification of demand.
- Demand of interest under Section 75 of Finance Act, 1994 is justified.
- Penalties imposed under Section 75A, 77 & 78 of Finance Act, 1994 is justified but needs to be redetermined in light of re-quantification of demand in de-novo proceedings.

5.1 In light of the discussions as above we uphold the impugned order but remand the matter for re-quantification of the demand after allowing the benefit cum tax value as per section 67(2) of Finance Act, 1994 and amount of tax paid by the appellants as per the ST-3 returns for relevant period filed by the appellant. Thus the appeal is allowed to this extent and matter remanded to adjudicating authority for re-quantification of demand and determination of penalties under Section 75A, 77 and 78.

(Order pronounced in the open court on 08.06.2020)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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