

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-1) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज़ भवन, सातवीं मंजिल, पोलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : V2(HS)32/STC-III/2015/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-062-16-17
दिनांक Date 28.07.2016 जारी करने की तारीख Date of Issue 28/7/16

श्री अभय कुमार श्रीवास्तव, आयुक्त (अपील-1) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Abhai Kumar Srivastav** Commissioner (Appeals-I) Central
Excise Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं
_____ दिनांक : _____ से सृजित

Arising out of Order-in-Original No 108/Ref/ST/DC/2015-16 dated : 31.08.2015 Issued by:
Deputy Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

घ अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The Appellants/Respondents

M/s. StemCyte India Therapeutics Pvt. Ltd.

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.



रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-1) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : **V2(HS)32/STC-III/2015/Appeal-I**

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-062-16-17**

दिनांक Date **28.07.2016** जारी करने की तारीख Date of Issue _____

श्री अभय कुमार श्रीवास्तव, आयुक्त (अपील-1) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Abhai Kumar Srivastav** Commissioner (Appeals-I) Central
Excise Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं
_____ दिनांक : _____ से सृजित

Arising out of Order-in-Original No **108/Ref/ST/DC/2015-16** dated : **31.08.2015** Issued by:
Deputy Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

घ अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The Appellants/Respondents

M/s. StemCyte India Therapeutics Pvt. Ltd.

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-

Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-

Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

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(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.



(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 & (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudation authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल हैं

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

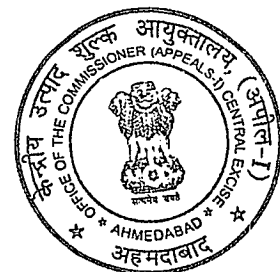
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(4)(i) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

M/s StemCyte India Therapeutics Private Ltd, Apollo Hospital Campus, Plot No.1A, Bhat GIDC Estate, Gandhinagar (hereinafter referred to 'the appellant'- for brevity) has filed an appeal against Order-in-Original No.108/Ref/ST/DC/2015-16 dated 31.08.2015 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner of Central Excise, Service Tax Division, Gandhinagar (hereinafter referred to as 'the adjudicating authority').

2. The facts, briefly stated, are that the appellant is engaged in the service of collecting, processing and cryogenically preserving the umbilical cord blood and umbilical cord portion; that the appellant is holding service tax registration; that a search was conducted by the jurisdictional central excise officers on 06.01.2014 based on an intelligence that the appellant was not paying service tax on the amount charged for providing aforesaid service; that during investigation, the appellant paid an amount of Rs. 40,00,000/- under protest, towards his tax liability in respect of the said service; that on 26.03.2015, however, the appellant filed a refund of the amount paid under protest, on the grounds that they were not liable to pay service tax on the said service as it was in the nature of healthcare service, which was exempted vide Notification No. 25/2012-ST dated 20.06.2012.

3. The refund claim was rejected by the adjudicating authority on the grounds: that(i) the period involved is from 01.07.2012 onwards and the service in question appears to have been exempted with effect from 17.02.2014 only; and that (ii) the investigation in the matter is under the process of finalization and in the absence of any outcome of the investigation, it was not feasible to hold if the whole or part of the service tax paid under protest, was refundable.

4. Being aggrieved, the appellant has filed the present appeal on the grounds that the impugned order does not deal with most of their submissions made before the adjudicating authority but was passed only on the grounds that the matter is under investigation and in the absence of any final outcome of investigation, the amount paid cannot be refunded; that the impugned order, being a non speaking order, is in gross violation of principles of equity, fair play and natural justice; that their services are squarely covered under "healthcare services", which has been exempted from payment of service tax vide Sr.No.2 of notification No.25/2012-ST dated 20.06.2012; that the appellant were providing various services under the private cord blood banking system and are covered under 'health care service', as defined in the notification supra and hence, service tax was not payable even with effect from 01.07.2012; that section 11B of Central Excise Act, 1944 deals with two propositions, namely (i) the refund claim should be filed within one year from the relevant date and (ii) there should be no unjust enrichment; that both the propositions are fulfilled in this case. The appellant further submitted that they are entitled to refund the amount deposited during investigation on the basis of various judgments of the Tribunal/Courts.

5. Personal hearing in the matter was held on 12.07.2016. Shri Rajesh J Shah, Chartered Accountant and Ms Madhu Jain appeared on behalf of the appellant and referred to their submissions made vide the letter dated 29.10.2015.



6. I have carefully gone through the facts of the case, submissions made by the appellant in the appeal memorandum as well as by the authorized representatives at the time of personal hearing. The primary issue to be decided is whether the appellant is eligible for refund of an amount of Rs. 40,00,000/- paid under protest during the investigation, which is still pending.

7. In the instant case, I find that the appellant is a registered service provider for rendering the service viz. collecting, processing and cryogenically preserving the umbilical cord blood and umbilical cord portion; that he was not paying service tax w.e.f. 01.07.2012. It is the contention of the appellant that since the said service is in the nature of 'healthcare service' and is exempt from service tax vide Sr. No. 2 of Notification No. 25/2012-ST dated 20.06.2012, they are not liable to pay service tax; that later it has been further amended by inserting entry No. 2A, vide notification no. 04/2014-ST dated 17.02.2014. The relevant portion of the Notification No. 25/2012-ST dated 20.06.2012, which exempts the taxable services of 'health care service' is reproduced hereinafter for ease of reference:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012- Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services leviable thereon under section 66B of the said Act, namely:-

- 1(1)
- 1(2) Health care services by a clinical establishment, an authorized medical practitioner or para-medics;
- 1(3) to 1(39)
2.
3. This notification shall come into force on the 1st day of July, 2012.

The said notification was further amended on 17.02.2014, vide Notification No. 04/2014-ST by inserting entry No. 2A which reads as under:-

(i) after entry 2, the following entry shall be inserted, namely:-

"2A. Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation;"

8. According to notification no. 25/2012-ST dated 20.06.2012, the services of health care provided by a clinical establishment, an authorized medial practitioner or para-medics are exempted from taxable service with effect from 01.07.2012. As per Clause (t) of Notification No.25/2012-ST dated 20.06.2012, 'health care service' means "any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma".

9. Notification No. 04/2014-ST dated 17.02.2014, by inserting entry No. 2A to Notification No.25/2012-ST, exempts services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation w.e.f. 17.02.2014. This notification nowhere mentions that the insertion/ amendment, has a retrospective effect. Further, the service provided by the appellant has not been included in the negative list. In other words, it is



from the date of said notification i.e. 17.02.2014, the service provided by the appellant stands exempted.

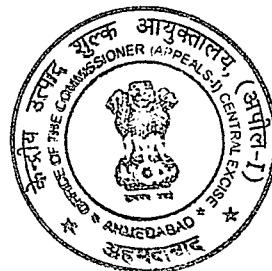
10. The present dispute, however, covers the period prior to 17.2.2014. The tax liability on the appellant for the period in dispute, i.e. from 01.07.2012 onwards, is being investigated and would be determined only after the completion of the investigation. If we go by the appellant's contention that the service provided by of cord blood bank is covered under health care service' and that no tax was leviable even prior to issue of notification no. 04/2014-ST dated 17.02.2014. If that be so, then possibly there was no need for the government to amend the exemption notification by introducing entry 2A, to cover services under consideration.

11. I find that the Hon'ble High Court of Madras had an occasion to deal a similar issue in the case of M/s Life Cell International (P) Ltd {2015 (40) STR 77 (Mad)}. While dealing the issue regarding maintainability of the writ petition, the Hon'ble Court viewed that it is for the authorities to determine whether the activities, fall within the meaning of 'health care service or otherwise. Relevant para reads as under:-

16. Before deciding the issue involved in this Writ Petition, this Court would make it clear no finding as regards whether the activities of the petitioner would fall within the ambit of "health care service" and thereby, the so-called amendment would apply to the petitioner organization in order to claim exemption of service tax" is going to be rendered by this Court in this writ petition. In view of the submission made by the learned counsel for the respondents that the assessment proceedings are yet to be finalized and the applicability of the amendment of exemption towards the services provided by the petitioner is also yet to be determined, this Court is of the view that it is for the authorities to determine whether the activities of the petitioner would fall within the meaning of "health care services" on scrutiny of documents and thorough investigation."

12. It goes without saying that subsequent to completion of investigation, issuance of notice and the completion of adjudication proceedings, will the question of refund arise, that too, if it is held in the proceedings that the services provided during the disputed period, were exempted as claimed by the appellant. In other words, it would be premature to pass a judgment on merits at this juncture, when the investigating authority has yet to draft charges, and original authority is yet to deliberate on those charges and pass an order. As held by the Hon'ble High Court of Madras in the case of M/s Life Cell International (P) Ltd supra, the liability of tax on the activities of the appellant would be finalized on scrutiny of records and investigation. In the present case, the tax liability covers the period from 01.07.2012 and since the investigation of the offence case booked against the appellant is yet to be finalized/concluded, the refund claim, was aptly rejected by the refund sanctioning authority, holding it to be premature.

13. The appellant has relied on various judgment of Court/Tribunal, in support of their argument for granting refund under section 11B of Central Excise Act, 1944. The case laws deal basically with two propositions, i.e. period of limitation and unjust enrichment. These two issues are not under consideration as of now. As the refund filed is held to be premature, the case laws relied upon are not relevant at this juncture.



14. In view of above discussions, I uphold the impugned order and reject the appeal filed by the appellant.

Date: 28.07.2016

Abhai
28.07.16
(Abhai Kumar Srivastav)
Commissioner (Appeals-I)
Central Excise, Ahmedabad

Attested

Mohan V.V.
(Mohan V.V)
Superintendent (Appeal-I)
Central Excise, Ahmedabad

BY R.P.A.D

To

M/s StemCyte India Therapeutics Pvt Ltd,
Apollo Hospital Campus,
Plot No.1A, Bhat GIDC Estate,
Dist. Gandhinagar



Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-III
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-III
4. The Dy. / Asstt. Commissioner, Central Excise, Division- Kalol, Ahmedabad-III
5. Guard file.
6. P.A

