



रजिस्टर डाक ए.डी.द्वारा

क फाइल संख्या (File No.): V2(ST)1/A-II/2017-18/2058 to 2057
 ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-121-17-18
 दिनांक (Date): 23/10/2017, जारी करने की तारीख (Date of issue): 2-11-17
 श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
 Passed by Shri Uma Shanker, Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-II), अहमदाबाद, आयुक्तालय द्वारा जारी
 मूल आदेश सं----- दिनांक -----से सृजित
 Arising out of Order-In-Original No. SD-02/Ref/236/VIP/16-17 Dated: 21.12.2016
 issued by: Assistant Commr STC(Div-II), Ahmedabad.

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Zaptech Solutions Pvt Ltd

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person an aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way:

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

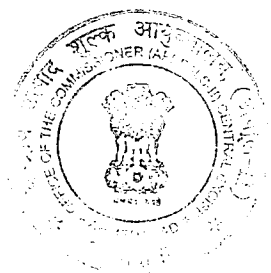
(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए।

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो।

In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।



Cont...2

- (c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हों।

- (d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

- (1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

- (2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

- (1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

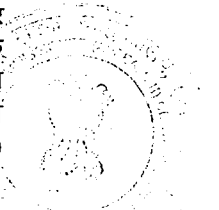
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

- (ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

- (b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

- (2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से



रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग" (Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

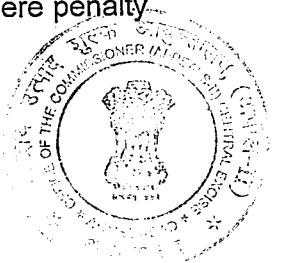
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस सन्दर्भ 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।

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. Zaptech Solution, 14, Sigma-I Corporate, B/h. Rajpath Club, Bodakdev, Ahmedabad (*hereinafter referred to as the 'appellants'*) have filed the present appeal against the Order-in-Original number SD-02/REF-236/VIP/2016-17 dated 21.12.2016 (*hereinafter referred to as 'impugned order'*) passed by the then Assistant Commissioner, Service Tax, Division-II, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

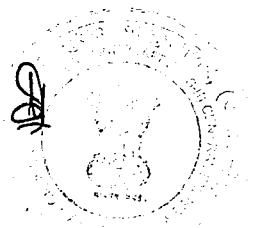
2. The facts of the case, in brief, are that the appellants had filed a refund claim amounting to ₹4,45,947/- for the period from October 2015 to December 2015 under Notification number 27/2012-CE(NT) dated 18.06.2012 in respect of Service Tax paid on input(s) services (specified services) used in output services/goods exported without payment of Service Tax.

3. During scrutiny of the claim, the adjudicating authority had found that the appellants had failed to submit BRCs in any of the export invoices as per the conditions laid down in paragraph 3(d) of the notification. Also, it was found that the amount of refund claim was more than the amount lying in balance at the end of the quarter. Accordingly rejected the entire refund claim of ₹4,45,947/- vide the above mentioned impugned order.

4. Being aggrieved with the impugned order the appellants have preferred the present appeals. The appellants filed the appeal after two months from the date of receipt of the impugned order. The appellants have submitted that the adjudicating authority has rejected the claims on the ground of non-submission of BRCs along with the claims. However, the adjudicating authority has conveniently ignored the 'Foreign Inward Remittance Certificates' (*hereinafter referred to as 'FIRC'*) submitted by the appellants. Thus, they claimed that the refund submitted by them was wrongly rejected and same should be sanctioned to them and requested to set aside the impugned order.

5. Personal hearing in the matter was granted and held on 04.10.2017. Shri Sandip P. Gupta, Chartered Accountant, appeared before me on behalf of the appellants and requested for condonation of delay as they were delayed by one month and stated that a proper application for condonation of delay would be filed within two days. The learned Chartered Accountant reiterated the contents of appeal memo and requested to allow the refund claim as an earlier Order-in-Appeal, with similar matter, was in their favour.

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. I find that the appellants have



delayed in filing the appeal, before me, by one month. As they have submitted a request to pardon the delay, vide letter dated 05.10.2017, I condone the delay considering their request to be genuine.

Now, I find that the adjudicating authority has rejected the appeal on two grounds, viz;

- (a) The closing balance of CENVAT credit, as on last day of the quarter i.e. 31st December 2015 was less than the refund amount.
- (b) The appellants could not produce BRCs in any of the export invoice.

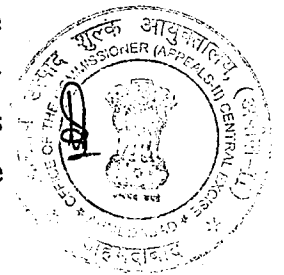
Now I will discuss both the issues point wise, in detail.

6.1 Regarding the first issue, i.e. the closing balance of CENVAT credit, as on last day of the quarter i.e. 31st December 2015 was less than the refund amount, I find that the adjudicating authority, in paragraph 9 of the impugned order, stated that the appellants have accepted their mistake and requested to condone the same. In their support, the appellants quoted, before the adjudicating authority, the judgment of Hon'ble Supreme Court in case of Mangalore Chemicals & Fertilizers Ltd. and two other cases of the CESTAT. In the said judgment, it was held that 'the eligibility of CENVAT credit cannot be denied in absence of malafide intention and procedural infraction/lapse may be condoned'. The adjudicating authority stated that the said case laws are not applicable to the instant case as the appellants failed to fulfill the basic condition of the said notification and hence, it cannot be treated as mere procedural lapse. The basic condition, it seems, is that the amount of refund claim should not be more than the amount of CENVAT credit lying in balance. The adjudicating authority has not discussed as to how the case laws are not applicable in the present case. Just saying that "as the basic condition is not fulfilled, the mistake cannot be treated as procedural", he cannot reject the claim. He has to judiciously discuss and justify his view as to how the verdict of the Hon'ble Supreme Court is not applicable to the instant case. He should have discussed the issue at length and if found the above case laws not related to the issue, then only he should have dismissed the appellant's plea.

As per Board's Circular No. 1006/13/2015-CX dated 21.09.2015;

"2. In this regard, attention is invited to the judgment of Hon'ble Supreme Court dated 14th October 2008 [2008(231) E.L.T.22(SC)/2008-TIOL-104-SC-CX-CB] in case of M/s Ratan Melting & Wire Industries Vs Commissioner of Central Excise, Bolpur. In the said judgment Hon'ble Supreme Court has held at para 6 & 7 that-

"6. Circular and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the



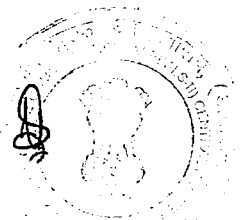
Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not to a view expressed in a decision of this court or the High Court. So far as the clarification/circulars issued by the central Government and of the state Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the Executive. Looked at from other angle, a circular which is contrary to the statutory provisions has really no existence in law...

7.. to lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by Supreme Court and the binding effect in terms of Article 141 of the Constitution.

3. Therefore, it is clarified that Board Circulars contrary to the judgments of Hon'ble Supreme Court become non-est in law and should not be followed."

Thus, in view of the above, it is quite clear that if the adjudicating authority found that the intention of the appellants is not malafide, then as per the verdict of the Hon'ble Supreme Court, the error may be considered as procedural lapse and same could be condoned. In view of the above, the case needs to be remanded back to the adjudicating authority for a thorough discussion as to whether the lapse on the part of the appellants was intentional or otherwise.

6.2. Regarding the second issue, I find that the claim has been rejected by the adjudicating authority for non-submission of BRCs. The appellants argued that they had submitted FIRC's before the adjudicating authority pertaining to the export remittances in relation to the refund claims. However, I find that the adjudicating authority has rejected the said FIRC's stating that the HDFC Bank has mentioned that these certificates are not export realization certificates and the purpose of remittance is shown as receipts against intermediary transit trade. The FIRC, in full, means 'Foreign Inward Remittance Certificate'. A Foreign Inward Remittance Certificate is a document that acts as a testimonial for all inward remittances and payments received in India from abroad. Most statutory authorities accept this document as proof that an individual or a business, has received a payment in foreign currency from outside the country. The Notification number 27/2012-CE(NT), dated 18.06.2012 has mentioned that BRC should be produced as a proof of realization of export proceeds. However, in the



judgment of *Apotex Research Pvt Ltd & Others (2014-TIOL-1836-CESTAT-BANG)*, it has been pronounced that the exporter has to establish that consideration in foreign currency has been received in respect of invoices raised by him. The CBEC has further clarified the issue vide Circular number 112/06/2009-ST dated 12.03.2009 in terms of refund of Service Tax paid on specified services used for export of goods. On the issue of FIRC, the Board has clarified that in such cases where FIRCs are issued on consolidated basis, the exporter should submit self-certified statement along with the FIRC showing the details of export in respect of which the FIRC pertains. As the adjudicating authority has not denied the fact that the export has actually taken place, refunds should be allowed on such certified statements. If the adjudicating authority has any doubt on the authenticity of the FIRC or the export, he should have confirmed the genuineness of the FIRCs from the concerned bank. Also, exporters should maintain a register showing running account which should be reconciled between the export and the remittance periodically. It seems that the adjudicating authority has not properly verified the FIRCs submitted by the appellants. In view of the discussion held above, the case needs to be remanded back to the adjudicating authority for verification of the FIRCs. The adjudicating authority should also check the applicability of the said FIRCs in the refund claims. He must record the reasons very clearly as to why the FIRCs should/ not be considered in the process of sanction of the said claim. The appellants are also directed to provide all possible assistance to the adjudicating authority in relation to the above mentioned claim.

7. The appeal is disposed off in terms of the discussion held in paragraphs 6.1 and 6.2 above.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

8. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

(उमा शंकर)

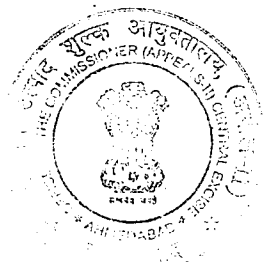
आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED

S. Dutta
26/10/17
(S. DUTTA)

SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.



To,

M/s. Zaptech Solution,
14, Sigma-I Corporate,
B/h. Rajpath Club, Bodakdev,
Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner, Central Tax, Ahmedabad (North).
- 3) The Dy./Asstt. Commissioner, Central Tax, Division-VI (S.G. Highway, West), Ahmedabad (North).
- 4) The Asstt. Commissioner(System), Central Tax Hq, Ahmedabad (North).
- 5) Guard File.
- 6) P. A. File.

