केंद्रीय कर आयुक्त (अपील)
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
सत्यमेवजयते केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise Building,
सातवी मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015
☎ 079-26305065 टेलेफैक्स : 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.) : **V2(ST)62/A-II/ 2017-18**/10066 to 10070

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 142-17-18**
दिनांक (Date):**26-10-2017**, जारी करने की तारीख (Date of issue): 27-11-17
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-I), अहमदाबाद, आयुक्तालय द्वारा जारी मूल आदेश सं---------- दिनांक _----------से सृजित
Arising out of Order-In-Original No ._**SD-01/Refund/64/AC/Hariom/2016-17**__**Dated: 16.02.2017** issued by: Assistant Commr STC(Div-I), Ahmedabad.

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

M/s Hariom Projects 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 पूवोक्त 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 डयूटी केडिट 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 हो।

(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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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, मेघाणी 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 इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर 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 ओर 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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 in 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 अपीलो 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 Hariom Projects Pvt. Ltd., B-301 Shree Balaji Residency, Near Sangath Silver Apartment, Sabarmati – Gandhinagar Highway, Motera, Ahmedabad – 380 005 (hereinafter referred to as 'the appellant') has filed the present appeal against **Order-in-original No.SD-01/Refund/64/AC/Hariom/16-17 dated 16/02/2017** (hereinafter referred to as 'the impugned order') passed by Assistant Commissioner, Service Tax, Division-I, Ahmedabad (hereinafter referred to as 'the adjudicating authority'). The appellant who was holding Service tax registration No.AABCH444BSD001 had provided construction services to Military Engineering Services (MES department, Ministry of Defence). In the Budget of 2016, Section 102 was inserted in Finance Act, 2016 granting retrospective exemption for the period 01/04/2015 to 29/02/2016 (both days inclusive) within the period of six months from the date of assent of Hon'ble President on Finance Bill 2016 i.e. 14/05/2016 in respect of specified services such as construction, renovation etc. meant for use other than for commercial purpose and rendered under works contract to the Government or an authority under the Government. The appellant filed a refund claim of **Rs.1,48,71,574/-** on **09/11/2016** under the provisions of Section 102 of the Finance Act, 1994 (hereinafter 'F.A., 1994') requesting for refund amount of Rs.1,42,58,812/- directly to be granted to Military Engineering Service (hereinafter MES) who was the recipient of service and the remaining amount of Rs.6,12,762/- to be sanctioned and paid to the appellant. A Show Cause Notice F.No.SD-01/04-130/Refund/Hariom/16-17 dated 16/02/2017 ('the SCN') was issued to the appellant asking them to show cause as to how and under what provision of Section 11B of CEA, 1944 made applicable to Service Tax matters *vide* Section 83 of F.A., 1994, could the refund application filed by the appellant be paid to a third party; as to how unjust enrichment is not applicable to the refund claim and whether the appellant had maintained separate accounts for taxable and exempted services under Rule 6 of Cenvat credit Rules, 2004 (CCR, 2004).

2. In the impugned order, the adjudicating authority has held that the as regards the claim of Rs.1,42,58,812/-, refund cannot be sanctioned to MES as under Section 11B of CEA, 1944, refund can be sanctioned only to one who files the refund claim and not to anyone else. The adjudicating authority has held that the appellant itself had mentioned in the claim that MES had already reimbursed the amount of Rs.1,42,58,812/- to the appellant and thus the claim for Rs.1,42,58,812/- was hit by bar of unjust enrichment and accordingly this amount has been ordered to be transferred to Consumer Welfare Fund. As regards the claim of refund amount of Rs.55,767/- towards interest paid, the adjudicating authority has rejected this claim holding that this payment of interest was nowhere related to the payment received from MES. In the impugned order the refund claim of Rs.5,56,995/- has been sanctioned to the appellant in terms of Notification No.

25/2012-ST dated 20/06/2012 and Section 102 of F.A., 1994 and Section 11B of CEA, 1944 made applicable to Service Tax matters *vide* Section 83 of F.A., 1994.

3. Aggrieved by the impugned order, the appellant has filed the instant appeal, *inter alia*, on the following grounds:

1) The learned adjudicating authority had erred in passing the order u/s 143(3) of the I.T. Act. The learned authority had erred in not providing the appellant reasonable opportunity for submission of information. The order passed rejecting refund claim of Rs.1,42,58,812/- and transferring the same to consumer welfare fund is totally illegal, incorrect and passed without application of mind as well as completely erroneous and unjustifiable to the appellant. Thus it is bad in law.

The appellant has also filed an application for condonation of delay by 25 days in filing the appeal.

4. Personal hearing was held on 04/10/2017 when Shri Rajesh D. Shah, C.A. appeared for the appellant and requested to tag another appeal file V2(ST)63/AII/2017-18 of M/s Vijay Construction, being identical matter. The learned CA reiterated the grounds of appeal and requested for time to submit papers / documents, for which 7 days time was allowed. The appellant submitted letter dated 11/10/2017 reiterating the grounds once again and submitting copies of letter dated 17/10/2016 from MES stipulating all contractors to file refund claim with department requesting department to refund service tax amount reimbursed by MES directly to MES. It has also been contended in this letter that unjust enrichment was not applicable as the claim was to refund the claim directly to MES.

5. I have carefully gone through the impugned order and the grounds of appeal filed by the appellant. I find that there is a delay of 25 days in filing of the appeal and the appellant has filed an application along with the appeal memorandum for condonation of delay. I allow the application and condone the delay of 25 days in filing of the appeal. On merit I find that the exemption in the instant case is by virtue of the provisions of Section 102 of Finance Act, 1994 that grants exemption for the period 01/04/2015 to 29/02/2016 (both days inclusive) in respect of specified services such as construction, renovation etc. meant for use other than for commercial purpose and rendered under works contract to the Government or a local authority or a Government authority. In terms of sub-section (2) of Section 102 of Finance Act, 1994 refund in available in lieu of the said retrospective exemption. In the instant appeal, the appellant has disputed the standpoint of the adjudicating authority for rejecting the reimbursement of the refund claim amount of Rs.1,42,58,812/- to a third party i.e. M/s MES out of the total claim of Rs.1,48,71,574/- filed by the appellant. The appellant has also challenged the transfer of refund claim amount of Rs.1,42,58,812/- to Consumer Welfare Fund as ordered in the impugned order.

6. The appellant has not produced any evidence in the form of reference to any statutory provision, Notification, Circular or Case law to support its challenge against the order of the adjudicating authority holding that there is no provision under Section 11B of CEA, 1944 made applicable to Service Tax matters *vide* Section 83 of F.A., 1994 to sanction and pay a portion of refund claim made by one person to a third person who has not filed the refund claim. The sanction of refund in such a manner cannot be merely on the basis of the contract or mode of transaction between two persons but on the basis of legal provisions stipulated by law under which such claim of refund is made. Therefore, I find no reason to interfere in the decision of the adjudicating authority in this regard. Further, the adjudicating authority has sanctioned the refund claim of Rs.1,42,56,812/- to the appellant and transferred the same to the Consumer Welfare Fund on the grounds of unjust enrichment, which is correct and legally sustainable because it remains an undisputed fact on record that the amount of Rs.1,42,56,812/- paid by the appellant who is the service provider had been reimbursed to the appellant by MES who is the service recipient. Thus the burden of tax had been passed on by the appellant to the service recipient and payment of such amount as refund to the appellant would clearly amount to unjust enrichment. Therefore, the correct way is to sanction the said refund amount and transfer the same to Consumer Welfare Fund as ordered in the impugned order. In view of the above discussions, the appeal filed by the appellant is rejected.

7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in the above terms.

(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date:26/10/2017

Attested

(K.P. Jacob)
Superintendent,
Central Tax (Appeals), Ahmedabad.

By R.P.A.D.

To

M/s Hariom Projects Pvt. Ltd.,
B-301, Shree Balaji Residency,
Near Sangath Silver Apartment,
Sabarmati – Gandhinagar Highway, Motera,
Ahmedabad – 380 005.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (North).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad (North).
4. The A.C / D.C., C.G.S.T Division: I, Ahmedabad (North).
5. Guard File.
6. P.A.