



सत्यमेव जयते

## केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,  
केंद्रीय कर शुल्क भवन,  
सातवीं मंजिल, पोलिटेकनिक के पास,  
आम्बावाडी, अहमदाबाद-380015

☎ : 079-26305065



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Near Polytechnic,  
Ambavadi, Ahmedabad-380015

टेलिफैक्स : 079 - 26305136

क फाइल संख्या : File No : V2(ST)51/A-II/2017-18  
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-002-APP-269-17-18  
दिनांक Date : 15-01-2018 जारी करने की तारीख Date of Issue 1-2-2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-02/Ref-292/VIP/16-17 Dated 23.02.2017  
Issued by Assistant Commr STC, Service Tax, Div-II , Ahmedabad

ध अपीलकर्ता का नाम एवं पता  
Name & Address of The Appellants

### **M/s. Relcon Infraprojects Ltd Ahmedabad**

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 :-

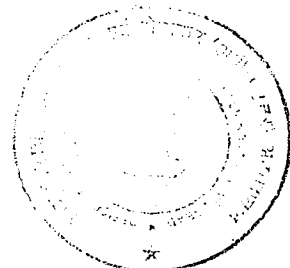
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैनटल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

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

*Original*



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-धाराओं एवं (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 (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A2I9K केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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 (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Adcl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्ता 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 adjudication 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 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 है -

- (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 होंगे।

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,

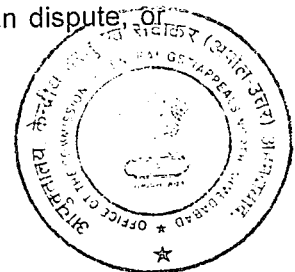
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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(1) 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(1) 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. Relcon Infraprojects Pvt. Ltd., 305, Atma House, Near-Paradise Hotel, Opp.-Reserve Bank, Ashram Road, Ahmedabad 380 009 (henceforth, "appellant") has filed the present appeal against the Order-in-Original No.SD-02/REF-292/VJP/2016-17 dated 23.02.2017 (henceforth, "impugned order") passed by the Assistant Commissioner, Service Tax, Division-II, Ahmedabad (henceforth, "adjudicating authority").

2. The facts of the case, in brief, are as follows. The appellant, a service provider, filed a refund claim of Rs.1,98,63,373/- before the adjudicating authority in terms of Notification No.09/2016-ST dated 01.03.2016 (effective from 01.03.2016) read with section 102 of the Finance Act, 1994. The adjudicating authority, out of Rs.1,98,63,373/-, rejected an amount of Rs.48,48,584/- after issuing a show cause notice dated 23.12.2016, on the ground that the appellant was not eligible for the Cenvat credit of inputs/ input services used in providing the services which became exempted retrospectively. As the appellant had failed to reverse the Cenvat credit of Rs.48,48,584/-, the same was adjusted against the refund amount claimed and accordingly, adjudicating authority rejected the claim amounting to Rs.48,48,584/-. The appellant is in appeal against rejection of refund.

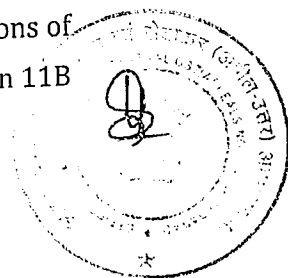
3. The grounds of appeal, in brief, are as follows-

3.1 Appellant states that CPWD and AMC have not paid any amount towards service tax and the amount charged by sub-contractors as service tax was already paid to the sub-contractors, and thus, duty incidence was borne by the appellant.

3.2 Appellant submits that if sub-contractor had not charged any service tax to the appellant, then the issue of availment and utilization of credit would not arise. In such situation, appellant would have paid the service tax liability in cash and would have been entitled to refund easily and would not have been tested for unjust enrichment.

3.3 Appellant submits that credit taken cannot be asked for reversal as the Cenvat credit was taken in respect of service tax paid by the sub-contractors on the same contracts; that they part paid the service tax liability by debiting the Cenvat credit account of the service tax amount which was paid to the sub-contractors.

3.4 Appellant argues that refund sought in terms of section 102 whereby services were exempted retrospectively is no longer a tax or duty; that provisions of section 102 are a self contained code and does not refer to provisions of section 11B



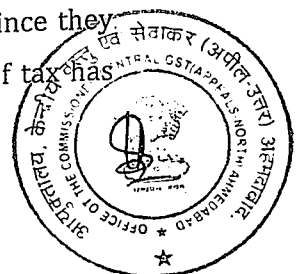
in any manner. Appellant has quoted decisions in the case of Nikon India Pvt Ltd v. CCE [2016(45) STR 271 (Trib.-Chan.)] and in the case of Gulshan Chemicals Ltd v. CCE [2016(45) STR 106 (Trib.-Del.)].

4. In the personal hearing held on 08.11.2017, CA Pravin Dhandharia reiterated the grounds of appeal. He explained that whatever credit was availed, has been paid only by them to the sub-contractors. He asked 15 days time to file affidavits to that effect that no refund has been claimed nor will be claimed.

4.1 As stated during personal hearing, appellant has supplied affidavits of three sub-contractors namely Mahindra Electric Store, Aditya Infrabuildcon Pvt Ltd, Shree Khodiyar Engineers (I) Pvt Ltd detailing the invoices issued and service tax paid against works performed for the appellant during the period 01.04.2015 to 29.02.2016. The affidavits also mention that sub-contractors have not claimed nor will claim the refund of service tax collected from appellant and have no objection to appellant's claim over refund. For remaining parties, appellant has submitted a Chartered Accountant (H D Solanki & Co.)'s Certificate confirming reimbursement of service tax to the parties.

5. I have carefully gone through the appeal. The appeal is against the denial of refund of Rs.48,48,584/-, out of Rs.1,98,63,373/- claimed under section 102 of the Finance Act, 1994 which granted retrospective exemption to certain construction related services provided to specified service recipients. Refund has been denied on the ground that appellant had availed Cenvat credit of Rs.48,48,584/- in respect of input services used in providing exempted services, i.e., the services that became exempted by virtue of retrospective exemption granted under section 102 ibid. The adjudicating authority states that rule 6 of the Cenvat Credit Rules, 2004 does not permit availment of Cenvat credit in respect of inputs/input services used in providing exempted services and for that reason the amount of Cenvat credit of Rs.48,48,584/- taken in respect of FOUR projects covered under retrospective exemption as listed in para 17 of the impugned order is liable to be reduced from the refund claimed. According to adjudicating authority, this much Cenvat credit was required to be reversed by the appellant while claiming the exemption.

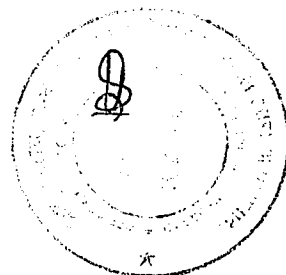
5.1 Appellant takes the ground that Cenvat credit of Rs.48,48,584/- was the amount of service tax paid by their sub-contractors to whom some work was outsourced and since services received from sub-contractors were input services for them, they availed Cenvat credit of service tax paid by the sub-contractors and utilized the same towards payment of service tax. Appellant states that since they have paid the amount of service tax to the sub-contractors, the burden of tax has been borne by them and they are entitled for the refund.



5.2 The whole issue boils down to the question whether refund of Cenvat credit taken in respect of the projects where service tax levy was not attracted is admissible to the appellant or not. As far as credit availed of service tax paid by sub-contractors and utilized for payment of service tax which was not required to be paid in terms of retrospective exemption is concerned, it should be refunded back to the appellant as appellant has borne the tax burden. It was a situation where exempted service was partly performed by outsourcing to sub-contractors and since the service provided was declared exempted subsequently, sub-contractors discharged the service tax liability and recovered from the appellant, and therefore, indirectly, the tax paid by appellant by utilizing the Cenvat credit of tax paid by sub-contractors is nothing but payment of service tax in respect of services which were declared exempted retrospectively. This is different from a case where Cenvat credit is taken for the services used in providing exempted services and utilized towards tax payment on taxable services. The provisions of rule 6 of the Cenvat Credit Rules, 2004 definitely apply in such a situation as the service provider in such a situation benefits doubly by claiming exemption for exempted service and reducing his tax liability for taxable service by utilizing the Cenvat credit of service tax paid on input services used in exempted service. I therefore find that refund is allowable to the appellant to the extent tax was paid through Cenvat credit taken of service tax paid by the sub-contractors in part performing the services covered under FOUR contracts listed in para 17 of the impugned order.

5.3 It is however not clear whether entire Cenvat credit taken and deducted from the refund claim pertains to service tax paid by the sub-contractors only. Any other Cenvat credit earned would be considered as the credit taken on inputs/ input services used for providing exempted services and hence would be invalid credit in terms of rule 6 of the Cenvat Credit Rules, 2004 and consequently ineligible for refund. This necessitates re-calculation and verification at the end of adjudicating authority, I deem it proper to remand the matter back to the adjudicating authority with a direction to ascertain the credit taken on sub-contractors invoices and utilized for payment of service tax for which refund has been claimed and allow refund of the same out of Rs.48,48,584/- deducted in the impugned order. Refund for the remaining amount will not be allowable. Appellant is also directed to produce necessary details and documents before the adjudicating authority.

6. In view of above, impugned order is set aside to the extent of denial of refund of Rs.48,48,584/- and appeal is allowed by way of remand.



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

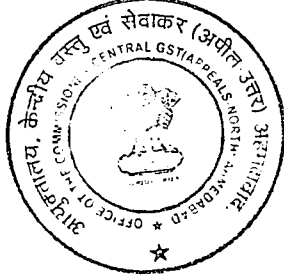
The appeal filed by the appellant stands disposed of in above terms.

*उमा शंकर*

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:



Attested

*S. Hudda*

(Sanwarmal Hudda)  
Superintendent  
Central Tax (Appeals)  
Ahmedabad

By R.P.A.D.

To,  
M/s. Relcon Infraprojects Pvt. Ltd.,  
305, Atma House, Near-Paradise Hotel,  
Opp.-Reserve Bank, Ashram Road, Ahmedabad 380 009

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax, Division-VII, Ahmedabad- North.
5. ~~Guard File.~~
6. P.A.