
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर शुल्कभवन, सातवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015	
☎ : 079-26305065		☎ : 079-26305136

क फाइल संख्या : File No : **V2(ST)188/A-II/2016-17**

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-002-APP-293-17-18**

दिनांक Date : **29/01/2018** जारी करने की तारीख Date of Issue **23/2/2018**

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-145/VJP/16-17** Dated **20.09.2016**

Issued by **Assistant Commr STC**, Service Tax, Div-II, Ahmedabad

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

M/s. Torrent Power 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 :-

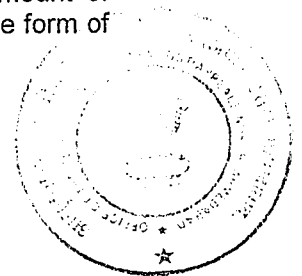
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

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 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 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 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

A. S. J.



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 A219K 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 Addl. / Joint or Dy. / Assit. Commissioner or Superintendent of Central Excise & Service Tax (OIO) 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 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 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 13 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 अर्जी 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।

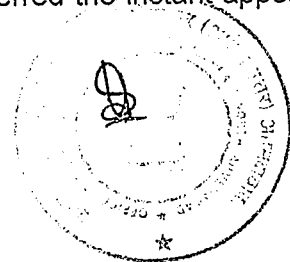
4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

ORDER-IN-APPEAL

M/s Torrent Power Ltd., Torrent House, Off Ashram Road, Ahmedabad – 380 009 (hereinafter referred to as 'the appellant') is holding Centralized Service tax registration No.AACCT0294JST001 and is engaged in the generation and distribution of Power. On the basis of an inquiry initiated against the appellant by D.G.C.E.I., it was observed that the appellant had failed to pay Service Tax amounting to Rs.2,58,07,171/- under **Reverse Charge Mechanism (RCB)**) on "**Banking and Other Financial Services**" defined under Section 65 (105) (zm) of the Finance Act, 1994 (F.A., 1994) for remittances in foreign currencies towards "Application Fee to Hermes Insurance" in External Commercial Borrowings (ECB)made by the appellant during **F.Y.2009-10 to F.Y.2013-14** to M/s Kfw Ipex-Bank GmbH, Germany, who did not have a permanent establishment in India. During the course of inquiry, the appellant had paid up an amount of Rs.2,58,07,171/- under protest along with an amount of Rs.1, 23,80,655/- towards interest. A Show Cause Notice F.No. DGCEI/AZU/36-64/2014-15 dated 17/06/2014 was issued to the appellant that was adjudicated by Principal Commissioner, Service Tax, Ahmedabad vide O.I.O. No. AHM-SVTAX-000-COM-008-15-16 dated 04/12/2015 confirming demand of Rs.2,58,07,171/- towards 'Banking and Other Financial service' under Section 73(1) of the F.A., 1994 and appropriating the amount paid by the appellant; confirming interest under Section 75 of F.A. and appropriating the amount paid by the appellant; imposing penalty of Rs.2,58,07,171/- on the appellant under Section 78 of F.A., 1994 and imposing penalty of Rs.10,000/- on the appellant under Section 77(1)(a) of F.A., 1994. After this order was passed, the appellant made a payment on 16/01/2016 of 25% of the penalty amount imposed under Section 78 of F.A., 1994.

2. The appellant preferred an appeal before Hon'ble CESTAT, Ahmedabad against O.I.O. No. AHM-SVTAX-000-COM-008-15-16 dated 04/12/2015 and subsequently it filed a refund application of **Rs.1,15,70,943/-** on the ground that the appellant having prepaid the entire outstanding loan on 21/09/2015, in view of the premature closure of the loan, a revised invoice for Hermes Premium was issued by Huler Hermes on 14/10/2015 based on which the Bank had refunded the overpaid amount of Hermes Premium paid by the appellant. A show cause notice dated 20/07/2016 was issued in respect of the refund application that was adjudicated *vide* **Order-in-Original No.SD-02/REF145/VJP/2016-17 dated 20/09/2016** (hereinafter referred to as '**the impugned order**') issued by the Assistant Commissioner, Service Tax, Division-II, Ahmedabad (hereinafter referred to as 'the adjudicating authority'), rejecting the refund claim on the ground that the classification of the impugned service confirmed by the department was challenged by the appellant and was pending decision in CESTAT, Ahmedabad.

3. Aggrieved by the impugned order, the appellant has preferred the instant appeal mainly on the following grounds:



1) The impugned order was non-speaking as various submissions made before the adjudicating authority was overlooked by the adjudicating authority who had mechanically confirmed the proposal made in the SCN. The appellant relies on the Apex court decisions in the cases of Cyril Lasardo (Dead) vs Juliana Maria Lasarado – 2004 (7) SCC 431 and A.C., Commercial Tax Department vs Shukla & Brothers – 2010 (254) ELT 6 (SC) and pleads that the impugned order being non-speaking was in gross violation of principles of equity, fair play and natural justice. The appellant has contended that refund cannot be denied on the ground that claim was premature as the refund proceedings are independent and decision has to be made on merits. The appellant places reliance on a recent decision in the case of Persistent Systems Ltd. vs CCE & ST, Pune-III – 2016 (43) STR 117 (Tri.-Mumbai). In the case of Dabur India Ltd. vs CCE, Ghaziabad – 2015 (324) ELT 398 (Tri.-Del.), it has been held that even if writ petition filed by the assessee is pending before the Apex court, the assessee is at liberty to file the refund claim.

2) Without prejudice to the above submission, no service had been provided to the extent of the amount refunded by M/s Euler Homes. At the time of issuance of the Show Cause Notice by D.G.C.E.I., there was no ground for the appellant to challenge the valuation aspect as the ground for refund arose at a later point in time as a result of the refund on premature closure of loan granted by M/s Hermes. Even if Service Tax liability is confirmed by the Hon'ble CESTAT in appeal filed by the appellant, the amount of Rs.15,84,28,160/- has to be excluded from the gross value of taxable service as this amount has, in effect, not paid to M/s Euler Hermes. In the present case the proceeding is independent of earlier litigation. Further the appellant had borne the burden of the Hermes Premium and the burden had not been passed to anyone.

4. Personal hearing in the appeal was held on 10/01/2018. Ms Madhu Jain, Advocate for the appellant and submits that since the part amount has been received, the taxability aspect should not affect their refund claim. She shows me the revised invoices and Remittance Certificate and the C.A. certificate for unjust enrichment. In the additional submissions, the appellant has attached credit notes and submits that a table of credit notes and adjustment in the books of accounts is to be submitted within ten days.

5. I have carefully gone through the facts of the case on records and grounds of appeal filed by the appellant. There is no dispute in the present case that the entire O.I.O. No. AHM-SVTAX-000-COM-008-15-16 dated 04/12/2015 issued by the Principal Commissioner, Service Tax, Ahmedabad, confirming the demand of Rs.2,58,07,171/- under reverse charge mechanism, for services classified as 'Banking and Other Financial services' received by the appellant from overseas Bank that had no establishment in India, had been challenged by the appellant, which is pending decision in CESTAT, Ahmedabad. The instant appeal pertains to rejection of the refund claim filed by the appellant on the ground that part of the Hermes Insurance paid by the appellant had been refunded, implying that the Service Tax amount of Rs.1,1,5,70,943/- was excess payment liable to be refunded. The adjudicating authority has rejected the refund claim holding that the department's case is based on classification of the service and the case of classification of Service is pending decision before CESTAT. I find that there is merit in the findings of the adjudicating authority because the entire confirmed Service Tax amount of Rs.2,58,07,171/- is under challenge before Hon'ble Tribunal,



which includes the refund claim amount. The fact of the case law in the matter of Persistent Systems Ltd. vs CCE & ST, Pune-III – 2016 (43) STR 117 (Tri.-Mumbai) relied upon by the appellant is distinguished in as much as in that case the competent authority had returned the refund claims with the observation that claimant was at liberty to file the claims afresh upon conclusion of the pending proceeding. In the present case, the refund claim has been rejected and not returned. The reliance placed by the appellant on the decision of CESTAT, Delhi in the case of Dabur India Ltd., vs CCE, Ghaziabad – 2015 (324) ELT 398 (Tri.-Del.) is also misplaced because a CBEC Circular was under challenge in that order, which had already been held to be null and void by Hon'ble High Court in a similar matter. In the present case, the valuation aspect is intrinsically connected to the classification aspect that has not achieved finality. Hence no occasion for refund arises and accordingly, the rejection of the refund claim is upheld and the appeal is rejected.

6. 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.

अशोक

(उमा शंकर)

आयुक्त (अपील्स-१)

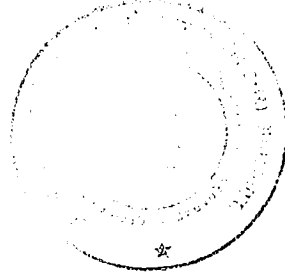
Date: 29/01/2018

Attested

(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.

To
M/s Torrent Power Ltd.,
Torrent House, Off Ashram Road,
Ahmedabad – 380 009.



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: VII, Ahmedabad (North).
5. Guard File.
6. P.A.

