

	केंद्रीय कर आयुक्त (अपील)	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय उत्पाद शुल्क भवन	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
	सतलवी मंजिल, पोलिटेक्निक के पास	
	आम्बावाडी, अहमदाबाद-380015	
	079-26305065	टेलिफैक्स 079-26305136

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(18)9 & 64 /North/Appeals/ 2017-18 / 1894-1828
 ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-343-344-17-18
 दिनांक (Date): 27-Feb-2018 जारी करने की तारीख (Date of issue): 23-3-2018
 श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित
 Passed by **Shri Uma Shanker**, Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-I), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी
 मूल आदेश सं _____ दिनांक _____ से सृजित
 Arising out of Order-In-Original No 237 to 239/AC/17-18/Ref Dated: 18/05/2017 & MP/172/Reb/17-18 dated 04/10/2017
 issued by: Assistant Commissioner Central Excise (Div-I), Ahmedabad North

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

M/s Adani Power 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



- (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 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 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 मेटल हॉस्पिटल 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 इ.ए-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 मांग विवादित हो सकती है।
गर शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

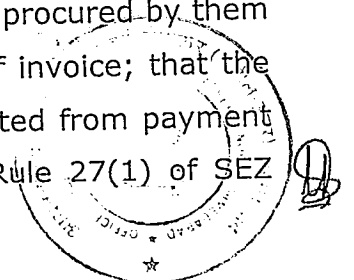
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

Two appeals have been filed by M/s Adani Power Ltd., "Achalraj", Opp-Mayor Bunglow, Law Garden, Ahmedabad [for short-appellant] against the Orders-in-Original No.237 TO 239/AC/17-18/Refund dated 18.05.2017 and MP/172/Reb/17-18 dated 04.10.2017 [impugned orders] passed by the Assistant Commissioner of GST Division-I, Ahmedabad North [the adjudicating authority].

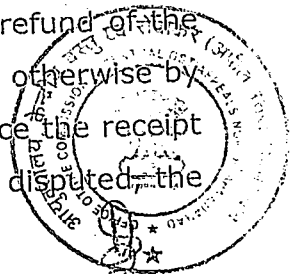
2. The facts of the cases are that the appellant have a Thermal Power Plant in SEZ Mundra. They filed refund claims amounting to Rs.17,31,587/- and Rs.43,000/- with interest in respect of Central Excise duty paid on inputs/spares/equipments procured by them from registered manufacturers. The adjudicating authority has rejected the said claims, after issuing show cause notice dated, vide the impugned orders on the grounds that [a]they have not submitted the required documents; [b] no procedure has been followed neither by the manufacturer/supplier or by the recipient of the goods; and [c] the claim of refund is not proper as per Rule 30 of SEZ rules, 2006 as they were not entitled for any O&M benefits issued by Ministry of Commerce & Industry vide circular dated 06.04.2015 and 17.02.2016 for the power plant set up by developer/co-developer.
3. Being aggrieved, the appellant has filed the instant appeals on the grounds that the refund claim rejected on the basis of not following ARE-1 procedure is wrong as the ARE-1 procedure prescribes only for cases where the manufacturer wishes to claim an upfront exemption from payment of duty; that in terms of the provisions of SEZ Act and Rules, they are entitled to procure all the goods and services required for undertaking the authorized operations without the same suffering any duty/tax liability; that such exemption can either be claimed upfront at the of procurement of goods or by way of refund subsequently; that only bill of export is required to be filed by the unit or developer on behalf of the supplier which is to be assessed by the authorized officer. A series of decisions by the Hon'ble Tribunal hold that all the goods received by the SEZ from DTA shall be exempted from all duties and taxes and the refund of tax paid on goods cannot be denied, if the goods are cleared by DTA unit on payment of duty.
4. Personal hearing of the appeals was granted on 02.02.2018. However, the appellant vide their letter dated 01.02.2018 submitted that in the similar issue in their case, the Hon'ble Tribunal Kolkata has allowed their appeal vide order No.F/076332-76339/2017 dated 25.07.2017 and requested to decide the instant appeal on merits. Accordingly, I take the appeal for decision on merit on the basis available records and submissions.
5. At the outset, I observe that the refund claims filed by the appellant is relating to Central Excise duty paid on inputs/spares/equipments procured by them from Central Excise registered manufacturers under the cover of invoice; that the said goods supplied to SEZ for authorized operations are exempted from payment of duty under Section 26(1) (c) of SEZ Act, 2005 read with Rule 27(1) of SEZ



Rules, 2006. The adjudicating authority denied the refund claim on the grounds that;

- [i] the manufacturer has not prepared and submitted any ARE-1 application for the clearance of goods to the appellant; that the appellant claimed the refund as buyer of the goods who born the incidence of the duty without proper duty paying documents.
- [ii] no documents showing that the goods procured by the appellant have been used/to be used to carry on the authorized operations by them, as mentioned under Section 26(1)(c) of SEZ Act, 2005 read with Rule 27(1) and 27(2) of SEZ Rules, 2006.
- [iii] the appellant supplies power to two states viz Gujarat and Haryana. They were not filing any Bills of Entry and not paying any central excise duty for supply of electricity from SEZ to DTA sale; that as they were not paying customs duty on supplies of electricity from SEZ to DTA, the benefit in form of exemption (by ways of refund) from central excise duty on raw materials and consumables used in operation and maintenance of power plant is not admissible; if the refund on the goods procured by them is granted, it will amount to double benefit.
- [iv] The appellant power plants approved as per guidelines No.P.6/3/2006-SEZ dated 16.02.2016 is entitled the benefits that "such power plants will be allowed O&M benefits only with regard to the average monthly power supplied to entities with the same SEZ during the preceding year. Henceforth, no O&M benefits including service tax exemption will be allowed for power supplied to DTA/other SEZs/EOUs from such power plants. The surplus power generated in such power plants may be transferred to DTA without payment of duty, keeping in consideration of fact that no duty free benefits on raw materials, consumable etc have been availed for generation of such power".
- [v] Principles of unjust enrichment would be attracted as they had passed on the incidence of duty to the buyers of the electricity produced and supplied by them; that no valid certificate of Chartered Accountant submitted.
- [vi] No interest payable as the manufacturer himself chosen to pay duty without making any reference to the department; that interest required to be paid if the payment is not refunded within three months and in the appellant's case not such delay has taken place due to rejection of refund claim within the time limit.

6. As regards procurement of inputs/consumables in question, the facts on records revealed that the appellant had received duty paid goods from the manufacturer. As per Rule 30 of SEZ Rules, 2006, the manufacturer shall clear the goods to a unit or Developer of SEZ, as in the case of export, either under bond or as duty paid goods under claim of rebate on the cover of ARE-1 referred to notification 40/2001-CE (NT) [superseded by notification 19/2004, 20/2004-CE (NT)]. The Notification is calibrated to enable recipients of taxable services (exempt from liability to tax under the provisions of the 2005 Act), to claim refund of the Service Tax, wherever assessed and collected by Revenue or remitted otherwise by the taxable service provider, inadvertently. It is a settled law that once the receipt of the goods and their utilization for the authorized operations is not disputed, the

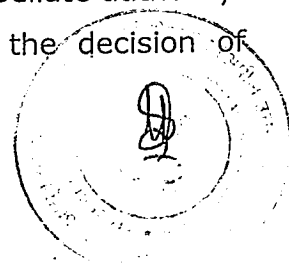


refund cannot be denied for procedural infractions like filing of ARE-1, Bill of Export etc. However, in the instant case, I observe that apart from the said issue relating to genuine of payment, there are also other issues involved for rejection of refund claim as mentioned at para 5[ii] to [vi] above.

7. The appellant submits that in a similar issue, the Hon'ble Tribunal Kolkata has allowed their appeal vide order No.F/076332-76339/2017 dated 25.07.2017. I have perused the said decision and observe that the Hon'ble Tribunal has decided issue relating to duty payment particulars and jurisdiction of filing of claims only. However, since other issues as mentioned at para 5 [ii] to [vi] are also in the instant case, with respect to the Hon'ble Tribunal's order supra, I am of the opinion that the said decision cannot be made applicable wholly to the instant case. Further, I observe that the Hon'ble High Court of Gujarat in case of M/s Intas Pharama Ltd [2016-332-ELT-680] and the Government of India in case of M/s Intas Pharama Ltd [2014-311-ELT-983] has decided an issue relating rebate under Rule 18 of CER. In the said decisions, it has been held that SEZ unit cannot be treated as export in terms of Section 2(m) of SEZ Act and cannot file rebate claim under Rule 18 of CER.

8. However, in the instant case, I observe that apart from the genuine of duty payment, the matter also involves double benefit of duty and principles of unjust enrichment as mentioned at para 5 above. I further observe that the adjudicating authority has elaborately discussed the ineligibility of refund claim in question at para 21 to 21.12 of the impugned order. Facts on records clearly reveal that the appellant was supplying power from SEZ to DTA without filing Bill of Entry and not paying any duty. Notification No.9/2016-Cus dated 16.02.2016 stipulates that exemption from customs duty on Electrical Energy supplied from SEZ to DTA is available only subject to the condition NO.103 of the notification which states that *"the power producer shall produce a certificate from the jurisdictional Development Commissioner in the Department of Commerce, Ministry of Commerce and Industry, that no benefit of customs duty and excise duty, as well as fuel-transportation related service tax has been availed by the said power producer towards raw materials and consumables used in operation and maintenance of the power plant."* In the circumstances, the adjudicating authority has rightly held that refund of central excise paid on spares/consumables used in operation of the power plant is not admissible to them.

6. The other aspect on rejecting the refund claim by the adjudicating authority is on the ground principles of unjust enrichment. The adjudicating authority held that the appellant has not submitted any valid documents to establish that the incidence of duty (which has been claimed as refund) had not been passed on by them to the buyers or any other person. I observe that the appellant has not contended anything regarding the above observation before the appellate authority. In the circumstances, I do not find any merit to interfere in the decision of adjudicating authority.



7. In view of above discussion and following Hon'ble Gujarat High Court's order and GOI's order *supra*, I observe that the adjudicating authority has rightly denied the refund claims filed by the appellant and therefore, I uphold the impugned order. Accordingly, I reject both the appeals filed by the appellant.

8. The appeals stands disposed of in above terms.

उमाशंकर
(उमा शंकर)
आयुक्त (अपील्स)
/02/2018

Attested

मोहनान V.V.
(Mohanan V.V)
Superintendent (Appeals)
CGST, Ahmedabad

R.P.A.D

To
M/s Adani Power Ltd.,
"Achalraj", Opp-Mayor Bunglow,
Law Garden, Ahmedabad

Copy to:-

1. The Chief Commissioner, CGST Zone, Ahmedabad.
2. The Commissioner, CGST & Central Excise, North
3. The Addl./Joint Commissioner, (Systems), CGST & CE North
4. The Dy. / Asstt. Commissioner, CGST & CEDivision-II, North.
5. Guard file.
6. P.A.

