

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

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.) : V2(STC)71 /North/Appeals/ 2017-18

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 396-17-18

दिनांक (Date): 22-Mar-2018 जारी करने की तारीख (Date of issue): 16/4/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-VI), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी

मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No GST-06/Refund/07/AC/KMM/Intas/2017-18 Dated: 30/10/2017

issued by: Assistant Commissioner Central Excise (Div-VI), Ahmedabad North

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

M/s Intas Pharmaceuticals 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 हैं ।

- (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 :-

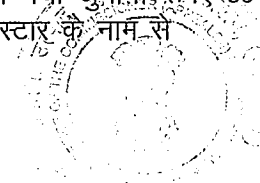
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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 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।

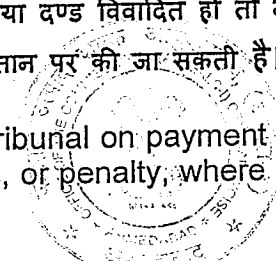
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section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

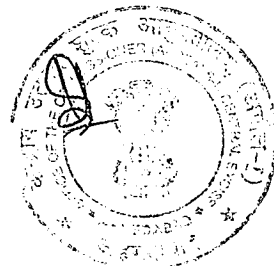
The subject appeal is filed by M/s. Intas Pharmaceuticals Ltd. registered office at 2nd Floor, Chinubhai Centre, Off. Nehru Bridge, Ashram Road, Ahmedabad, (hereinafter referred to as 'the appellant') against OIONo.GST/06/REFUND/07/AC/KMM/INTAS/17-18 (hereinafter referred to as 'the impugned order') passed by the Asstt. Commissioner, CGST DIV-VI, Ahmedabad-North (hereinafter referred to as 'the adjudicating authority'). The appellant is engaged in the manufacture and trading of pharmaceutical products and also holds Service Tax Registration No. AAAC15120LST001.

2. Briefly stated facts of the case are that the appellant had filed refund claim of Rs. 1,24,56,627/- on dated 28.04.2017 along with all relevant documents. that they had wrongly paid service tax on the amount received from their employees for notice period of 2-3 months., first the claimant paid service tax, interest and penalty on the amount received from their employees, that they had provided declared service to their employees as mentioned under Section 66E (e) of the Finance Act, 1994. Subsequently they realized that they were not liable to pay service tax on the said amount and paid service tax, interest and penalty for the period from 2013-14 to 2016-17. SCN was issued and vide impugned order said refund claim was rejected.

3. Being aggrieved with the impugned order the appellant has filed the instant Appeal on the following main grounds;

A. As per terms of employment of contract with employee, if employee leaves company before defined period, then employee is required to pay notice payment. As per definition of "Service" as defined in Section 65B (44) of Finance Act, provision of service by an employee to the employer in the course of or in relation to his employment is excluded from service tax net. Amount has been paid by employee to employer towards notice pay, hence, as per Section 65B (44) of Finance Act, Service Tax is not applicable on such recovery from employee. Company has recovered only the notice pay amount from employee, and not recovered service tax amount from the employee but paid it separately to the Government. Service Tax amount has been shown as "receivable" in the books of account. Subsequently they realized that they were not liable to pay service tax on the said amount received from their employees and they had paid service tax wrongly. Accordingly, they claimed the refund of service tax paid by them, (with interest and penalty) during the period from 2013-14 to 16-17.

B. Vide Finance Act 2012, w.e.f. 01.07.2012, introduced a new system of taxation of services, known as 'Negative List' all services, became taxable except for a small set of services falling under the 'Negative List' or exempted under an exemption notification. Under the new regime, Section 66B of the Act (as amended) is the 'charging section'. On the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one



person to another and collected in such manner as may be prescribed."They relied upon the provision of Section 656(44), Clause (e) of Section 66E, Section 67(1).They placed reliance on the following decisions. 1. Yamaha Motors India Pvt Ltd. 2005 (186) ELT 161 (T)2. Amresh Enterprises 2007 (8) STR 611 (T) 3. The Commissioner (Appeals), Vadodara in the case of M/s. Gujarat State Fertilizers & Chemicals Ltd. vide Order-in-Appeal No. VAD-EXCUS-003-APP-392/2016- 17 dated 20.10.2016 .

C. That by collecting notice pay for defaults of the employees under the employment contract cannot be said to have provided declared service of 'agreeing to the obligation to tolerate an act'. The expression 'to tolerate an act' included under 'declared services' should be understood to cover instances where the consideration is being charged by one person in order to allow another person to undertake any particular activity. In That the word 'obligation' used in Section 66E(e) indicates the need for the existence of the desire in the person for whom the activity is done.

E. In view of the above, when such terms and conditions are not fulfilled, the defaulting party is obligated to make good the loss by paying liquidated damages. Such liquidated damages cannot itself become consideration for continuing with the main supply of service/goods by terming the same as towards tolerating the acts of the defaulting party. They relied on the Order-in-Original No. 47/AC/\$T/Ghaziabad/2015-16 dated 30.03.2016 passed by Additional Commissioner, Ghaziabad in the matter of M/s Glaxo Smith line Consumer Healthcare Limited .

F. That the notice pay amount collected is not towards any declared service and it is not liable to service tax. Hence, the SCN proposing to deny refund to them on the notice pay alleging the same to be consideration is liable to be dropped on this ground. That they are not performing alleged declared service of any consideration. The Explanation (a) to Section 67 of the Act provides that 'consideration' includes any amount that is payable for the taxable services provided.

G. They referred to Rule 6(2)(vi) of the Valuation Rules provides that accidental damages due to unforeseen actions not relatable to the provision of service shall not be included in the value of the taxable service. They relied upon Section 73 of the Indian Contract Act, 1872 statutorily allows a party to recover damages from the defaulting party in case of default or breach of terms of the contract. They rely on case laws 1. Balkrishna Industries Ltd. 2011 (271) E.L.T. 148 (G.O.I.) 2. Indian Ispat Works (P) Ltd. 2006 (3) S.T.R. 161.

4. Personal hearing in this case was granted on 08.2.2018, Ms.Madhu Jain advocate, appeared on behalf of the appellant. She reiterated submissions made in their GOA. I have carefully gone through the case records, facts of the case, OIO, submission made by the appellant and the case laws cited. I find that I have to decide as to whether the appellant has wrongly paid Service Tax on the notice pay amount and if so, eligible for the refund.

[Handwritten Signature]



5. I have examined the basis on which the refund claim has been filed. I find that, as per terms of employment of contract with employee, if employee Leaves Company before defined period, then employee is required to pay notice payment. As per definition of "Service ' as defined in Section 65B (44) of Finance Act, provision of service by an employee to the employer in the course of or in relation to his employment is excluded from service tax net. Amount has been paid by employee to employer towards notice pay, hence, as per Section 65B (44) of Finance Act, Service Tax is not applicable on such recovery from employee. The appellant has recovered only the notice pay amount from employee, and not recovered service tax amount from the employee but paid it separately to the Government. Service Tax amount has been shown as "receivable" in the books of account. Subsequently, they realized that they were not liable to pay service tax on the said amount received from their employees and they had paid service tax wrongly. Accordingly, they claimed the refund of service tax paid by them, (with interest and penalty) during the period from 2013-14 to 16-17.

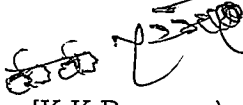
6. I find that by collecting notice pay amount for default of the employees under the employment contract cannot be said to have provided declared service of 'agreeing to the obligation to tolerate an act'. The expression 'to tolerate an act' included under 'declared services' should be understood to cover instances where the consideration is being charged by one person in order to allow another person to undertake any particular activity. In That the word 'obligation' used in Section 66E(e) indicates the need for the existence of the desire in the person for whom the activity is done. I find that, the notice pay amount collected by appellant is not towards any declared service and it is not liable to service tax. Hence, the impugned order rejecting service tax refund to them is to be dropped on this ground.

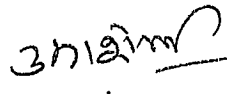
7. Further I find that, that they are not performing alleged declared service for any consideration. The Explanation (a) to Section 67 of the Act provides that 'consideration' includes any amount that is payable for the taxable services provided. I also rely upon the decision of the Commissioner (Appeals), Vadodara in the case of M/s. Gujarat State Fertilizers & Chemicals Ltd. vide Order-in-Appeal No. VAD-EXCUS-003-APP-392/2016- 17 dated 20.10.2016. Therefore, I hold that as per Section 65B (44) of Finance Act, Service Tax is not applicable on such recovery from employees.

8. In view of above, I set aside the impugned order and allow the appeal filed by the appellant.

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

Attested


[K.K.Parmar)
Superintendent (Appeals)
Central tax, Ahmedabad.


[उमा शंकर)
आयुक्त (अपील्स]

Date- /3/18

By Regd. Post AD.

M/s. Intas Pharmaceuticals Ltd.
2nd Floor, Chinubhai Centre,
Off. Nehru Bridge, Ashram Road,
Ahmedabad-380009.

Copy to-

1. The Chief Commissioner, CGST Central Excise, Ahmedabad zone.
2. The Commissioner, CGST Central Excise, Ahmedabad- North
3. The Asstt. Commissioner, CGST. Di-VI, Ahmedabad- North
4. The Asstt. Commissioner (Systems), CGST , Ahmedabad-North.
5. Guard file.
6. PA File.

