

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

रजिस्टर डाक ए.डी.द्वारा

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क फाइल संख्या (File No.): V2(73)61 /Ahd-II/Appeals-II/ 2016-17

स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 61-17-18

दिनांक (Date): 8/28/2017 जारी करने की तारीख (Date of issue): 26/11/17

श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-IV), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं----- दिनांक -----से सृजित

Arising out of Order-In-Original No. 26/AC/D/2016/UKG Dated: 04/26/16 issued by:
Assistant Commissioner Central Excise (Div-IV), Ahmedabad-II

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

M/s Shree Pre-Fab Steels(P) 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 प्रक्रिया 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 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, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हास्पिटल 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 रूपरूप 5 लाख या उससे कम है वहाँ रूपरूप 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपरूप 5 लाख या 50 लाख तक हो तो रूपरूप 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपरूप 50 लाख या उससे ज्यादा है वहाँ रूपरूप 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 Appellate 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 हैं।

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।

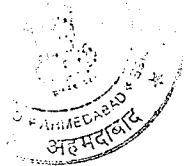
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section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

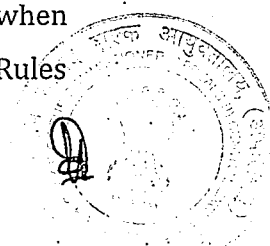
M/s Shree Pre-Fab Steels (P) Ltd, Survey No.453, Opp. Chachawadi Bus Stop, Village-Matoda, Chanerdar, Changodar, Ahmedabad 283 213 (henceforth, "appellant") has filed the present appeal against the Order-in-Original No.26/AC/D/2016/UKG dated 26.4.2016 (henceforth, "impugned order") passed by the Assistant Commissioner of Central Excise, Division-IV, Ahmedabad-II (henceforth, "adjudicating authority").

2. Briefly stated, the facts of the case are that a show cause notice, based on departmental audit, was issued to the appellant on 8.1.2016 for recovery of Cenvat credit of Rs.2,42,427/- taken by the appellant during the period Jan 2013 to Jun 2014 of service tax paid on mess (catering) expenses incurred for the employees. The Cenvat credit was sought to be denied on the ground that outdoor catering service was not an input service in terms of rule 2(l) of the Cenvat Credit Rules, 2004 (henceforth, "Cenvat Rules") as it fell under the excluded category of services with effect from 1.4.2011. The adjudicating authority, under the impugned order, disallowed the Cenvat credit and ordered to be recovered alongwith interest. Equal penalty was also imposed under rule 15(2) of the Cenvat Rules read with section 11AC of the Central Excise Act, 1944.

3. The appellant has filed the appeal mainly on the ground that outdoor catering service was used in relation to business activities; that in general it is compulsion to provide such a service under the Factories Act; that cost of these input services formed part of the cost of final product. According to appellant, services used for business activities continued to be eligible for credit if not excluded specifically. The appellant has cited number of decisions which were relied upon in his defence reply to the show cause notice. The appellant has also contested the charge of suppression of facts and imposition of penalty.

4. A personal hearing was held on 21.8.2017, wherein Shri Vipul Khandhar, Chartered Accountant represented the appellant and reiterated the grounds of appeal.

5. I have carefully gone through the appeal papers. The issue to be decided is of admissibility of Cenvat credit on outdoor catering service from 1.4.2011 when outdoor catering service came to be excluded in the rule 2(l) of the Cenvat Rules under a separate clause.

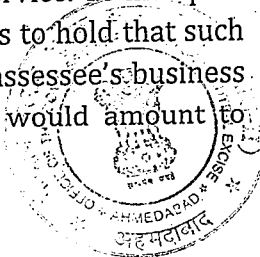


5.1 It is a fact that vide Notification No.3/2001-CE(NT) dated 1.3.2011 (effective from 1.4.2011), the definition of 'input service' provided under rule 2(l) of the Cenvat Rules was amended, which resulted in the deletion of the expression "activities relating to business" from the inclusive part of the definition and also exclusion of certain services, outdoor catering service being one of them, primarily meant for personal use or consumption of the employees. Accordingly, outdoor catering service meant primarily for the personal use or consumption of the employees does not constitute an input service under rule 2(l) of the Cenvat Rules.

5.2 The appellant has relied upon various decisions where outdoor catering service has been held to be an input service, however, most of the cases relied are in the context where credit was taken before aforesaid amendment in rule 2(l) ibid. The order of Mumbai Tribunal in case of Hindustan Coca Cola Beverages Pvt Ltd v. Commr. of C.Ex., Nashik [2015(38) STR 129 (Trib.-Mumbai)] however is noteworthy where credit has been allowed after 1.4.2011 in view of the fact that the cost of services was admittedly borne by the appellant and not by employee.

5.3 There is, however, another decision of Bangalore Tribunal in the case of AET Laboratories P Ltd v. CCE, Cus & ST, Hyderabad-I [2016(42) STR 720 (Trib.-Bang.)] where it has been clearly held that from 1.4.2011 outdoor catering service is not an input service under rule 2(l) of the Cenvat Rules. Para 5 of the said order is worth quoting and it is as under-

5. I have considered the submissions made by both the sides. There is no dispute about the factual or the legal position. The period involved in the present appeal is admittedly after 1-4-2011 and the amendment to the provisions of Rule 2(l) defining the input service came into existence w.e.f. 1-4-2011 only. The definition is extended by providing the inclusive as well as exclusive clauses. The exclusion clause was effective w.e.f. 1-4-2011 and Clause (C) of the said exclusion specifically excludes the services provided in relation to outdoor catering and health insurance or life insurance, etc. Admittedly such services, prior to 1-4-2011, have been held to be covered by the definition of input services. In fact, the need for exclusion would arise only when the services are otherwise covered by the definition. Legislation, in its wisdom, has excluded certain services from the availment of Cenvat credit w.e.f. 1-4-2011, when such services are otherwise covered by the main definition clause of input service. To interpret the said exclusion clause, in such a manner, so as to hold that such services have direct or indirect nexus with the assessee's business and thus would be covered by the definition, would amount to



defeat the legislative intent. It is well settled that the legislative intent cannot be defeated by adopting an interpretation which is clearly against such intent. As such, I find no justifiable reason to allow the credit in respect of the two disputed services and I uphold the confirmation of denial of Cenvat credit and demand of interest thereon.

5.4 The CESTAT, Principal bench, New Delhi, in its decision in the case of Bajaj Motors Ltd v. Commr. of C.Ex., Delhi-III [2015 (39) S.T.R. 85 (Tri. - Del.)] has also held that credit is not available on outdoor catering service with effect from 1.4.2011. I quote the relevant head-note as under-

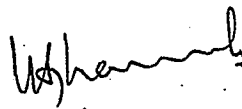
Cenvat credit of service tax - Input credit - Outdoor Catering service - Denial of - With effect from 1-4-2011, Outdoor catering service excluded from definition of input service - Assessee not entitled for input credit availed during 2011-12 - Rule 2(l) of Cenvat Credit Rules, 2004.

5.5 The Cenvat credit of Rs.2,42,427/- availed on outdoor catering service in the year 2013-14, therefore, is liable to be denied. I therefore uphold the impugned order for recovery of the said amount, alongwith interest. Further, I observe that appellant, despite there being clear provision in the Cenvat Rules took the Cenvat credit on ineligible service and the fact of taking Cenvat credit on ineligible service remained suppressed from the department unless an audit was conducted. The charge of suppression of facts therefore holds true and invocation of penalty provisions of rule 15(2) of the Cenvat Rules read with section 11AC is rightly justified. Accordingly, appellant is found liable to equal penalty.

6. In view of forgoing, I reject the appeal.

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)

केन्द्रीय कर आयुक्त (अपील्स)

Date: .8.2017

Attested


(Sanwamal Hudda)

Superintendent.

Central Tax (Appeals), Ahmedabad



By R.P.A.D.

To,

M/s Shree Pre-Fab Steels (P) Ltd,
Survey No.453, Opp. Chachawadi Bus Stop,
Village-Matoda, Chanerdar,
Changodar, Ahmedabad 283 213

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-IV, Ahmedabad North.
- ✓ 5. Guard File.
6. P.A.



