आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
: 079-26305065 टेलेफैक्स : 079 - 26305136

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क फाइल संख्या :File No : **V2(ST)61/North/Appeals/2019-20**/14988 TO 14992

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-002-APP-013-2020-21**

दिनाँक Date :17.06.2020 जारी करने की तारीख Date of Issue: 30/06/2020

श्री **अखिलेश कुमार,** आयुक्त (अपील) द्वारा पारित

Passed by **Shri Akhilesh Kumar,** Commissioner (Appeals) Ahmedabad

ग _____आयुक्त, केन्द्रीय GST, अहमदाबाद North आयुक्तालय द्वारा जारी मूल आदेश : दिनाँक : से सृजित

Arising out of Order-in-Original:**29/AC/18-19/Refund,** Date: **10/04/2018** Issued by: **Assistant** Commissioner ,CGST, Div: I, Ahmedabad North.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Adani Power (Mundra)

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 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 ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) 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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

केन्द्रीय कर एवं सेवाकर (अपील), अहमदाबाद OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS), AHMEDABAD

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

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 **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 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 न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर 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 ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

आयुक्त, केन्द्रीय वस्तु एवं सेवाकर (अपील), अहमदाबाद. OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS), AHMEDABAD.

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall beer a court fee stamp of Rs.6.50 paisa 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 in 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 उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 होगे।**

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.**

(6)(i) **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।**

(6)(i) 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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

आयुक्तालय, केन्द्रीय वस्तु एवं सेवाकर (अपील), अहमदाबाद. OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS), AHMEDABAD.

ORDER-IN-APPEAL

M/s. Adani Power (Mundra) Ltd., Adani House, Near Mithakhali Six Road, Navrangpura, Ahmedabad-380009 (hereinafter referred to as the "*appellant*") has filed the present appeal against the Order-in-Original No.29/AC/18-19/Refund dated 10.04.2018 (hereinafter referred to as the "*impugned order*") passed by the Assistant Commissioner of CGST & Central Excise, Division-I, Ahmedabad North Comm'rate, Ahmedabad, (hereinafter referred to as the "*adjudicating authority*"). Since M/s. Mundra Power Generating Undertaking (along with its assets and liabilities) of M/s. Adani Power Ltd., was transferred to M/s. Adani Power (Mundra) Ltd. vide NCLT Order dated 03.11.2017 in CP(CAA) No.104/NCLT/AHM/2017 with CP(CAA) No.105/NCLT/AHM/2017, the appellant has filed the present appeal in place of M/s. Adani Power Ltd.

2(i). The fact of the case, in brief, are that on 12.01.2018, the appellant filed a refund claim for Rs.7,16,851/- under Section 11B of the Central Excise Act 1944, for the amount of excise duty paid by them under 14 invoices pertaining to the period from 30.01.2017 to 26.06.2017 for inputs/spares/equipments procured by them from several manufacturers registered with the Division-I of Ahmedabad North Comm'rate. The procurement of goods were made without availing any exemption/benefit towards supply of goods to M/s. Adani Power Ltd., Mundra Thermal Power Project situated in Adani Power SEZ, Mundra. No ARE-1 application was prepared and submitted by the manufacturer/supplier of goods. It appeared that they had procured central excise duty paid goods from manufacturers and subsequently claimed refund as buyer who had borne incidence of duty. The appellant also submitted that in light of the Power Guidelines dated 06.04.2015, issued by Ministry of Commerce, they are not allowed to procure the inputs and spares without payment of duty.

2(ii). The refund was claimed on the ground that the they have established a thermal power plant in SEZ at Mundra pursuant to Letter of Approval dated 19.12.2006 issued by Director, Ministry of Commerce & Industry, Department of Commerce (SEZ Section), New Delhi; that thereafter Development Commissioner, Kandla SEZ vide order dated 14/15.06.2007 demarcated the area of 293-88-10 hactares at Taluka Mundra, Distt-Kutch, Gujarat as processing area where their plant is situated; that as per Section 26 of the SEZ Act, 2005 and Rule 27(1) of the SEZ Rules, 2006 they were not required to pay any duty on the goods imported/procured into SEZ for carrying on authorized operations which inter-alia includes operation & maintenance (O&M) of plant; that as per Power Guidelines dated 16.02.2016, issued by Ministry of Commerce & Industry for power plants, which have been approved prior to 27.02.2009, their plant is situated in processing area and therefore imposition of duty is in contravention of the said provisions of SEZ Act and Rules. They also claimed the interest from date of payment of such duty.

2(iii). For the previous 3 refund claims filed by the appellant, a clarification was sought vide letter dated 28.03.2017 by the adjudicating authority from the Development Commissioner of Adani Port & SEZ, Mundra. The detailed reply dated 05/06.04.2017, received from the office of the Development Commissioner, Adani Port and SEZ, Mundra was found against the appellant. (details available in Show Cause Notice and impugned order also). In view of this, a Show Cause Notice dated 08.02.2018 (hereinafter referred to as the *"SCN"*) was issued to the appellant proposing rejection of the said Refund claim.

2(iv). Opportunities of personal hearing were granted to the appellant on 19.02.2018 and 26.02.2018. The appellant vide their letter dated 19.02.2018 sought adjournment for the personal hearing fixed on 19.02.2018 and further sought additional time for preparation of suitable reply. A further opportunity of personal hearing was granted to them on 16.03.2018. But the appellant did not avail any of the opportunity of the personal hearing. Since the proviso to Section 33A(2) of the Central Excise Act, 1944 did not allow the adjudicating authority to grant more than three adjournment, she decided the refund claim vide the impugned order, on merits and on the basis of available records. The refund claim was rejected vide the impugned order after discussion and findings mainly on the ground that the procedure prescribed under Rule 30 of SEZ Rules, 2006 has not been followed; that the certificate of Chartered Accountant (hereinafter referred to as *"CA"*) produced before her/him neither bear any signature nor has the membership number of the said CA; that substantive documents in support of the refund claim have not been submitted by the appellant; that the Development Commissioner's report regarding the said refund goes against the appellant etc.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the grounds that they were not given second and third chance of hearing for which they relied upon the case of Shukla & Bros reported in 2010(254)ELT 6(SC); that they are importing/procuring various inputs and spares required for authorized operation which is generation of electricity in their thermal power plant situated in the SEZ as well as for operation and maintenance of plant, however in light of power guidelines dated 06.04.2015 they were not allowed to procure inputs and spares without payment of duty and therefore they procured the same on payment of duty; that in terms of Section 26(c) of SEZ Act, 2005 and Rule 27(1) of SEZ Rules, 2006 they were not required to pay any duty on the goods imported/procured into a SEZ for carrying on authorized operation; that such duty imposition is in contravention of the above said provisions; that plant is situated in processing area which is confirmed by power guidelines dated 16.02.2016; that they are not required to receive the goods in question by following the procedure prescribed for export from DTA as required under Rule 30 of SEZ Rules, 2006; that where the goods are brought into the SEZ without claiming any upfront exemption there is no requirement of filing ARE1 or Bill of Export or authorization from specified/authorized officer; that entire evidence regarding

movement of goods, their receipt at SEZ and utilization for authorized operation is on record; that they have shown refund claim as central excise duty receivable from central excise department in the books of accounts and has not been passed on the burden of duty to another person; that they are eligible for interest from the date of filing of refund claim.

4. Personal hearing was accorded to the appellant on 25.07.2018, 12.09.2018, 24.10.2018 or 26.10.2018, 02.07.2019, 15 & 16.07.2019, 20.08.2019, 13.09.2019, 10.10.2019, 13.11.2019, 19.12.2019, 08.01.2019, 13.02.2020 and 26.02.2020. The appellant neither attended any of the hearing nor sought any adjournment. Since sufficient opportunities of personal hearing have been granted to the appellant and they have not availed any of them, I proceed to decide the appeal on the basis of available records on merits.

5. I have carefully gone through the facts of the case available on records and submissions made by the appellant in the Appeal Memorandum. It is observed that the issue to be decided in the instant appeal is whether the refund is admissible to the appellant on the ground that the duty paid goods were supplied to them for authorized operation in SEZ.

6(i). The relevant legal provisions for units operating in SEZ are discussed in subsequent paragraphs :

6(ii). Section 2(c) of the SEZ Act, 2005 reads as under :

"(c) 'authorized operations' means operations which may be authorized under sub-section (2) of section 4 and sub-section (9) of section 15;"

6(iii). Section 4(2) of the SEZ Act, 2005 reads as under :

"4. (1) The Developer shall, after the grant of letter of approval under sub-section (10) of section 3, submit the exact particulars of the identified area referred to in sub-section (2) to (4) of that section, to the Central Government and thereupon that Government may, after satisfying that the requirements, under sub-section (8) of section 3 and other requirements, as may be prescribed, are fulfilled, notify the specifically

***Provided** that an existing Special Economic Zone shall be deemed to have been notified and established in accordance with the provisions of this Act and the provisions of this Act shall, as far as may be, apply to such Zone accordingly.*

***Provided further** that the Central Government may, after notifying the Special Economic Zone, if it considers appropriate, notify subsequently any additional area to be included as a part of that Special Economic Zone.*

(2) After the appointed day, the Board may, authorize the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorize."

6(iv). Section 7 of the SEZ Act, 2005 reads as under :

"7. Exemption from taxes, duties or cess : Any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by, -

(i) a Unit in a Special Economic Zone; or

(ii) a Developer;

shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule."

6(v). Section 15(9) of the SEZ Act, 2005 reads as under :

"(9) The Development Commissioner may, after approval of the proposal referred to in sub-section (3), grant a letter of approval to the person concerned to set up a Unit and undertake such operations which the Development Commissioner may authorize and every such operation so authorized shall be mentioned in the letter of approval."

6(vi). Rule 19(3) of the SEZ Rules, 2006 reads as under :

"An entrepreneur holding Letter of Approval issued under sub-rule (1) shall only be entitled to set up a Unit in processing area of the Special Economic Zone or Free Trade and Warehousing Zone, as the case may be"

6(vii). Relevant part of Section 26 of the SEZ Act, 2005 reads as under :

"Section 26(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely: -

(a).....

(b).....

(c) exemption from any duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorized operations by the Developer or entrepreneur;

(d).....

(e).....

(f).....

(g).....

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)."

6(viii). Relevant part of Rule 27 of the SEZ Rules, 2006 reads as under :

"27. Import and Procurement — (1) A Unit or Developer may import or procure from the Domestic Tariff Area without payment of duty, taxes or cess or procure from Domestic Tariff Area after availing export entitlements or procure from other Units in the same or other Special Economic Zone or from Export Oriented Unit or Software Technology Park unit or Electronic Hardware Technology Park unit or Bio-technology Park unit, all types of goods, including capital goods (new or second hand), raw materials, semi-finished goods, (including semi-finished Jewellery) component, consumables, spares goods and materials for making capital goods required for authorized operations except prohibited items under the Import Trade Control (Harmonized System) Classifications of Export and Import Items:

***Provided** that exemptions from payment of duty, taxes or cess, drawbacks and concessions on all types of goods and services, required for setting up and maintenance of the factory building, allowed to a unit shall also be available to the contractors appointed by such unit and all the documents in such cases shall bear the name of the unit along with the contractor and these shall be filed jointly in the name of the unit and the contractor:*

***Provided further** that the unit shall be responsible and liable for proper utilization of such goods and services in all cases.*

(2) In case of any doubt as to whether any goods or services are required by a Unit or Developer for authorized operations or not, it shall be decided by the Development Commissioner.

(3) The import of duty-free material for setting up educational institutions, hospitals, hotels, residential and/or business complex, leisure and entertainment facilities or any other facilities in the non-processing area of the Special Economic Zone shall be as approved by the Board and import of no duty-free material shall be permitted for operation and maintenance of such facilities.

Provided further that any goods for the personal use of, or consumption by officials, workmen, staff, owners or any other person in relation to a Unit or Developer, shall not be eligible for exemptions, drawback and concessions or any other benefit in accordance with the provisions of section 7 or 26."

6(ix). Rule 25 of the SEZ Rules, 2006 reads as under :

"25. Where an entrepreneur or Developer does not utilize the goods or services on which exemptions, drawbacks, cess and concessions have been availed for the authorized operations or unable to duly account for the same, the entrepreneur or the Developer, as the case may be, shall refund an amount equal to the benefits of exemptions, drawback, cess and concessions availed

without prejudice to any other action under the relevant provisions of the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Excise Tariff Act, 1985, the Central Sales Tax Act, 1956, the Foreign Trade (Development and Regulation) Act, 1992 and the Finance Act, 1994 (in respect of service tax) and the enactments specified in the First Schedule to the Act, as the case may be:
***Provided** that if there is a failure to achieve positive net foreign exchange earning, by a Unit, such entrepreneur shall be liable for penal action under the provisions of Foreign Trade (Development and Regulation) Act, 1992 and the rules made there under."*

6(x). Relevant part of Rule 30 of the SEZ Rules, 2006 reads as under :
"30. Procedure for procurements from the Domestic Tariff Area.— (1) The Domestic Tariff Area supplier supplying goods to a Unit or Developer shall clear the goods, as in the case of exports, either under bond or as duty paid goods under claim of rebate on the cover of ARE-1 referred to in Notification number 42/2001-Central Excise (NT) dated the 26th June, 2001 in quintuplicate bearing running serial number beginning from the first day of the financial year.

(2) Goods procured by a Unit or Developer, on which Central Excise Duty exemption has been availed but without any availment of export entitlements, shall be allowed admission into the Special Economic Zone on the basis of ARE-1.

(3) The goods procured by a Unit or Developer under claim of export entitlements shall be allowed admission into the Special Economic Zone on the basis of ARE-1 and a Bill of Export filed by the supplier or on his behalf by the Unit or Developer and which is assessed by the Authorised Officer before arrival of the goods:
***Provided** that if the goods arrive before a Bill of Export has been filed and assessed, the same shall be kept in an area designated for this purpose by the Specified Officer and shall be released to the Unit or Developer only after completion of the assessment of the Bill of Export.*

(4) A copy of the ARE-1 and/or copy of Bill of Export, as the case may be, with an endorsement by the authorized officer that goods have been admitted in full into the Special Economic Zone shall be forwarded to the Central Excise Officer having jurisdiction over the Domestic Tariff Area supplier within forty-five days failing which the Central Excise Officer shall raise demand of duty against the Domestic Tariff Area supplier.

(7) On arrival of the goods procured from the Domestic Tariff Area at the Special Economic Zone gate, the Authorized Officer shall examine the goods in respect of description, quantity, marks and other relevant particulars given in the ARE-1, invoice, Bill of Export of packing list and also as per the examination norms laid down in respect of export goods in cases where the goods are being procured under claim of an export entitlement.

(9) A copy of the Bill of Export and ARE-1 with an endorsement of the Authorised Officer that the goods have been admitted in full in the Special Economic Zone, shall be treated as proof of export.

(10) Where the goods are to be procured by a Unit or Developer from a Domestic Tariff Area supplier who is not registered with the Central Excise authorities, or is a trader or merchant exporter, the procedure under sub rules (1) and (2) above shall apply, mutatis mutandis, except that the goods shall be brought to the Special Economic Zone under the cover of an invoice and the ARE-1 shall not be required.

(11) The Unit or Developer may also procure goods from Domestic Tariff Area without availing exemptions, drawbacks and concessions on the basis of invoice or transport documents, issued by the supplier:
***Provided** that such invoices or transport documents shall be endorsed to the effect that no exemptions, drawbacks and concessions have been availed on the said supplies."*

7(i). The appellant is a co-developer engaged in generation of power, its transmission and distribution in SEZ as well as in DTA. They are governed by guidelines for Power issued by Ministry of Commerce & Industry. The Power Guideline dated 06.04.2015 reads as under :

(Relevant part only)
"With reference to subject cited above, I am directed to inform that the above mentioned guidelines issued vide this Department's letter of even number dated 21st March, 2012 have been withdrawn by

the Government with immediate effect i.e. 1st April, 2015. Further, the Power Guidelines issued vide this Department's letter of even number dated 27th February, 2009 have been resorted. A copy of the communication in this regard is enclosed.

2. In pursuance of the above cited decision, you are informed that henceforth setting up of power plants shall be allowed only in the Non-Processing Area of SEZs. Further, those power plants which are presently situated in Processing Areas of SEZs, shall be demarcated as Non-Processing Areas and no operation and maintenance (O&M) benefits will now be available for such power plants. An action taken report in the matter may be furnished to this Department."

7(ii). Further the relevant part of Power Guidelines dated 16.02.2016 reads as under :

(Relevant part only)

"(i) A power plant, including non-conventional energy power plant, to be set up by developer/co-developer in an SEZ as part of infrastructure facility will be in the Non-Processing Area of SEZ only, and will be entitled to fiscal benefits only for its initial setting up and no fiscal benefit would be admissible for its operation and maintenance. There will be no obligation to achieve positive NET Foreign Exchange (NFE) for such power plants. Such a power plant can supply power to DTA after meeting the power requirement of the SEZ subject to payment of customs duty as determined by DoR keeping in view the duty foregone on initial setting up of the power plant.

(ii) ...
(iii) ...
(iv) ...
(v) ...
(vi) Those Power Plants in SEZs which were approved prior to 27.02.2009, and subject to issue of Power Guidelines and provisions of SEZ Act & Rules, either as an infrastructure facility by Developer/Co-developer or as a unit in the Processing Area will be permitted to operate. It is relevant that during period of installation of such plants, duty benefits on capital investment of mega power plants were available under the then prevalent policy guidelines even in the DTA area.

Henceforth, such power plants will be allowed O&M benefits only with regard to the average monthly power supplied to entities within 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/EOU 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 the fact that no duty free benefits on raw materials, consumables, etc. have been availed for generation of such power. However, those power plants not having the capacity of the mega power plant, as given in the DoR Notification No.21/2002-Customs dated 01.03.2002 will be required to pay duty for sale in DTA, on account of duty free import of capital goods, as determined by DoR."

8(i). It is apparent from the above, that the Central Government vide its "Guidelines for Power Generation, Transmission and Distribution in Special Economic Zones (SEZs)" dated 16.02.2016 under its Para(i) has clearly stated that "*A power plant, including non-conventional energy power plant, to be set up by developer/co-developer in an SEZ as part of infrastructure facility will be in the Non-Processing Area of SEZ only, and will be entitled to fiscal benefits only for its initial setting up and* ***no fiscal benefit would be admissible for its operation and maintenance****."*

8(ii). Further, for Power Plants, which were approved prior to 27.02.2009 (applicable to the case in hand for the appellant), the guidelines under para (vi) has clearly stated that such power plants will be allowed O&M benefits only with regard to the average monthly power supplied to entities wihin the same SEZ during the preceding year. It has further directed that henceforth, no O&M benefits including service tax exemption will be allowed for power supplied to DTA/other SEZs/EOU from such power plants.

Thereby the Government has made it clear that they no longer intend to extend the O&M benefit of any tax/duty exemption for power supplied to DTA/other/SEZs/EOU from such power plants which were approved prior to 27.02.2009. Here in the present case, the appellant has got approval in December, 2006 i.e. prior to 27.02.2009 and therefore by issuing the guideline dated 16.02.2016, the Government has made it clear that the appellant will no longer be eligible for tax/duty exemption for O&M of their plant for the power supplied to DTA/other/SEZs/EOU from their power plant. It is also pertinent to mention here that even this benefit is extended to the units which were working in the Processing Zone, whereas in the case on hand the appellant is presently working in the Non-Processing Zone as stated by office of the Development Commissioner, APSEZ, Mundra vide its letter dated 05/06.04.2017. Hence, they are ineligible for any duty exemption.

8(iii). The office of the Development Commissioner, APSEZ, Mundra also clearly stated that the appellant is not eligible for other benefits/concessions except those mentioned in the power guidelines; that the appellant has been allowed O&M benefit on the basis of average monthly power supplied within the SEZ w.e.f. 16.02.2016 to 31.10.2016 and their remaining claims were under process; that the appellant is not filing BOE (SEZ to DTA sale) for supply of electricity from SEZ to DTA sale and not paying any duty; that the power plant is demarcated in the Non-Processing Area. The appellant is silent on the said report of office of the Development Commissioner.

8(iv). It is clear from the records that the appellant is supplying their electricity in DTA/outside SEZ also. The Rule 47(3) of the SEZ Rules, 2006 states that the surplus power generated in a Special Economic Zone's Developer's Power Plant in the SEZ or Unit's captive power plant or diesel generating set may be transferred to Domestic Tariff Area on payment of duty on consumables and raw materials used for generation of power. This makes it clear that if the appellant transfer surplus power to DTA then the duty on the consumables and raw material used for generation of power will be payable by the appellant. As discussed in para-8(iii) above, office of the Development Commissioner has already said that the appellant is not paying any duty for supply of electricity from SEZ to DTA sale.

8(v). It is not coming out of the records that the goods/consumables were used for supplying the power/electricity to the same SEZ only. The appellant did not submit the details of the power supplied in the same SEZ and the power supplied to DTA/other SEZs/EOU out of the same SEZ, before the adjudicating authority. The appellant also failed to establish that the inputs/consumables are procured for setting up of the power plant. Therefore, the adjudicating has rightly rejected the refund claim of the appellant in view of the provisions of law and as per the information received from office of the Development

Commissioner, APSEZ, Mundra. Moreover, the appellant failed to submit relevant documents establishing their claim as per the provisions of law.

9. In view of above discussion, I reject the appeal filed by the appellant and uphold the impugned order.

17 June, 2020

(Akhilesh Kumar)
Commissioner (Appeals)

Date : .06.2020

Attested

29/06/20

(Jitendra Dave)
Superintendent (Appeal)
CGST, Ahmedabad.

BY R.P.A.D. / SPEED POST TO :
M/s. Adani Power Ltd.,
Adani House, Near Mithakhali Six Road,
Navrangpura, Ahmedabad-380009

Copy to :-

1. The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Principal Commissioner, CGST & Central Excise, Ahmedabad North Comm'rate.
3. The Addl./Jt. Commissioner, (Systems), CGST & Cen. Excise, Ahmedabad North Comm'rate.
4. The Dy./Asstt. Commissioner, CGST & Cen. Excise, Division-I, Ahmedabad North Comm'rate.
5. Guard File.
6. P.A. File.