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

क फाइल संख्या : File No : **V2(ST)056/A-II/2017-18**/6074-78

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-001-APP-122-17-18**

दिनाँक Date :20-10-2017 जारी करने की तारीख Date of Issue 16/11/2017

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **STC/Ref/187/Jmc/Kmm/Ac/D-III/16-17** Dated **10.03.2017** **Issued by AC STC,** Service Tax, Ahmedabad

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

M/s. JMC Projects Ltd.
Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:–
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar,Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of

crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त,, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA)(उसमें से प्रमाणित प्रति होगी) और अपर
आयुक्त, सहायक / उप आयुक्त अथवा A2I9k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 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 हैं, 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।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

Under Central Excise and Service Tax, "Duty demanded" shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇨ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) **इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।**

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

ORDER IN APPEAL

M/s. JMC Projects (India) Pvt. Ltd., A-104, Shapath-4, Opp. Karnavati Club, S. G. Road, Ahmedabad *(hereinafter referred to as 'the appellants')* have filed the present appeal against Order-in-Original number STC/Ref/187/JMC/K.M.Mohadikar/AC/Div-III/2016-17 dated 10.03.2017 *(hereinafter referred to as 'impugned order')* passed by the Assistant Commissioner, Service Tax, Division-III, Ahmedabad *(hereinafter referred to as 'adjudicating authority')*.

2. The facts of the case, in brief, are that the appellants were engaged in providing services under the category of 'Works Contract Service' and hold valid registration number AAACJ3814EST001. The appellants had provided services for construction of additional office complex for the Supreme Court of India , New Delhi under Mega Examption Notification number 25/2012-ST dated 20.06.2012. As the government refused to reimburse the Service Tax paid by the appellants, the appellants had filed a refund claim of ₹ 4,28,85,053/- on 27.10.2016. The said refund claim was filed under Section 102 of the Finance Act, 2016 read with the Finance Act, 1994 and rules made there under. During scrutiny of the claim, it was noticed that the appellants had availed a total CENVAT credit of ₹2.13 crores during 2015-16. Out of which, the appellants reversed an amount of ₹0.78 crores as per Rule 6(3A) of the Cenvat Credit Rules, 2004 considering only the common input services. It was further noticed that the appellants had recovered the Service Tax from their client and hence, it was presumed that the incidence of Service Tax was passed on by them and the doctrine of unjust enrichment would be applicable. Thus, the adjudicating authority, vide the impugned order, rejected the entire claim of refund of ₹4,28,85,053/-.

3. Being aggrieved with the impugned order the appellants have preferred the present appeal. They stated that the adjudicating authority neither issued any show cause notice nor offered the appellants any opportunity of personal hearing thereby denying the latter their right to natural justice. The appellants further reiterated that the refund claim cannot be denied on the ground of irregular reversal of CENVAT credit. They further argued that the claim cannot be rejected on the ground of unjust enrichment.

4. Personal hearing in the matter was granted and held on 21.08.2017. Shri Jigar Shah, Advocate, appeared before me on behalf of the appellants and reiterated the contents of appeal memo. Additional submissions and various judgments were also tabled before me, by him, during the course of hearing. He points out the judgment of Hon'ble Supreme Court in the case of Addison & Co. vs. Commissioner of Central Excise, Madras.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. There are the following issues to be decided in the case viz.;

(i) The claims were rejected by the adjudicating authority without following the principles of natural justice i.e. without issuing show cause notice and without offering the appellants the opportunity of personal hearing;

(ii) Claim rejected on the ground that the appellants had passed on the burden of Service Tax to their clients and thus doctrine of unjust enrichment would be applicable;

(iii)Claim rejected on the ground that the appellants did not reverse the entire CENVAT credit availed by them;

6. Regarding the issue that the appellants were not given any opportunity to present their case properly as per the principle of natural justice as no show cause notices were issued to them; I consider that the Adjudication proceedings shall be conducted by observing principles of natural justice. The principles of natural justice must be followed by the authorities at all levels in all proceedings under the Act or Rules and the order passed in violation of the principles of natural justice is liable to be set aside by Appellate Authority. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice. Natural justice has certain cardinal principles, which must be followed in every proceeding. Judicial and quasi-judicial authorities should exercise their powers fairly, reasonably and impartially in a just manner and they should not decide a matter on the basis of an enquiry unknown to the party, but should decide on the basis of material and evidence on record. Their decisions should not be biased, arbitrary or based on mere conjectures and surmises. The first and foremost principle is what is commonly known as *audi alteram partem* rule. It says that no one should be condemned unheard. The orders passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. The Supreme Court in the case of S.N. Mukherjee vs Union of India [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". The Hon'ble Supreme Court has further elaborated the legal position in the case

of Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr. [AIR 1976 SC 1785], as under;

> *".....If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ...".*

The adjudicating authority should, therefore, bear in mind that no material should be relied in the adjudication order to support a finding against the interests of the party unless the party has been given an opportunity to rebut that material. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated. However, the appellants, vide their letter dated 21.08.2017, have requested before me to decide the case on merit only at my level as remanding the case back for fresh hearing would be utter wastage of man-hour. In view of their request, I would now discuss the case exclusively on merit.

7. Regarding the second issue i.e., rejection of the claim on the ground that the appellants had passed on the burden of Service Tax to their clients and thus doctrine of unjust enrichment would be applicable, the appellants have claimed that CPWD (the service recipient) has recovered the amount of ₹4,28,85,053/- vide R.A. Bill number 23, CV number 757 dated 01.11.2016. In support of their claim, the appellants have submitted before me a photocopy of the certificate, dated 03.11.2016, issued by the Executive Engineer, Supreme Court Project Division-I, New Delhi. In the said letter, it is certified in paragraph 6 that they have recovered the amount of ₹ 4,28,85,053/- from the appellants. In paragraph 8 of the impugned order, the adjudicating authority has accepted this fact. However, I find that, in the pre-audit verification, it has been claimed that mere photocopy of the said

letter cannot be accepted as a reliable document. The adjudicating authority, in the impugned order, has refrained from discussing the fact as to whether he agrees with the statement of pre-audit or otherwise. He has simply pasted the comments of the pre-audit, in the impugned order, and without any rational discussion, has rejected the claim citing the doctrine of unjust enrichment. This again converts the impugned order into a non-speaking one. I agree with the view of the Hon'ble Supreme Court that if the incidence of duty that is passed on to the buyer is returned back and same is authenticated by the certificate of a responsible agency, then the refund is eligible. I find the point raised by the pre-audit section is baseless. If the department starts rejecting the refund claims on flimsy grounds, then we will witness an increase of unnecessary litigations which would put extra burden on the quasi judicial and judicial bodies. I understand that adjudicating authority was quite convinced of the authenticity of the certificate of the Executive Engineer but could not gather enough courage to rebuff the allegation raised by the pre-audit section. The adjudicating authority should work as an independent entity and should have concluded the issue free from any prejudice. In view of the discussion held above, I confirm that as the appellants had reimbursed their client the amount of Service Tax collected, the principle of unjust enrichment will not be applicable to the case.

8. Regarding the third issue i.e., rejection of the claim on the ground that the appellants did not reverse the entire CENVAT credit availed by them, I find that the appellants have reversed the credit of common input service availed by them. In fact, in the paragraph 9 of the impugned order, the adjudicating authority has confirmed the same stating even the entry numbers vide which the credits were reversed back. I quote the contents of paragraph 9 of the impugned order as below;

> *"I also find that the claimant has reversed the CENVAT Credit vide CENVAT Credit Registered Entry No. 5840 dated 13.06.2016 to the extent of Rs.14,33,269/- pertaining to the common input service and also vide their CENVAT Credit Registered Entry No. 24463 dated 31.12.2016 they have reversed the CENVAT Credit to the extent of Rs.63,31,136/- pertaining to input service directly used in the said project. Accordingly, I find that the claimant has reversed to the total CENVAT Credit to the tune of Rs.77,64,405/-".*

The adjudicating authority, quoting the above, has still rejected the claim without citing any valid reason. In fact, in paragraph 12 of the impugned order, the adjudicating authority has claimed that the appellants were required to reverse 7% of the gross value (i.e. ₹2,12,53,231/-), as per Rule 6(3)(1) of CCR, 2004, and as they have reversed only ₹77,64,405/- instead of the above, their claim is not sustainable. In this regard, I would like to quote below the contents of Rule 6 of CCR, 2004;

"Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-

(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2). ***Provided*** *that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely:-

(i) the manufacturer of goods shall pay an amount equal to 6% of value of the exempted goods and the provider of output service shall pay an amount equal to 7%. of value of the exempted services; or

(ii)the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).

Explanation I.- *If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods*

manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

***Explanation II.**-For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service".*

In the case of the Commissioner of Central Excise, Puducherry versus the the CESTAT, Chennai, the Hon'ble Hon'ble High Court of Judicature, Madras concluded that the assessee, *suo moto,* reversed the credit on common inputs used for manufacturing of dutiable and exempted goods. Hence, reversal of 8% of value of exempted goods not required. Question of law answered against Revenue.

In the case of the Commissioner of Central Excise, Chennai-II versus ICMC Corporation Ltd., the Hon'ble Hon'ble High Court of Judicature, Madras proclaimed that when credit attributable to them is reversed in the case of inputs used exclusively for manufacture of exempted products, demand of 8% or 10% on sale price was not justified under Rule 6 of Cenvat Credit Rules, 2004.

Thus, from the above, it is quite clear that the adjudicating authority cannot direct the appellants to follow the conditions mentioned in Rule 6(3) above. The appellants have to follow either of the options and the department is not supposed to force any of the options on the appellants. In this case, the appellants have opted for option number (ii) and reversed an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A). They have further, submitted before me a certificate from Vanraj & Co., Chartered Accountants, certifying the same. Also, the appellants are not supposed to reverse the entire credit as demanded by the department. If a person is engaged in manufacturing dutiable & exempted goods or rendering taxable & exempted services together then he has to determine and avail CENVAT Credit only on those inputs or input services which are used for providing taxable services or manufacturing dutiable goods. Therefore, I find that the appellants have rightly reversed the common input services and are eligible for the entire amount of refund claimed.

9. Therefore, in view of the discussion held above, I set aside the impugned order and allow the appeals filed by the appellants with consequential relief.

10. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeal filed by the appellants stands disposed off in above terms.

(उमा शंकर)

CENTRAL TAX (Appeals),
AHMEDABAD.

ATTESTED

(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.

To,
M/s. JMC Projects (India) Pvt. Ltd.,
A-104, Shapath-4,
Opp. Karnavati Club, S. G. Road,
Ahmedabad- 380 015.

Copy to:

1) The Chief Commissioner, Central Tax, Ahmedabad.
2) The Commissioner, Central Tax, Ahmedabad (South).
3) The Dy./Asst. Commissioner, Central Tax, Division-VII (Satellite), Ahmedabad.
4) The Asst. Commissioner (System), Central Tax, Hq., Ahmedabad (South).
5) Guard File.
6) P. A. File.