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

क फाइल संख्या : File No : **V2(ST)057/A-II/2017-18** / 8010 to 8014

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-001-APP-134-17-18**

दिनाँक Date :27-10-2017 जारी करने की तारीख Date of Issue 30-10-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **SD-02/Ref-297/VJP/2016-17** Dated **28.02.2017**

Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. L & T Construction
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 A2l9k 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 रू 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 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।

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 Larsen & Turbo Ltd., 1009 SAKAR-II, Ellis bridge, Opposite Town Hall, Ashram Road, Ahmedabad (hereinafter referred to as 'the appellant') has filed the present appeal against **Order-in-original No.SD-02/REF-297/VIP/2016-17 dated 28/02/2017** (hereinafter referred to as 'the impugned order') passed by Assistant Commissioner, Service Tax, Division-II, Ahmedabad (hereinafter referred to as 'the adjudicating authority'). The appellant was awarded a contract by M/s Bharat Sanchar Nigam Ltd., Western Telecom projects, Gujarat Area, 2nd Floor, Microwave Building, Navrangpura, Ahmedabad-06, holding Service Tax Registration No. AABCB5576GSD799 (hereinafter referred to as M/s BSNL for brevity), a Government of India Enterprise for setting up intelligent Fibre Optic technology to connect 219 Army Stations, 33 Navy Stations & 162 Air force stations across the country. The service provided by the appellant and received by M/s BSNL was in the nature of service in respect of construction of any other original works predominantly for use other than for commerce, industry or any other business or profession covered under Mega Exemption Notification No. 25/2012-ST amending Section 102 of the Finance Act, 1994. M/s BSNL had filed a Refund claim on **11/11/2016** for an amount of **Rs.4,85,54,577/-,** on the basis of NO OBJECTION CERTIFICATE issued by the appellant who as the service provider had paid Service Tax and recovered the same from M/s BSNL.

2. On verification of the refund claim of M/s BSNL, it appeared that the appellant had availed CENVAT credit without maintaining separate accounts of receipt and use of capital goods / services in respect of exempted services as well as taxable services consequent to the fact that the services provided by the appellant to M/s BSNL had became exempt under Notification No. 09/2016 dated 01/03/2016. Therefore, it appeared that the appellant was required to pay an amount at applicable rate under Rule 6(3) of CCR, 2004 on the value of exempted services amounting to Rs.95,30,20,871/-. It was observed that the certificate issued by the appellant to facilitate claim of refund by M/s BSNL had no legal validity and the amount liable for reversal by the appellant under Rule 6(3) of CCR, 2004 was required to be deducted from the total amount of the admissible refund claim amount filed by M/s BSNL. A Show Cause Notice F.No.SD-02/Ref-177/16-17 dated 23/12/2016 (hereinafter referred to as 'the SCN') was issued to M/s BSNL as well as to the appellant proposing to recover the applicable amount on exempted value of services from the appellant under Rule 6(3) of CCR, 2004 and appropriate this demand against the refund claim due for sanction to M/s BSNL; proposing to reject the refund claim to the extent of **Rs.4,85,54,577/-** filed by M/s BSNL for non-compliance of the conditions in Notification No. 09/2016 ST dated 01/03/2016 read with Section 102 of Finance Act, 1994 along with Section 11B of CEA, 1944 as made applicable to Service Tax under Section 83 of F.A., 1994 and the rules framed thereunder. The SCN was adjudicated *vide* the impugned order where the adjudicating authority has relied on the Certificate issued by the appellant's Chartered

Accountant that the appellant had maintained separate records for the project of M/s BSNL as laid down in Rule 6(2) of CCR, 2004 while availing CENVAT credit amounting to Rs.42,84,562/- on input service and capital goods used for the said project during the period **April-2015 to February-2016** and accordingly he has held that the question of recovery under Rule 6(3) of CCR, 2004 from the appellant does not arise in this case. Further, the adjudicating authority has held that as the appellant had failed to reverse the amount of Rs.42,84,562/- availed as CENVAT credit relating to the said project, M/s BSNL was entitled for refund of **Rs.4,42,70,015/-** after adjusting the CENVAT credit amount of Rs.42,84,562/- [Rs.4,85,54,577/- (-) Rs.42,84,562/-]. Accordingly, the adjudicating authority has sanctioned the refund amount of **Rs.4,42,70,015/-** and rejected the refund claim amount of Rs.42,84,562/- out of a total refund claim of Rs.4,85,54,577/- filed by M/s BSNL.

3. Aggrieved by the impugned order, the appellant has filed the instant appeal, mainly on the following grounds:

1) The learned adjudicating authority ought to know that as per law the demand of any amount pertaining to ineligible input service tax credit is demandable only from the assessee who had availed the credit and law does not permit the deduction of such amount from the service recipient who had fully paid the tax involved on the services and who had borne the total tax involved in the services, thereby being fully entitled to receive the full amount as refund. He had committed gross error and injustice in traversing beyond the scope of the notice issued to them and to M/s BSNL, in violation of the principles of natural justice as the contentions made by the appellant were not considered. The learned authority ought to have considered the clear mandate contained in Section 102 of F.A., 1994 directing the refund of tax so collected without prescribing any condition and out not to have resorted to invocation of Rule 6 of CCCR, 2004. The authority had erred to appreciate that the credit availed by the appellant was admissible and it was a gross error on his part to refuse to follow the ratio of the judgment of Hon'ble High Court of Karnataka in the TAFE case. Once the authority was satisfied that separate records were maintained in the BSNL project by the appellant, he is debarred from proceeding to deduct the amount of Rs.42,84,562/- from the legitimate refund claim made by M/s BSNL. The authority had ignores the legislative intent of Notification No. 25/2012 ST dated 20/06/2012, providing for mega exemption under entry no. 12 for the subject services, as the contractors were providing works contract services which enabled the appellant to claim exemption as per the above said entry. The appellant had paid tax directly to the Government Treasury and a portion was paid by their sub-contractors to the Government Treasury, thus the entire amount having been received by the Government, the legislative intent of granting exemption should be respected and the entire refund ought to have been granted.

4. Personal hearing in appeal was held on 10/10/2017. Shri Keval Parikh, Assistant General Manager, Indirect Taxes for the appellant appeared and reiterated the grounds of appeal.

5. I have carefully gone through the impugned order and the grounds of appeal filed by the appellant. I find that no dispute is arising in the impugned order with regards to the refund claim of M/s BSNL as far as the provisions of Section 102(2) of the Finance Act, 1994 are concerned. The dispute in the present case arises out of the fact that the

appellant had passed on the entire duty liability paid by them amounting to Rs.4,85,54,577/- to M/s BSNL, while availing and utilizing CENVAT credit of Rs.42,84,562/-. Hence the issue to be determined is whether rejection of the CENVAT quantum of the refund claim i.e. rejection of Rs.42,84,562/- to M/s BSNL is sustainable or otherwise.

6. The appellant has not denied or disputed the fact that it had availed the CENVAT credit of Rs.42,84,562/- or that this credit was used in relation to exempted services by virtue of Section 102 of Finance Act, 1994 applied retrospectively. The contention in the grounds of appeal is that the demand for any ineligible CENVAT credit should have been raised at the end of the appellant and not adjusted in the refund claim filed by M/s BSNL. It is pertinent to note that the admissibility of CENVAT credit has not been disputed or denied in the impugned order. The exemption in the instant case is by virtue of the provisions of Section 102 of Finance Act, 1994 that grants exemption for the period 01/04/2015 to 29/02/2016 (both days inclusive) in respect of specified services meant for use other than for commercial purpose and rendered to the Government or a local authority or a Government authority. Further, sub-section (2) of Section 102 of Finance Act, 1994 provides for refund in lieu of the said retrospective exemption. M/s BSNL had filed a refund claim of Rs.4,85,54,577/- in accordance with the provisions of Section 102(2) of the Finance Act, 1994 on the strength of Certificate issued by the appellant and this claim amount includes the amount of Rs.42,84,562/- that has already been availed and utilized by the appellant as CENVAT credit. In such a situation, if the entire refund claim amount of Rs.4,85,54,577/- is sanctioned as claimed in the instant appeal, then the benefit of this amount would be available twice over at the cost of Government exchequer – once as CENVAT credit to the appellant and secondly as refund to M/s BSNL. Such a situation is detrimental to the interest of Revenue and is neither justified nor is legally tenable. The appellant has not reversed the impugned credit of Rs.42,84,562/- before issuing a Certificate to M/s BSNL, enabling M/s BSNL to file the refund claim, which is against the spirit of the provisions of CCR, 2004 that envisages to prevent cascading effect of taxation and does not provide for double benefit at the cost of Government exchequer. On the other hand, the rejection of the claim of Rs.42,84,562/- to M/s BSNL ordered by the adjudicating authority does not entail any encumbrance on the appellant to reverse the CENVAT credit of Rs.42,84,562/-. Hence there is no loss or injury accruing to the appellant by the rejection of the CENVAT quantum of refund in the impugned order. In the landmark judgment in the case of MAFATLAL INDUSTRIES LTD. vs UNION OF INDIA – 1997 (89) E.L.T. 247 (S.C.), Hon'ble Supreme Court has laid down the principle that as per the Law of Restitution, ***"the person claiming restitution should have suffered a 'loss or injury'"*** and that ***"the very basic requirement for claim of restitution under Section 72 of the Contract Act is that the person claiming restitution should plead and prove a loss or injury to him. If that is not done the action for restitution or refund should fail."*** In the present case the appellant or M/s BSNL have not claimed any loss or injury to itself by

the action of the adjudicating authority rejecting the claim of Rs.42,84,562/- already availed and utilized as CENVAT credit by the appellant. No evidence has been adduced showing that appellant or M/s BSNL had suffered any loss or injury emanating from the impugned order. Therefore, there is no merit in the plea of the appellant made against the rejection of the CENVAT quantum of credit in the impugned order.

7. Further, in the case of BROOK BOND LIPTON INDIA LTD. vs C.E.R. – 2012 (283) E.L.T. 336 (All.), it has been held by Hon'ble Allahabad High Court that allowing credit on inputs which are brought into the factory and for which the credit has been taken before the date when the final product became exempted will amount to **unjust enrichment.** The relevant portion of the order is as follows:

> **16.** We have noticed that Rule 57-A underwent amendment and was substituted by M.F. (D.R.) Notification No. 6/97-C.E. (N.T.), dated 1-3-1993, inserting sub-rule (4) which provides that the credit of specified duty under this section shall be allowed on inputs used in relation to manufacture of the final products whether directly or indirectly and whether contained in the final product or not. Rule 57(3)(c) was also amended by Notification dated 2-3-1998 providing that no credit of the specified duty shall be allowed on such quantity of inputs which are used in the manufacture of final product (which are exempted from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty). A new Rule 57-CC was inserted for adjustment of credit or inputs used in exempted final products or maintenance of separate in the entry and accounts of the inputs by the manufacturer. After these amendments the credit on inputs may be adjusted where the final product is exempted. Prior to the amendment, however, such adjustment was not permissible.
>
> **17.** In view of the aforesaid discussion, we are of the opinion that allowing the Modvat credit on inputs which are brought into the factory and for which the credit has been taken before the date when the final product became exempted lying unutilised, as raw material will amount to **unjust enrichment.** The question no. 1 is thus answered against the applicant, and in favour of the revenue.

In the light of the above ruling, it is seen that in the present case, the claim of Rs.42,84,562/- has been rejected to M/s BSNL not on the ground of ineligible CENVAT credit but it has been rejected because no evidence was adduced either by the appellant or M/s BSNL to show that the CENVAT quantum of the refund claim had been reversed. Therefore, if the entire claim amount of Rs.4,85,54,577/- is sanctioned then it will amount to unjust enrichment as per ruling of Hon'ble Allahabad High Court in the cited *supra*. The question of separate records under Rule 6(2) of CCR, 2004 as well as reversal under Rule 6(3) of CCR, 2004 stands decided in the impugned order in favor of the appellant. It is pertinent to note that the appeal has been filed by the appellant who in the present case is the service provider, whereas the refund claim was filed by M/s BSNL who is the recipient of service. In view of the fact that the impugned CENVAT credit of Rs.42,84,562/- availed by the appellant has not been denied in the impugned order nor is there any order to the appellant to reverse such credit, the rejection of the refund amount does not amount to denial of substantive benefit to the appellant. On the other hand sanctioning of the CENVAT quantum of refund claim will amount to

unjust enrichment at the cost of Government exchequer. In view of the above discussions, the appeal filed by the appellant is rejected.

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 the above terms.

(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date:27/10/2017

Attested

(K.P. Jacob)
Superintendent,
Central Tax (Appeals),
Ahmedabad.

By R.P.A.D.

To

M/s Larsen & Toubro Ltd.,
1009 SAKAR-II, Ellis Bridge,
Opposite Town Hall,
Ashram Road, Ahmedabad.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (South).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad ( ).
4. The A.C / D.C., C.G.S.T Division: , Ahmedabad ( ).
5. Guard File.
6. P.A.

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