

क फाइल संख्या : File No : **V2(ST)0204/A-II/2016-17 / 9063 to 9073**
 ख अपील आदेश संख्या : Order-In-Appeal No.. **AHM-EXCUS-001-APP-138-17-18**
 दिनांक Date : 27-10-2017 जारी करने की तारीख Date of Issue 23-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **AHM-SVTAX-000-JC-022-16-17** Dated **17.10.2016** Issued by **Joint Commissioner STC, Service Tax, Ahmedabad**

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

**M/s. SMPS Consultants LLIP
 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 :-

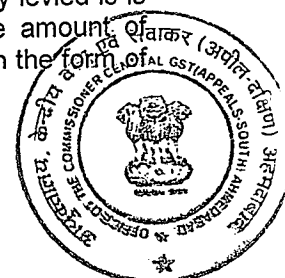
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 विरुद्ध 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 वहाँ 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 वहाँ 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 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



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 राकेगी 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 (OIC) 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 शर्तों 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, 1988 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1988 की धारा 43 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 होगा।

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

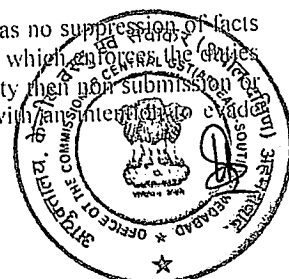
This appeal is filed by M/s. SMPS Consultants LLP [earlier known as SMPS Consultants Private Limited], Abhijeet-1, 10th floor, Mithakali Six Roads, Ahmedabad- 380 006. [for short – ‘appellant’] against OIO No. AHM-SVTAX-000-JC-022-16-17 dated 17.10.2016 passed by the Joint Commissioner, of the erstwhile Service Tax Commissionerate, Ahmedabad [for short – ‘adjudicating authority’].

2. Based on an audit objection a show cause notice dated 20.10.2015 was issued to the appellant *inter alia* alleging that though they had provided the consulting engineer services to SEZ units viz M/s. P I Industries Limited and M/s. Geotech Worldwide Limited during the period from 2010-11 and 2013-14 they had not paid the service tax of Rs. 5,61,223/- by wrongly availing benefit of the exemption notification No. 9/2009-ST dated 3.3.2009 [as amended by notification No. 15/2009-ST], notification No. 17/2011-ST dated 1.3.2011 and notification No. 40/2012-ST dated 20.6.2012. The show cause notice therefore, demanded service tax of Rs. 5,61,223/- along with interest and further proposed penalty on the appellant under sections 77 and 78 of the Finance Act, 1994.

3. This show cause notice was adjudicated vide the aforementioned OIO dated 17.10.2016 wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty on the appellant under sections 77(2) and 78 of the Finance Act, 1994.

4. Feeling aggrieved the appellant has filed this appeal raising the following averments:

- o that the adjudicating authority has merely brushed aside the submissions and confirmed the demand: that they wish to rely on the case of Cyril Lasardo [2004(7) SCC 431], Shukla Brothers [2010(254) ELT 6(SC)];
- o that under notification nos. 9/2009-ST dated 3.3.2009 amended by 15/2009-ST superseded by notification no. 17/2011-ST dated 1.3.2011 and further superseded by notification no. 40/2012-ST dated 20.6.2012, there is no time limit specified for obtaining list of specified services as well as submission of form A-1:
- o that the subject condition envisages the requirement for getting list of specified services to be approved from the approval committee and filing declaration in specified form A-1, which however do not make any restriction or prohibition or caveat that the same is to be obtained or filed as the case may be, prior to the provision of the services by the service provider;
- o that substantive benefits should not be deprived off due to minute procedural and venial glitches;
- o that provisions of SEZ Act and Rules are overriding to the exemption notification issued under the Finance Act, 1994; that the conditions prescribed in the Finance Act is merely operative provisions and in no way can take away the benefit granted under SEZ Act;
- o that they would like to rely on the case of DHL Lemuir Logistics [2016-TIOL-1455-CESTAT-MUM], M/s. Norasia Container Lines [2011-TIOL-574-CESTAT-Del], Intas Pharma [2013(320) STR 543]; that the Tribunal has already observed that mere conditions prescribed in the notifications issued under Section 93(1) cannot disentitle
- o that they would also like to rely on the case of Barclays Technology Centre [2015-TIOL-82-CESTAT-MUM], Eon Kharadi Infrastructure P Ltd [2015-TIOL-327-CESTAT-Mum], Mahindra Engineering Services [2014-TIOL-2534-CESTAT-Mum], Reliance Industries Limited [2015-TIOL-CESTAT-Mum], Convergys India Services P Limited [2012(25) STR 251], Keane Worldzen India P Limited [2008(10) STR 471], Harichand Shri Gopal [2010(260) ELT 3(SC)];
- o that when the exemption is extended to the service receiver being SEZ unit the same equally implies the exemption from payment of service tax at the ends of service provider;
- o that when refund is admissible to SEZ units irrespective of the violation of any conditions of the subject notifications of the subject notification then why the exemption should not be allowed to service providers of SEZ units;
- o that extended period of limitation is not invocable in the present case as there was no suppression of facts with an intent to evade payment of service tax; that when there are no provisions which enforce the duties on appellant to submit any document or make any declaration before the authority then non submission/non disclosure of such details would not tantamount to suppression of facts with an intent to evade



- payment of service tax; that the notice fails to establish or provide any reasoning about how there is a non payment of service tax with an intention to evade payment of duty;
- appellant was entitled to collect tax separately from their customer to whom they had provided the services then in such a scenario how the question of intention to evade tax arises;
- that the entire exercise would become revenue neutral;
- that penalty under 78 and 77 is not imposable; that no penalty is imposable when the appellant was acting in a bonafide belief.

5. The personal hearing in the case was held on 6.10.2017 wherein Shri Pratik Trivedi, CA appeared on behalf of the appellant and reiterated the grounds of appeal. He submitted written additional submissions, which I find is a summary of the grounds of appeal, already submitted.

6. I find that the adjudicating authority has denied the benefit of exemption notification No. 9/2009-ST dated 3.3.2009 [as amended by notification No. 15/2009-ST], notification no. 17/2011-ST dated 1.3.2011 and notification no. 40/2012-ST dated 20.6.2012 and consequently confirmed the duty demand along with interest and further imposed penalty on the appellant. Hence, the primary question to be decided in the appeal is whether the appellant had correctly availed the benefit of the aforementioned notifications or otherwise.

7. The benefit of notification No. 9/2009-ST dated 3.3.2009 [as amended by notification No. 15/2009-ST], stands denied on the grounds that the appellant had availed the exemption during the period from 25.6.2010 to 16.8.2010, while the list of services required for claiming exemption, was approved only on 27.8.2010 by the Development Commissioner, Sterling Special Economic Zone. The condition of the notification that stands violated is

Provided that -

(a) the developer or units of Special Economic Zone shall get the list of services specified in clause (105) of section 65 of the said Finance Act as are required in relation to the authorised operations in the Special Economic Zone, approved from the Approval Committee (hereinafter referred to as the specified services);

The services in this case was provided to M/s. PI Industries.

8. Notification No. 17/2011-ST dated 1.3.2011 para 2(c) and notification No. 40/2012-ST dated 20.6.2012, para 2 (d), which prescribed that for claiming exemption *ab initio*, the unit of a SEZ or a developer shall furnish a declaration in Form A-1 verified by the Specified Officer of the SEZ in addition to the list of taxable services as required for the authorized operations, approved by the approval committee. The appellant provided Form A-1 in respect of M/s. PI Industries dated 28.12.2012 issued by the Development Commissioner, Sterling Special Economic Zone, for services provided during the period from July 2011 to August 2012. In respect of M/s. Geotech World Wide in respect of the services for the period January 2012 to January 2013, the Developer/SEZ unit had obtained the Form A-1 dated 17.8.2015 issued by Specified Officer (Customs), Indore, SEZ, Pithampur (MP) under notification No. 12/2013 dated 1.7.2013. The condition of the notification that stands violated is

Notification No. 17/2011-ST dated 1.3.2011

(b) for the purpose of claiming exemption, the Developer or Unit of SEZ shall obtain a list of taxable services as are required for the authorised operations approved by the Approval Committee (hereinafter referred to as the specified services) of the concerned SEZ;



(c) the Developer or Unit of SEZ who does not own or carry out any business other than SEZ operations, shall furnish a declaration to that effect in Form A-1, verified by the Specified Officer of the SEZ, in addition to obtaining list under condition (b) above, for the purpose of claiming exemption;

Notification No. 40/2012-ST dated 20.6.2012

(c) for the purpose of claiming exemption, the Unit of a SEZ or developer shall obtain a list of services that are liable to service tax as are required for the authorised operations approved by the Approval Committee (hereinafter referred to as the specified services) of the concerned SEZ;

(d) for the purpose of claiming ab initio exemption, the unit of a SEZ or developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, in addition to the list specified under condition (c); the unit of a SEZ or developer who does not own or carry on any business other than the operations in SEZ, shall declare to that effect in Form A-1;

The services in this case was provided to M/s. PI Industries & M/s. Geotech World Wide.

9. Summarizing, I find that

- in respect of the services provided during the period from 25.6.2010 to 16.8.2010 to M/s. PI Industries, the list of services was approved only on 27.8.2010.
- in respect of the services provided during the period from July 2011 to August 2012 to M/s. PI Industries, the appellant provided Form A-1 dated 28.12.2012.
- in respect of services provided during the period from January 2012 to January 2013 to M/s. Geotech World Wide, the Developer/SEZ unit had obtained the Form A-1 dated 17.8.2015, issued by the Specified Officer (Customs), Indore Special Economic Zone, Pithampur(MP) under notification No. 12/2013 dated 1.7.2013.

Hence, in all the cases, as is evident, it can be said that the condition of the notifications. *ibid*, was met *post facto*, i.e. after the consulting engineer's services were rendered by the appellant to the SEZ unit/developer. In fact, in respect of the services provided during the period from January 2012 to January 2013, when notification No. 17/2011-ST and 40/2012-ST, was in vogue, the Form A-1 was obtained in terms of notification No. 12/2013-ST.

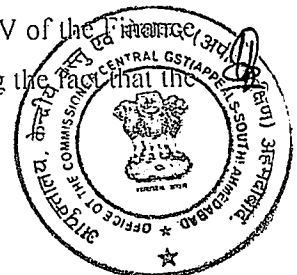
10. However, before moving forward, I find that the SEZ Act. in Section 51 and Section 26, states as follows, the relevant of extracts of which is reproduced below for ease of reference:

51. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

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:—

(e) exemption from service tax under Chapter V of the Finance Act, 1994 on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

What section 51 of the Special Economic Zones. Act, 2005, effectively states is that it will have an overriding effect over other Acts. Section 26(1)(e), *ibid*. further states that every Developer/Unit, would be entitled to exemption from service tax under Chapter V of the Finance Act, 1994 to carry on the authorized operations in SEZ. Now no one is disputing the fact that the



services were rendered by the appellant to the Developer/Unit. No one is also disputing the fact that the services rendered found a mention in the approved list of specified services and that they had furnished a declaration in Form A-1, verified by the Specified Officer of SEZ, though subsequent to providing/rendering these services. In terms of section 26(1)(e) of the SEZ Act, 2005, the Developer/Unit was exempted from payment of service tax. This read with Section 51 of the SEZ Act, 2005, clearly shows that this exemption from service tax would have an overriding effect on the Finance Act, 2005. Now the question that arises is - *when the recipient of the service is exempted from payment of tax by the overriding effect of the SEZ Act, 2005, would it be fair/rationale to demand tax from the supplier of the service.* The supplier of the service in this case is also exempted from payment of tax by way of an *ab initio* exemption or by way of refund consequent to payment of service tax.

11. The appellant provided services without payment of service tax claiming the benefit of the exemption, which was in vogue during the period concerned. I find that the only point on which the exemption under the notification stands denied is that [a] the list of services was approved consequent to provision of services; [b] appellant provided Form A-1, consequent to provision of services. At best this can be considered as a technical glitch/aberration, for which a substantive benefit i.e. exemption, should not be denied.

12. I find that the essence of the overriding effect of the SEZ Act, 2005 has already been upheld by the Tribunal in the case of Intas Pharma Ltd. [2013 (32) S.T.R. 543], the relevant extracts of which are as under:

7. We notice that the Special Economic Zones Act, 2005 (Central Act 28 of 2005) was enacted providing for SEZ within the territory of India and for providing inter alia immunities/exemptions from taxes/duties/cesses. Section 7 of the 2005 Act enjoins that any goods or services exported outside, or imported into, or procured from the domestic tariff area, by a unit in SEZ or a developer shall, subject to such terms and conditions and limitations, as may be prescribed be exempted from payment of taxes/duties/cesses under all enactments specified in the First Schedule. The First Schedule does not enumerate the Act (Finance Act, 1994) as among the enactments in respect of which exemption from taxes/duties or cesses is available under Section 7 of the 2005 Act. However, Section 26(1)(e) enacts that subject to the provisions of sub-section (2) thereof, every developer and entrepreneur shall be entitled to exemption from Service Tax under Chapter (V) of the Act on taxable services provided to a developer or unit to carry on the authorised operations in a SEZ.

8. In view of the legislated exemption supra and since provisions of the 2005 Act are provided an overriding effect vide Section 51; and absent any provision in the Act which eclipses the overarching trajectory of the 2005 Act, the immunity to Service Tax in respect of taxable services provided in relation to SEZ is a legislatively enjoined immunity. Therefore, any Service Tax paid/remitted by a service provider is liable to be refunded to the provider who has remitted Service Tax in relation to taxable services provided to a developer or unit, to carry on authorized operations in a SEZ.

13. The appellant has also questioned the denial of the exemption stating that the notification nowhere mentions the time limit and since they had submitted the approved list of services and Form A-1, after the provision of services, they should be allowed the benefit of the notification.



14. Since there is no dispute/allegation that the services rendered were not covered in the approved list or that Form A-1 was never submitted or that the services were not for the authorized operations, I find that the adjudicating authority was not correct in denying the benefit of the notification, ibid. I therefore, set aside the impugned OIO and allow the appeal holding that the appellant was eligible for the benefit of the notification(s).

15. In view of the foregoing, the impugned OIO is set aside and the appeal is allowed.

16. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

16. The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date: 27/10/2017

Attested

(Vinod J. Kose)
Superintendent,
Central Tax (Appeals),
Ahmedabad.

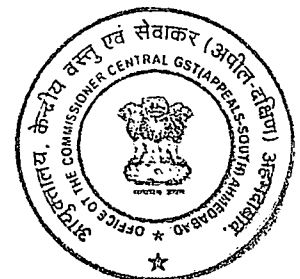
By RPAD.

To,

M/s. SMPS Consultants LLP
[earlier known as SMPS Consultants Private Limited].
Abhijeet-1, 10th floor,
Mithakali Six Roads,
Ahmedabad- 380 006

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division VI, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
5. Guard File.
6. P.A.



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