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

क फाइल संख्या : File No : **V2(ST)44to46/RA/A-II/2016-17** 10540 to 10545

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-001-APP-152 to 154-17-18**

दिनाँक Date :17-11-2017 जारी करने की तारीख Date of Issue 11-12-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **STC/Ref/81to83/JMC/KMM/AC/Div-III/16-17**

Dated **23.09.2016 Issued by Assistant Commr STC,** Service Tax, Ahmedabad

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

M/s. JMC Projects (India) Pvt 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. 5/ Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5/ Lakhs or 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 ::

The Assistant Commissioner, Service Tax, Division-III, Ahmedabad *(hereinafter referred to as 'appellant')* has filed the present appeals against the following Orders-in-Original *(hereinafter referred to as 'impugned orders')* passed in the matter of refund claim filed by M/s. JMC Projects (India) Pvt. Ltd., A-104, Shapath-4, Opp. Karnavati Club, S. G. Road, Ahmedabad *(hereinafter referred to as 'respondents')*;

Sr No	OIO No.	OIO date	Amount of refund claimed (₹)	Amount of refund sanctioned (₹)	Rev. Order No.
1	STC/Ref/81/JMC/K.M.Mohadikar/ AC/Div-III/16-17	23.09.16	1,10,16,063	60,49,169	40/2016-17
2	STC/Ref/82/JMC/K.M.Mohadikar/ AC/Div-III/16-17	23.09.16	85,21,613	85,21,612	41/2016-17
3	STC/Ref/83/JMC/K.M.Mohadikar/ AC/Div-III/16-17	23.09.16	2,54,10,032	2,54,10,032	42/2016-17

2. The facts of the case, in brief, are that the respondents were engaged in providing services under the category of 'Works Contract Service' and hold valid registration number AAACJ3814EST001. The respondents had provided services to government organizations under Mega Exemption Notification number 25/2012-ST dated 20.06.2012. As the government refused to reimburse the Service Tax paid by the respondents, they had filed the above mentioned refund claims under Section 102 of the Finance Act, 2016 read with the Finance Act, 1994 and rules made there under. The said refund claims were sanctioned vide the impugned orders by the adjudicating authority after rejecting the amount of ₹49,66,894/- pertaining to the refund claim mentioned in serial number 1 above.

3. The impugned orders were reviewed by the Commissioner of Service Tax, Ahmedabad and issued review orders number 40/2016-17, 41/2016-17 and 42/2016-17 all dated 27.12.2016 respectively for filing appeal under section 84(1) of the Finance Act, 1994 on the ground that the impugned orders were not legal and proper and the refunds were sanctioned erroneously. The appellant claimed that during scrutiny of the refund claims it was observed that the respondents were availing CENVAT credit of input services which were used in taxable as well as exempted services provided by the latter. It was further noticed that the respondents were not maintaining separate account of CENVAT credit as per Rule 6(3) of the Cenvat Credit Rules, 2004. Further, it was noticed that the respondents had reversed the CENVAT credit as per Rule 6(3A) of the Cenvat Credit Rules, 2004 considering only common input services. However, they were required to reverse the entire CENVAT credit irrespective of common input services or otherwise. The appellant alleged that the adjudicating authority, before sanctioning the claims, did not verify (a) whether the respondents had utilized the CENVAT credit on input services in terms of CCR, 2004 and whether they had maintained separate accounts of CENVAT credit used in exempted services as well as taxable services; (b) how the refund claims have been sanctioned without fulfillment of condition of sub-rule (3)(1) of Rule 6 of CCR, 2004; and (c) the adjudicating authority had not referred to the ST-3 returns for the year 2015-16 to ascertain the utilization of CENVAT credit of input services. The appellant also alleged that the adjudicating authority has not verified the

detailed calculation of reversal of the CENVAT credit.

4. Personal hearing in both the matters was granted and held on 21.08.2017. Shri Jigar Shah, Advocate, appeared before me on behalf of the appellants and argued that Section 102 of the Finance Act, 2016 is self contained provision and pointed out several judgments in their favour.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral and written submissions made by the respondents at the time of personal hearing.

6. The appellant has claimed that the adjudicating authority has not verified the detailed calculation of the reversal of CENVAT credit. The appellant has alleged that the respondents were required to reverse 7% of the gross value instead of the credit of common services they have reversed. Thus, according to the appellant, the respondents have not reversed the amount as per Rule 6(3)(1) of CCR, 2004. 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 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. The concerned portion of the verdict is reproduced as below;

*"**13.** For claiming the benefit under Section 57CC(9) of the Act, the manufacturer has to maintain separate books of accounts, sub-section (2) to Section 73 of the Finance Act, 2010 mandates that the assessee has to make an application to the Commissioner of Central Excise along with documentary evidence and a Certificate from the Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 received the assent of the President. However, in the present case, even as per the show cause notice and the order of adjudication, it is clear that the input credit has been reversed by the respondent/assessee even prior to the amendment. In such view of the matter, the Tribunal, following the decision of the Allahabad High Court in Hello Mineral Water case (supra), which followed the decision of the Apex Court in Chandrapur Magnet Wires case (supra) rightly set aside the demand".*

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. The related portion of the said judgment is reproduced below;

*"**2.** Following the decision of the Apex Court in the case of Chandrapur Magnet Wires (P) Ltd. v. Collector of Central Excise, Nagpur reported in 1996 (81) E.L.T. 3 (S.C.), wherein the Apex Court held that when the credit attributable to the inputs in exempted product is reversed by the assessee, the demand of 8% - 10% on the sale price was not justified under Rule 6 of the Cenvat Credit Rules, 2004, the Customs, Excise and Service Tax Appellate Tribunal allowed the appeal filed by the assessee holding that when the credit was reversed by the assessee, it was as if they had not taken any credit at all.*

***3.** Aggrieved by this, the Revenue is on appeal before this Court.*

***4.** We find from a reading of the amendment made to Rule 6 under Section 73 of the Finance Act, 2010 that the procedure of the Cenvat Credit Rules under Rule 6 was brought in with retrospective effect from September, 2004 by insertion under Rule 6(6), which reads as under :*

S. No.	Provisions of Cenvat Credit Rules, 2004 to be amended	Amendment	Period of effect of amendment
1	2	3	4

	Rule 6 of the Cenvat Credit Rules, 2004 as published vide Notification Number G.S.R. 600 (E), dated the 10th September, 2004 [23/2004-CENTRAL EXCISE (N.T.), dated the 10th September, 2004].	*In the Cenvat Credit Rules, 2004, in Rule 6, after sub-rule (6), the following sub-rule shall be inserted, namely :* *"(7) Where a dispute relating to adjustment of credit on inputs or input services used in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 and ending with the 31st day of March, 2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President, then, notwithstanding anything contained in sub-rules (1) and (2), and clauses (a) and (b) of sub-rule (3), a manufacturer availing Cenvat credit in respect of any inputs or input services and manufacturing final products which are chargeable to duty and also other final products which are exempted goods, may pay an amount equivalent to Cenvat credit attributable to the inputs or input services used in, or in relation to the manufacture of, exempted goods before or after the clearance of such goods :* *Provided that the manufacturer shall pay interest at the rate of twenty-four per cent, per annum from the due date till the date of payment of the said amount.* *Explanation : For the purpose of this sub-rule, "due date" means the 5th day of the month following the month in which goods have been cleared from the factory.*	*10th day of September, 2004 to the 31st day of March, 2008 (both days inclusive).*

As per Section 73 sub-section (2) of the Finance Act, 2010 the assessee has to make an application to the Commissioner of Central Excise along with documentary evidence and a Certificate from the Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 received the assent of the President.

5. *Considering the fact that the assessee had reversed the credit even prior to the amendment and the order of the Tribunal is in fact no different from what is contemplated under the Finance Act, 2010, we do not find anything survives further for this Court to consider the merits of the case pleaded by the Revenue.*

6. *Accordingly, the Civil Miscellaneous Appeal fails and the same is dismissed. No costs".*

Thus, from the above, it is quite clear that the adjudicating authority cannot direct the respondents to follow the conditions mentioned in Rule 6(3) above. The respondents have the choice to follow either of the options and the department is not supposed to force any of the options on the respondents. In these cases, the respondents had 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). The appellant has confirmed this in paragraph 6 of the appeal memorandums where it is specifically mentioned that the respondents have reversed CENVAT credit as per Rule 6(3A) of the CCR, 2004.

considering only the common input services. The respondents have further, submitted before me a certificate from Vanraj & Co., Chartered Accountants, certifying the same. The respondents 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 respondents have rightly reversed the common input services and are rightly eligible for the amount of refund sanctioned to them.

7. Further, the appellant has claimed that the adjudicating authority has failed to verify whether the respondents have taken CENVAT credit of inputs which were exclusively used for providing services to the government organizations. The respondents have submitted before me Chartered Accountant's certificates which clarify the fact that the respondents had offered services to the government organizations and they had discharged the Service Tax liabilities and had availed CENVAT credit of Service Tax paid on the services which were directly relevant to the govt. projects and also availed credit of Service Tax paid on commonly used input services. In view of the above, the allegation of the appellant does not sustain.

8. In view of the facts and discussions hereinabove, I reject the appeal filed by the Department and uphold the impugned order.

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

9. The appeals filed by the appellant stand disposed off in above terms.

(उमा शंकर)
CENTRAL TAX (Appeals),
AHMEDABAD.

ATTESTED

17/1/17
(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.