
	<b>केंद्रीय कर आयुक्त (अपील)</b>	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,	7 <sup>th</sup> Floor, Central Excise Building,	
केन्द्रीय कर शुल्क भवन	Near Polytechnic,	
सातवीं मजिल, पोलिटेक्निक के पास,	Ambavadi, Ahmedabad-380015	
आम्बावाडी, अहमदाबाद-380015		
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क फाइल संख्या : File No : V2(ST)0218/A-II/2016-17 / 10/20 to 10/20  
 ख अपील आदेश संख्या : Order-In-Appeal No. AHM-EXCUS-001-APP-161-17-18  
 दिनांक Date : 20-11-2017 जारी करने की तारीख Date of Issue 26-12-17

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-192/VJP/2016-17 Dated 16.11.2016 Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

**M/s. M.S Khurana Engineering 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 मैनटल हास्पिटल कम्पाउण्ड, मेघानी 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 1000/- where the amount of service tax & interest demanded & penalty levied is 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



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 फॉर्म 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 A219K 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 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, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014) की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 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 रुपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल हैं -

- (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 in case of dispute, where payment of 10% of the duty demanded where duty or duty and penalty are in dispute, where penalty alone is in dispute.



### ORDER IN APPEAL

This is an appeal filed by M/s M. S. Khurana Engineering Ltd. (herein after referred to as the appellants) against the OIO No. SD-02/Ref-192/VJP/2016-17 dtd. 16.11.2016 (herein after referred to as the impugned order) passed by the Assistant Commissioner (herein after referred to as the adjudicating authority).

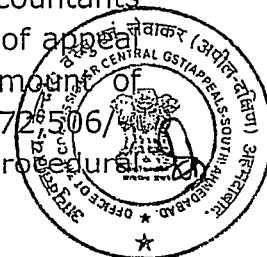
2. The brief facts of the case are that the appellants filed a refund claim dtd. 08.07.2016 for Rs. 1,99,72,506/-. During the scrutiny of the refund claim, it was noticed that the appellants had not submitted the concerned RA bills along with the refund claim, the Adjudicating authority, vide the impugned order, found that the appellants had not been maintaining separate records for cenvat credit used in both dutiable as well as exempted services and that the appellants had not borne the incidence of tax and had passed on the burden of tax to their customers and therefore the appellants were held not eligible for refund. The adjudicating authority accordingly sanctioned the refund of Rs. 1,96,73,356/- and ordered it to be credited to Consumer Welfare Fund in terms of the provisions of Section 12 C of the Central Excise Act, 1944 (herein after referred to as the said Act).

3. Being aggrieved by rejection of refund claim of Rs. 1,96,73,356/-, the appellants have filed this appeal on the following grounds:

- (a) That as soon as the Finance Act, 2016 provided exemption vide the Notification No. 9/2016-ST dtd. 01.03.2016 from the retrospective effect, they had reccredited the service tax collected from their customer and had shown as a receivable and therefore it amounts to compliance of unjust enrichment principal;
- (b) That when there were no tax, it amounted to the deposit of money and accordingly required to be refunded to the appellants and therefore when service tax is not payable, the principal of unjust enrichment is not applicable;
- (c) That when refund has arisen from the retrospective amendment in law, the principal of unjust enrichment is not applicable;
- (d) The appellants sought support from the following case laws:

JK Overseas vs. Commissioner of Customs, Ahmedabad – 2015 (317) ELT-356 (Tri-Ahmd.) regarding non-applicability of principle of unjust enrichment in case of pre-deposits, Commissioner of Central Excise, Bhubaneshwar-II vs. Golf Oil Corporation – 2007 (219) ELT -948 (Tri-Kol) regarding non-applicability of principle of unjust enrichment in case customer returning extra amount of duty collected from them, Visaka Industries Ltd. vs. Commissioner of C. Ex., Bangalore-II – 2015 (329) ELT-801 (Tri-Bang.), Chennai Petroleum corporation vs. Commissioner of C. Ex., Chennai – 2004 (168) ELT-395 (Tri-Chen.) and many other cases.

4. The personal hearing in the case was held on 07.09.2017 in which Shri Vipul Khandhar and Shree Chiten Shah, both Chartered Accountants appeared on behalf of the appellants. They reiterated the grounds of appeal and pointed out typographical error in the Form ST-4 where amount of refund has been mentioned as Rs. 2,99,150/- in place of Rs. 1,99,72,506/-. They also submitted that the refund has been denied due to procedural requirement and has been credited to Consumer Welfare Fund.



5. I have carefully perused the documents pertaining to the case and submitted by the appellant alongwith the appeal. I have considered the arguments made by the appellants in their appeal memorandum as well as oral submissions during personal hearing.

6. I find that the issue to be decided in the instant case is whether the refund claim has been properly rejected.

7. From the findings given in the impugned order, I find that the issue to be decided is whether the refund claim can be sanctioned and credited to the consumer welfare fund in view of the documents available on records. I find that the appellant started charging service tax and deposited with the department in due course but the Finance Act, 2016 amended the provisions retrospectively and restored the exemption to the service provided by them vide the Notification no. 09/2016-ST dtd. 01.03.2016. Therefore the appellants claimed refund of the Service tax amounting to Rs. 1,99,72,506/- paid by them.

8. From the findings given in the impugned order in para 15 (4), one observation of the department's pre-audit section has been noted that the Jurisdictional Assistant Commissioner should verify from the service receiver whether the appellants have actually paid back the service tax amount of Rs. 1,99,72,506/- collected from them towards the services provided. Consequently I find that the enquiries were made from the appellants and their customer to whom services were provided. The appellants informed that since they had taken cenvat credit of Rs. 2,99,151/-, this amount not be considered for refund. Accordingly the refund claim was reduced to Rs. 1,96,73,355/-. The customer of the appellant, vide their letter dtd. 07.11.2016, intimated that since the amount involved in the refund claim has been reimbursed to the appellants, the refund should not be made directly to the appellants as the same needs to be deposited with them i.e. the customer.

9. In view of the outcome of the enquiry from the appellants and their customer, the adjudicating authority has sanctioned the refund but ordered it to be credited to the consumer welfare fund because the appellant had failed to clear the bar of unjust enrichment.

10. I also find from the records available that there is a letter dtd. 30.12.2016 issued by the Customer of the appellant addressed to the Jurisdictional Assistant Commissioner certifying that the amount of Rs. 1,96,73,355/- has been received by them from the service provider i.e. the appellants and there is no amount due to be recovered from the appellant. I find that this letter dtd. 30.12.2016 appears to have been received after the issuance of the impugned order so it was impossible for the adjudicating authority to consider this letter while considering the refund claim. Accordingly, I hold that the ends of justice would meet only when the letter dtd. 30.12.2016 as detailed above is verified and its genuineness ascertained to establish beyond any doubt that the amount involved in the instant refund claim has been returned to the customer by the appellant and if it is established then the appellant will be entitled for refund.

11. In view of that, I have caused enquiries about the genuineness of the letter. Accordingly, a certificate dtd. 08.11.2017 issued by a chartered

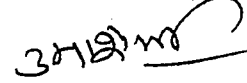


Accountant has been produced in which the transaction involved in the refund claim has been certified to have been verified from the accounts of the customer of the appellants. This certificate dtd. 08.11.2017 proves the claim made by the appellants that the amount involved in the refund claim has been returned to their customers and consequently I hold that the incidence of the amount has not been passed on to the customers and it satisfies the bar of unjust enrichment. I also find support from the case of Commissioner Of Central Excise, Madras Versus Addison & Co. Ltd.- 2016 (339) E.L.T. 177 (S.C.) in which it has been held that when duty incidence has been initially passed on to customers and later, excess duty amount returned to buyers and same evidenced by Chartered Accountant certificate - HELD : Since assessee had borne burden of duty, they were entitled to refund of excess duty paid.

11. In view of the above findings, the impugned order is set aside and remanded for carrying out verification of the letter dtd. 30.12.2016.

12. The appeal is disposed off accordingly with consequent relief.

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



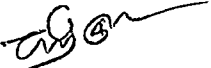
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

अहमदाबाद.

Date: 20.11.2017

सत्यापित



(धर्मेन्द्र उपाध्याय)

अधीक्षक (अपील्स),

केन्द्रीय कर, अहमदाबाद.

**BY R.P.A.D.**

M/s. M. S. Khurana Engineering Ltd.,  
2<sup>nd</sup> Floor, MSK,  
Passport Office to Panjarapole Road,  
Ambawadi,  
Ahmedabad-380 015

**Copy To:-**

- (1) The Chief Commissioner, CGST, Ahmedabad Zone.
- (2) The Commissioner, CGST, Ahmedabad (South).
- (3) The Asst./Dy. Commissioner, CGST, Div-VI, Ahmedabad (South)
- (4) The Astt./Dy. Commissioner, Systems, CGST, Ahmedabad (South)
- (5) Guard File.
- (6) P.A. File.



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