



<b>केंद्रीय कर आयुक्त (अपील)</b>		
<b>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX</b>		
सत्यमेव जयते	केंद्रीय कर शुल्क भवन	Floor: Central Excise Building
		Near Polytechnic
	सातवीं मजिल पोलिटिकनिक के पास	Ambavadi, Ahmedabad-380015
	आम्बावाडी अहमदाबाद-380015	
 079-26305065		टेलिफैक्स 079-26305136

क फाइल संख्या : File No : V2(ST)021/A-III/2017-18 10635 to 10639

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-198-17-18**

दिनांक Date : 30-11-2017 जारी करने की तारीख Date of Issue 11-12-17

श्री उमाशंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No SD-02/Ref-269/VIP-16-17 Dated 01.02.2017

Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

**M/s. Larsen & Toubro 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 :-

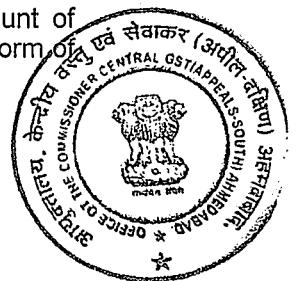
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 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 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 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 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 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,

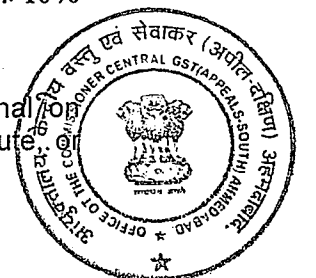
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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 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.



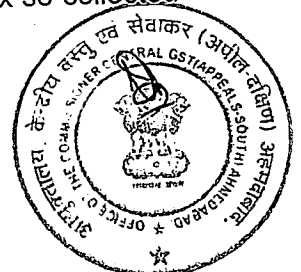
**ORDER-IN-APPEAL**

This order arises out of an appeal filed by M/s. Larsen & Toubro Ltd., 1009, Sakar-II, Near Ellisbridge, Opp. Town Hall, Ashram Road, Ahmedabad-380006 (in short 'appellant') against OIO No.SD-02/REF-269/VIP/2016-17 dated 01.02.2017 (in short 'impugned order') passed by the then Assistant Commissioner, Service Tax Division-II, Ahmedabad (in short 'adjudicating authority')

2. Briefly stated that the appellant filed refund claim of Rs.16,14,654/- on the ground that they had been awarded contract for construction of hospital complex for AIIMS, Jodhpur. Since the said contract involved the execution of original work, the appellant availed exemption from payment of service tax in terms of Notifn. No.25/2012-ST dated 20.06.2012 Sr. No. 12(a). However, consequent to withdrawal of said exemption vide Notifn. No.6/2015-ST dated 01.03.2015 w.e.f. 01.04.2015, the appellant started levying service tax in the bill raised to the AIIMS who in turn paid to it and the same was deposited to the govt. chequer. Consequent to re-introduction of the said exemption retrospectively w.e.f. 01.04.2015, vide Section 102 of the Finance Act, 1994 vide Notification No. 09/2016-ST dated 1st March, 2016, the appellant filed the subject refund claim which culminated into issue of Show Cause Notice dated 21.12.2016 for recovery of amount on exempted services under Rule 6(3) of the Cenvat Credit Rules, 2004 (in short 'CCR, 2004') as they had taken Cenvat credit on input services which were used in the taxable as well as non-taxable services and that in light of retrospective grant of exemption, the credit taken by the appellant is not proper and violative of Rule 6(3)ibid. This SCN was adjudicated by the adjudicating authority vide impugned order wherein refund of Rs.8,04,202/- was sanctioned but credited to Consumer Welfare Fund and Rs.8,10,452/- was rejected.

3. Aggrieved with the impugned order, the appellant has filed the present appeal wherein, *inter alia*, submitted that:

- (a) the adjudicating authority has failed to understand as to how the concept of unjust enrichment can be made applicable to part of the amount when it is an admitted fact that they have collected entire amount of tax involved from AIIMS, Jodhpur and also have agreed to adjust said amount in their future bills.
- (b) the demand of any amount pertaining to ineligible input service tax credit is demandable by initiating appropriate proceedings against the assessee who availed the said credit.
- (c) the adjudicating authority ought to have considered the clear mandate contained in Section 102 of the Act directing the refund of tax so collected

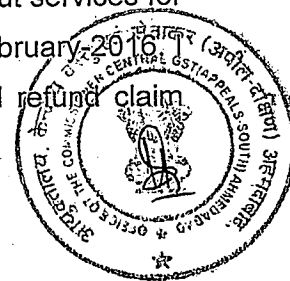


- without prescribing any condition ought not to have resorted to invocation of Rule 6 of CCR, 2004.
- (d) since the input service tax credit taken by them at the material time was used in the taxable output service on which they paid the appropriate tax, it is not proper or just on the part of the adjudicating authority to hold them ineligible to such credit in retrospect in absence of any of the provisions of the CCR, 2004 mandating such a condition.

4. Personal hearing in the matter was held on 08.11.2017. Shri Keval Parikh, AGM, Indirect Taxes and Shri Jitendra Padhiyar, Manager, Indirect Taxes, appeared on behalf of the appellant and reiterated the ground of appeals. They also filed additional written submission wherein, interalia, submitted copy of letter dated 11.09.2017 of AIIMS, Jodhpur stating that Rs.16,14,654/- is recovered from RA Bill No.37. Vide letter dated 22.11.2017, the appellant also submitted Certificate dtd.17.11.2017 of AIIMS, Jodhpur stating that an amount of Rs.16,14,654/- have been fully recovered on 16.09.2017 from RA Bill No.37 of the appellant.

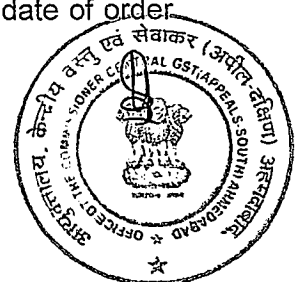
5. I have carefully gone through the case records, appeal memorandum and submission made at the time of personal hearing and evidences available on records. I find that the main issue to be decided is whether the impugned order is just, legal and proper or otherwise. Accordingly, I proceed to decide the case on merits.

6. Prima facie, I find that the appellant is a service provider and has been awarded contract for construction of hospital complex for AIIMS, Jodhpur. The said activity was exempted from levy of service tax in terms of Notification No.25/2012-ST dated 20.06.2012 vide Sr. No.12(a). This exemption was withdrawn vide Notifn. No.6/2015-ST dated 01.03.2015. Hence, the appellant charged and collected service tax at appropriate rate from the AIIMS, Jodhpur and deposited this amount to govt. exchequer. Now this exemption was re-introduced with retrospective effect vide Notifn. No.9/2016-ST dated 01.03.2016 Entry No.12A. Accordingly, the appellant filed the refund claim for service tax paid during the period 01.04.2015 to 29.02.2016 alongwith NOC of service recipient i.e. AIIMS, Jodhpur. In this regard, I find that it is a settled law that when the final product is exempted (in the present case outward service), Cenvat credit availed on input services needs to be reversed in terms of provisions contained in Rule 6(1) of the CCR, 2004. In this regard, the appellant has produced Chartered Accountant's certificate dated 11.01.2017 stating that they have availed and utilized Cenvat credit of Rs.8,10,452/- on input services for said AIIMS Jodhpur project during the period from April-2015 to February-2016. I find that the appellant should have ensured before filing the said refund claim



that they have reversed the said input Cenvat credit availed and utilized. I find that the appellant has failed to ensure this aspect before filing the subject refund claim. I also find that when the output service provided is exempted retrospectively, the input service credit availed also becomes ineligible. In such a situation, if the entire refund claim amount of Rs.16,14,654/- is sanctioned as claimed by the appellant, then the benefit of this amount would be available twice over at the cost of govt. exchequer – once as CENVAT credit to the appellant and secondly as refund to the appellant. 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.8,10,452/- before filing the subject refund claim, which is against the spirit of the provisions of the CCR, 2004 that envisages to prevent cascading effect of taxation and does not provide for double benefit at the cost of govt. exchequer. On the other hand, the rejection of the claim of Rs.8,10,452/- ordered by the adjudicating authority does not entail any encumbrance on the appellant to reverse the said CENVAT credit. 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 this regard, I find that in the case of MAFATLAL INDUSTRIES LTD. vs UNION OF INDIA – 1997 (89) E.L.T. 247 (S.C.), the 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 have not claimed any loss or injury to itself by the action of the adjudicating authority rejecting the claim of Rs.8,10,452/- already availed and utilized as CENVAT credit by the appellant. No evidence has been adduced showing that the appellant 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 credit quantum in the impugned order. Hence, I find that the adjudicating authority has rightly sanctioned refund of Rs.8,04,202/- (Rs.16,14,654/- less Rs.8,10,452/-) and credited it to the Consumer Welfare Fund in terms of provisions contained in Section 11B of the CEA, 1944 read with Section 12Cibid. Since the appellant has not borne the incidence of said service tax amount and passed the burden of tax to the service receiver, the former is not eligible for the claim of refund of Rs. 8,04,202/-.

6.1 Further, I find that the appellant has not reimbursed the amount of service tax collected from the AIIMS, Jodhpur during the period 01.04.2015 to 29.02.2016 and claimed as refund. In this regard, I find that till the date of order

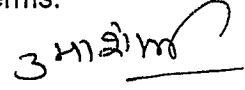


of the impugned order, said amount was with the appellant i.e. either not reimbursed or adjusted against any dues from the AIIMS, Jodhpur. So, the appellant had attained unjust enrichment. I find that any future incident has no place in the eyes of law.

7. In view of the above, I find no reason to interfere with the impugned order, hence appeal is rejected.

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


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



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested:

  
(B.A. Patel)  
Supdt.(Appeals)  
Central GST, Ahmedabad.

**BY SPEED POST TO:**

M/s. Larsen & Toubro Ltd.,  
1009, Sakar-II, Near Ellisbridge,  
Opp. Town Hall, Ashram Road,  
Ahmedabad-380006

**Copy to:-**

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Commissioner, Central GST, Ahmedabad-South (RRA Section).
- (3) The Asstt. Commr, Central GST, Division VI(Vastrapur), Ahmedabad South.
- (4) The Asstt. Commissioner(System), Central Tax , Ahmedabad-South (for uploading OIA on website)
- ✓(5) Guard file
- (6) P.A. file.

