केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर शुल्क भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015

7th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015

☎ : 079-26305065

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1125 to 1128

क फाइल संख्या : File No : **V2(ST)0272/A-II/2016-17**

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-EXCUS-001-APP-214-17-18**

दिनाँक Date :26-12-2017 जारी करने की तारीख Date of Issue 5/1/2018

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-240/VIP/2016-17** Dated **23.12.2016**

Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Intas Pharmacuetical 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. 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 वर्णित 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

This appeal is filed by M/s. Intas Pharmaceuticals Limited, 2nd floor, Chinubhai Centre, Off Nehru Bridge, Ashram Road, Ahmedabad [ ] against OIO No. SD-02/Ref-240/VIP/2016-17 dated 23.12.2016 issued by Assistant Commissioner, Division II, Service Tax Commissionerate, Ahmedabad [for short –'adjudicating authority].

2. The facts briefly are that the appellant filed a refund claim of Rs. 1,57,24,613/- under notification No. 12/2013-ST dated 1.7.2013 for the period from October 2015 to December 2015 on 23.9.2016. A show cause notice dated 16.11.2016 was issued to the appellant *inter alia* proposing rejection of the refund on the grounds:

- that the appellant had failed to obtain necessary permission for utilization of certain services i.e. other than 119 for authorized operations as per para 3(1) of notification ibid;
- that they had not followed the principle of distribution of service tax paid in respect of common services on the basis of turnover of authorized operations;
- that the appellant had not maintained proper account of receipt and use of specified common services;
- that they had submitted only sample invoices of providing input service instead of all invoices involved in the refund claim; that they had failed to furnish completed proof and documentary evidence of payment of service tax in respect of the said input invoices and hence the aspect of time bar could not be ascertained;
- that as per ST-3 returns submitted for the relevant period, it is difficult to ascertain the amount of CENVAT credit taken and its distribution;
- that they had failed to submit the bifurcation between the exemption availed as per Form A-2 and refund claim filed under Form A-4.

3. This show cause notice was adjudicated vide the impugned OIO dated 23.12.2016 wherein the adjudicating authority rejected the refund on the grounds:

- that the appellant had violated the condition of para 3(1) of the notification, ibid;
- that it was difficult to ascertain that they had followed the principle of distribution of service tax paid in respect of common services as per Rule 7 of the CCR '04;
- that they have submitted invoices of only approved services & not of non approved services;
- that the claimant has submitted the list of challans but have not submitted the input invoices with their claims hence it is difficult to ascertain that service tax is paid or otherwise;
- that the statement of ISD invoices issued during the period but the same is not tallying with the relevant period of refund claim in the ST-3.

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

- the head office of the appellant is registered as an ISD;
- the appellant as an ISD distributed the credit of input service to all its units in compliance to Rule 7(d) of the CCR '04;
- since the input services were consumed for the SEZ unit, they filed a refund claim under notification No. 12/2013-ST dated 1.7.2013;
- that the impugned OIO is a non speaking order, passed in violation of principles of equity, fair play and natural justice;
- that as per para 3(1) of notification ibid, no condition is cast on the appellant to get the approval to utilize the services for authorized operations;
- that the appellant have produced the list of approved services for the authorized operations at SEZ; that the services availed by SEZ can be tallied with the list of services approved by the authority;
- that the credit was distributed in October 2015 to December 2015 [FY 2015-16] & therefore for distribution purpose the turnover of the previous FY 2014-15, was considered;
- that all the ISD invoices for distribution of proportionate credit to SEZ along with the challans is placed on record;

- the finding, that the appellants have submitted a statement of ISD invoices during October 2015 to March 2016 did not tally with the relevant period of refund claim, is baseless and devoid of legal merits; the statement tallies exactly with the returns;
- that the services rendered by the appellants are exempted under SEZ Act;
- that a combined reading of Section 26 of the SEZ Act and Rule 31 of the SEZ Rules, shows that any service rendered by a service provider to a SEZ unit or developer in the SEZ for authorized operations would be exempted from payment of service tax;
- that Section 51 of the SEZ Act grants the said Act an overriding effect over other laws;
- that the services rendered by the appellant to the SEZ were otherwise exempt & hence they were not liable to pay service tax;
- that the refund claim is not barred by limitation;
- that the show cause notice is issued to the appellant who is an ISD & has distributed appropriate CENVAT credit of common input service to the SEZ unit; that the proceedings cannot be initiated against the appellants;

5. Personal hearing in the matter was held on 14.11.2017 wherein Ms. Madhu Jain Advocate, appeared on behalf of the appellant. The Learned Advocate, reiterated the grounds of appeals and took me through the OIO and further submitted that OIO's findings in para 13 about utilization of services are erroneous and does not have legal backing.

6. I have gone through the facts of the case, the grounds of appeal and the oral averments raised during the course of personal hearing. I find that issue to be decided is whether the appellant is eligible for refund or otherwise.

7. I have in para 3, *supra*, briefly mentioned the various grounds on which the adjudicating authority rejected the refund. The first finding which the adjudicating authority has held against the appellant is that they had violated the condition stipulated in para 3(1) of the notification, *ibid.* Para 3(1) of notification No. 12/2013-ST dated 1.7.2013, states as follows:

> *3. This exemption shall be given effect to in the following manner :*
> *(I) The SEZ Unit or the Developer shall get an approval by the Approval Committee of the list of the services as are required for the authorised operations (referred to as the 'specified services' elsewhere in the notification) on which the SEZ Unit or Developer wish to claim exemption from service tax.*

I find that the allegation in the show cause notice against the appellant is that they had failed to get necessary permission for utilization of certain services i.e. other than 119 for authorized operations as per para 3(1) of notification *ibid.* The appellant's contention is that the Development Commissioner, SEZ, had approved certain input services as the specified services in the authorized operations of the SEZ; that para 3(1) of the notification does not cast any such condition on the SEZ to get the approval to utilize the services for authorized operations. I agree with the contention of the appellant in this regard. The finding of the adjudicating authority that the appellant failed to get necessary permission for utilization of services, is not legally tenable.

7.2. The second finding which the adjudicating authority has held against the appellant is that it was difficult to ascertain that they had followed the principle of distribution of service tax paid in respect of common services as per Rule 7 of the CCR '04. The appellant's contention is that the credit was distributed in October 2015 to December 2015 [FY 2015-16]

and therefore, for distribution purpose the turnover of the previous FY 2014-15, was considered. Now, Rule 7 of the CCR '04, states as follows:[relevant extracts]

> ***Rule 7. Manner of distribution of credit by input service distributor.*** —
> *The input service distributor shall distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or unit providing output service or an outsourced manufacturing units, as defined in Explanation 4, subject to the following conditions, namely :—*
> *(a)……;*
> *(b)……;*
> *(c)……;*
> *(d) The credit of service tax attributable as input service to all the units shall be distributed to all the units pro rata on the basis of the turnover of such units during the relevant period to the total turnover of all the units, which are operational in the current year, during the said relevant period;*
> ***Explanation 2.*** *- For the purposes of this rule, the total turnover shall be determined in the same manner as determined under rule 5:*
> ***Explanation 3.*** *- For the purposes of this rule, the 'relevant period' shall be, -*
> *(a) if the assessee has turnover in the 'financial year' preceding to the year during which credit is to be distributed for month or quarter, as the case maybe, the said financial year; or;*
> *(b) if the assessee does not have turnover for some or all the units in the preceding financial year, the last quarter for which details of turnover of all the units are available, previous to the month or quarter for which credit is to be distributed.*
>
> ***Rule 5. Refund of CENVAT Credit.***
>
> *(E) "Total turnover" means sum total of the value of -*
> *(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;*
> *(b) export turnover of services determined in terms of clause (D) of sub-rule (1) above and the value of all other services, during the relevant period; and*
> *(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.*

On going through the appellant's contention I find that they have followed the procedure as stipulated under Rule 7 of the CCR '04. The adjudicating authority's finding in this regard appears vague as he has not pointed out as to what was wrong in the claim of the appellant or as to how he has wrongly distributed the CENVAT credit to their various units in respect of the service tax paid on the input service. To this extent, I find the impugned OIO to be a non speaking order.

7.3. The third finding which the adjudicating authority has held against the appellant is that they have submitted invoices of only approved services & not of non approved services. The fact of the matter is that the appellant had filed refund claim of Rs. 1,57,24,613/-. Thereafter, the appellant vide his reply dated 14.12.2016 vide Annexure A stated that out of total refund claim, they had approved service of Rs. 1,55,44,344/- and that they were not eligible for refund of Rs. 1,80,270/- as it related to non approved services. When the appellant is himself stating that they are not eligible for refund of Rs. 1,80,270/-, to reject the refund of the rest of the amount, on the ground that the invoices pertaining to Rs. 1,80,270/- were not submitted, is not a legally tenable. I do not find any merit in the adjudicating authority rejecting the refund on this ground.

7.4 The fourth finding of the adjudicating authority against the appellant is that the claimant has submitted the list of challans but have not submitted the input invoices with their

claims, hence it is difficult to ascertain whether service tax is paid or otherwise. The appellant, however, states that they have submitted the copy of invoices issued to the appellants by ISD along with copies of the challans. The finding of the adjudicating authority and the claim of the appellant, seems contradictory. However, non submission of invoice does not appear to be a proper ground for rejection as the adjudicating authority could have obtained it from the appellant.

7.5 The fifth finding of the adjudicating authority against the appellant is that the statement of ISD invoices, issued during the period is not tallying with the relevant period of refund claim in the ST-3 returns. The appellant has contested this by stating in the grounds of appeal that the finding is baseless and devoid of legal merits; that the statement of ISD invoices along with ST-3 returns and the figures for the period October 2015 to December 2015 is exactly tallying.

8. Before moving further, I find that none of the issue raised in the five findings under which refund was rejected was substantive. In case there was any query, requirement of further documents, etc., it could have been obtained from the appellant, more so since the Hon'ble High Court of Bombay in the case of Madhav Steel [2016(337)ELT 518], on the issue of procedural infractions, has held as follows:

> *14. It is submitted that the respondent No. 2 failed to appreciate that the petitioners have successfully established the exact co-relation between the goods which were manufactured and cleared on payment of central excise duty and the goods which were exported. The respondents failed to appreciate that the core aspect or fundamental requirement for rebate is manufacture and subsequent export of the goods. As long as this requirement is met, other procedural deviations can be condoned. The procedure has been prescribed to facilitate verification of substantive requirements. As per the law laid down by the Hon'ble Supreme Court, substantive benefit cannot be denied for procedural lapses. Procedural infractions are to be condoned if exports have actually taken place.*

9. As already stated, since none of the grounds on which the refund stands rejected appear to be legal/tenable, more so since the appellant is stating that [a] the distribution of the CENVAT credit was done as per Rule 7 of the CCR '04; [b] all the documents were provided to the adjudicating authroity; and [c] order in parts cannot be termed as a speaking order, as appropriate findings are not given, it would be in the interest of justice is the matter is remanded back to the adjudicating authority to pass a fresh order keeping in mind the observations made above. In the meantime, the appellant is directed to provide all the documents, etc. not provided till date, if any, to the adjudicating authority. The appellant, needless to state, will cooperate with the adjudicating authority, in case further documents, etc. are called for.

10. In view of the foregoing, the impugned OIO is set aside and the matter is remanded back to the adjudicating authority. While remanding the case to the adjudicating authority, reliance is placed on the case of Associated Hotel Limited [2015(37) STR 723 (Guj.)].

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

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

(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)

Date :26.12.2017

Attested

(Vinod Lukose)
Superintendent ,
Central Tax(Appeals),
Ahmedabad.

By RPAD.

To,

M/s. Intas Pharmaceuticals Limited,
2nd floor, Chinubhai Centre,
Off Nehru Bridge,
Ashram Road, Ahmedabad

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.