केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

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

7th Floor, GST Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/99/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-268-2017-18**
दिनाँक Date : **24-01-2018** जारी करने की तारीख Date of Issue 5/2/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Assistant Commissioner, केन्द्रीय कर, Ahmedabad-South द्वारा जारी मूल आदेश सं **CGST-VI/Ref-10/QX/17-18** दिनाँक: **30/8/2017,** से सृजित

Arising out of Order-in-Original No. **CGST-VI/Ref-10/QX/17-18** दिनाँक: **30/8/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

QX KPO services Pvt Ltd
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person a aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्ट विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

... 2 ...

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस 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।

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 on account of an appeal filed by M/s. QX KPO Services Pvt. Ltd., 201 & 401, GNFC Info Tower, S. G. Highway, Bodakdev, Ahmedabad (hereinafter referred to as the '*the appellants*' for sake of brevity) against Order-in-Original No. CGST-VI/REF.-10/QX/17-18 dated 30.08.2017 (hereinafter referred to as the '*impugned order*' for the sake of brevity) passed by the Assistant Commissioner, CGST, Division-VI (Vastrapur), Ahmedabad (South) (hereinafter referred to as the '*adjudicating authority*' for the sake of brevity).

2. Briefly facts of the case are that the appellants are registered with the Service Tax Department under the category of "Rent-a-Cab Service, Security/ Detective Agency Service, Manpower Recruitment/ Supply Agency Service, Business Auxiliary Service, Legal Consultancy Service' and holding Registration No. AAACQ1087GST001. They filed a refund claim of ₹24,29,453/- on 03.05.2017 for the period July 2016 to September 2016 under Notification number 27/2012-C.E.(NT) dated 18.06.2012 (hereinafter referred to as '*the said Notification*' for sake of brevity) before the proper authority in prescribed format. The adjudicating authority, vide the impugned order, rejected the refund of ₹24,29,453/- in terms of Notification number 27/2012-C.E.(NT) dated 18.06.2012 read with Section 11B of the Central Excise Act,1944 made applicable to the Service Tax matter vide Section 83 of the Finance Act,1994 on the ground that the appellants are a subsidiary of UK based company QX Ltd. and are financially dependent on their parent company. As the appellants are dependent on their parent company for survival and have no independent source of income other than from their parent company, the provider and recipient of service are merely establishments of distinct persons and hence the services provided by the appellants do not qualify as Export of Services as per Rule 6A of Export of Services Rules of Service Tax Rules, 1994.

3. Being aggrieved with the impugned order, the appellants filed the present appeal on the grounds that they are a company incorporated under the Companies Act, 1956 (now Companies Act, 2013) and are a separate legal entity and QX Ltd. is a company incorporated under the laws of United Kingdom which is a separate legal entity. The two different entities cannot be treated as mere establishment of distinct person. They argued that they have no other establishment in non taxable territory and therefore Explanation 3(b) of Section 65B(44) of the Finance Act, 1994 will not be applicable to this case.

4. Personal hearing in the case was granted on 22.01.2018 wherein Shri Tushar Shah, Chartered Accountant, appeared on behalf of the appellants and reiterated the contents of the appeal memorandum. He claimed that the appellants are distinct person and different legal entities.

5. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, and oral submissions made by the appellant at the time of

personal hearing. I find that adjudicating authority has rejected the refund claim on the sole ground that the appellants are financially dependent on their parent company and hence the services provided by the appellants do not qualify as Export of Service. Now the question to be decided is whether as per clause (f) of Rule 6A, the appellants are merely establishment of M/s. QX Limited, UK or otherwise.

6. At the onset, I find that the appellants have submitted before me that they are incorporated under the Companies Act, 1956 (now Companies Act, 2013) and they claimed that this is quite sufficient to establish the fact that they are legally independent entity. They further argued that their financial dependence on their parent company cannot deny their existence as an independent entity. As per clause (1) of rule 6A of Service Tax rules, any service provided or agreed to be provided shall be treated as export of service if all the below mentioned conditions satisfied cumulatively-

A. The provider of service is located in the taxable territory:- *The first condition to be satisfied is that the service provider must be located in the taxable territory. Under section 65B(52) of the act, the term 'taxable territory' means the territory to which the provisions of the act apply.*

B. The Recipient of service is located outside India :- *The second condition to be satisfied is that the recipient of service (service receiver) must be located outside India. This means that the service receiver must be located outside the territorial limits of India, including the State of Jammu & Kashmir.*

C. The service is not a service specified in section 66D of the Act :- *The third condition to be satisfied is that the service must not be a service specified in the Negative List spelt out in section 66D of the Act.*

D. The place of provision of the service outside India :- *The forth condition to be satisfied is that the place of provision of the service must be outside India. The fulfillment of this condition will have to be determined in accordance with the place of provision of service laid down in Rules 3 to 14 of the PPP Rules.*

E. The payment of such service has been received by the provider of service in convertible foreign exchange :- *The fifth condition to be satisfied is that the payment for the service in question must have been received by the provider of that service in convertible foreign exchange. The term 'convertible foreign exchange' has not been defined in the act or the Rules. Generally, the term is understood to mean 'foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 and any rules made thereunder'.*

F. The provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act:- *This is the sixth and final condition that must be satisfied. This is deeming provision which carves out an exception to the general rule that only services provided by a person to another person are taxable. The fiction created was to ensure that inter se provision of services between such persons, deemed to be separate persons would be taxable. The sixth condition stipulates that the provider of service and recipient of service should not be merely establishments of a distinct person referred to above. In effect, if a person has one establishment in a taxable territory and another establishment in a non-taxable territory, services provided by the former to the latter will not be treated as 'export of service'.*

Now, I find that the adjudicating authority, as per clause (1) of rule 6A of Service Tax rules, has concluded that the appellants are merely establishment of their UK based parent company, and decided that the services they are providing cannot be qualified as export of services. Here once it is established by the adjudicating authority in the impugned order that the appellants are merely an establishment of the M/s. QX Limited, UK and decided that it cannot be qualified as export of services then he should have looked into the taxability of the service as the appellants have not paid the Service Tax on so called export services and also to examine the availability of Cenvat credit to the appellants. Going through the impugned order, I could not find any discussion about the taxability of the said service provided by the appellants. In view of the above, it can be concluded that case is required to be remanded back for fresh consideration for reasons;

i) Reliance placed by the appellants in the case of **Tandus Flooring India Private Limited,** in Ruling No.AAR/ST/03/2013, Application No. AAR/44/ST12/12-13 decided on August 26, 2013 which has not been examined by the adjudicating authority thus it is felt necessary to remand the case to examine the above referred citation. Also, the department had filed a writ petition before the Hon'ble High Court of Karnataka. The adjudicating authority should also take reference from the judgment of the Hon'ble High Court of Karnataka [2015(39)S.T.R. 424(Kar.)] passed in response to the said writ.

ii) Once service are held to be not the export of services then adjudicating authority had to examine the taxability of services provided by the appellants as they have not paid Service Tax on the so called export of services and also to examine the availability of Cenvat credit to the appellants.

7. In view of above discussions I, hereby remand the case back to adjudicating authority to decide the matter a fresh in view of discussion at para-6 above.

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

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

(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED

(S. DUTTA) 24/07/18

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.

To,
M/s QX KPO Services Pvt. Ltd.,
201 & 401, GNFC Info Tower,
S. G. Highway, Bodakdev,
Ahmedabad-380 054.

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, Central Tax, Ahmedabad (South).
3. The Assistant/Deputy Commissioner, CGST, Division-VI (Vastrapur), Ahmedabad (South).
4. The Assistant Commissioner, (System) Central Tax, Ahmedabad (South).
5. Guard File.
6. P.A. File.

OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD केन्द्रीय वस्तु एवं सेवाकर (अपील) आयुक्तालय, अहमदाबाद