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

8525 to 8529

क फाइल संख्या : File No : V2(ST)6/Ahd-South/2018-19
Stay Appl.No. /2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-004-2018-19**
दिनाँक Date : **21-05-2018** जारी करने की तारीख Date of Issue 6/6/2018

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

ग Arising out of Order-in-Original No. **CGST-VI/Ref-82/Mifamed-Medical/2017-18** दिनाँक: **31.01.2018** issued by Assistant Commissioner,Div-VI, Central Tax, Ahmedabad-South

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

Mifamed Medical 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 पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व 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।

OFFICE OF THE COMMISSIONER CENTRAL GOODS & SERVICE TAX (APPEALS) AHMEDABAD
कार्यालय, केन्द्रीय वस्तु एवं सेवाकर (अपील) आयुक्त

(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 डयूटी 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 अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियग, 1944 की धारा 35–बी/35–इ के अंतर्गत:–

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

M/s. Mifamed Medical Private Limited, 3rd Floor, 315, Zodiac Square, Opp. Gurudwara, S G Road, Ahmedabad 380 054 (henceforth, "*appellant*") has filed the present appeal against the Order-in-original No.CGST-VI/REF-81/Mifamed-Medical/17-18 dated 31.01.2018 (henceforth, "*impugned order*") issued by the Assistant Commissioner, CGST Division-VI (Vastrapur), Ahmedabad - South (henceforth, "*adjudicating authority*").

2. The facts giving rise to this appeal are that the appellant, a service tax registrant, was engaged in providing 'business support services' to MPA/S Denmark (MPAS). On 27.10.2017, appellant filed a refund claim for Rs.3,45,483/- under rule 5 of the Cenvat credit Rules, 2004 read with Notification No.27/2012-CE(NT) dated 18.06.2012 in respect of Cenvat credit lying unutilized on account of export of services for the period Oct-2016 to Dec-2016. The adjudicating authority, after serving a show cause notice, rejected the claim on the ground that the services being provided by the appellant were in the nature of 'intermediary services' for which place of provision of services was the **location of service provider** in terms of rule 9 of the Place of provision of Service Rules, 2012 (POPS Rules) and hence services provided by the appellant cannot be termed as export of services.

3. The main grounds of appeal, in brief, are as follows-

3.1 Appellant states that for the similar matter in respect of earlier period, it has been held in the Order-in-Appeal dated 22.11.2017 that the services provided are not in the nature of intermediary services.

3.2 Appellant after analyzing the definition of "intermediary" explains that role of intermediary should be that of a middleman; that services with respect of vendor due diligence, quality inspection report, etc. are directly provided by them to MPAS and there is no existence of any third party; that they are not acting as a commission agent or play any pivotal role in the conclusion of deals between MPAS and its vendors; that majority of services provided by them are AFTER the vendor order is placed by MPAS; that they are not engaged in sourcing the material for MPAS as per the agreement; that they are not arranging or facilitating the provision of services or supply of goods between MPAS and vendors in India and they cannot be regarded as an intermediary.

3.3 Appellant states that adjudicating authority has conveniently ignored the agreement dated 15.02.2016 which is applicable for the subject period and has

considered the old agreement which expired on 31.03.2016; that adjudicating authority has presumed something which is not written in the service agreement.

3.4 Appellant contends that classification of services is not relevant in post negative list regime; that classification of services under business auxiliary service of business support service is not relevant in negative list regime, what is relevant is whether they are covered under the definition of intermediary or not.

3.5 Appellant submits that the impugned order has been passed without giving an opportunity of personal hearing thereby violating the principle of natural justice and on this ground alone, the impugned order should be quashed.

4. In the personal hearing held on 17.05.2018, CA Hitesh Mundra reiterated the grounds of appeal and submitted a copy of earlier Order-in-Appeal dated 23.03.2018, alongwith written submisions.

4.1 In written submissions given at the time of personal hearing, appellant, in addition to reiterating certain facts, has quoted earlier OIA dated 23.03.2018 in their favour.

5. I have carefully gone through the appeal wherein refund of unutilized Cenvat credit on account of export of output services has been denied on the ground that services provided by the appellant cannot be treated as export of services for the reason that services provided by the appellant to overseas client (MAPS) are "intermediary services" as defined under rule 9 of the POPS Rules. As a consequence, place of provision of services, being dependent of the location of service provider, shall be in India and not outside the taxable territory so as to consider the services provided as export of services. Therefore, the core issue to be decided is whether the services provided by the appellant are "intermediary services" in terms of POPS Rules.

5.1 The term "intermediary" was defined under rule 2(f) of the POPS Rules as under -

(f)**"intermediary"** means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.;

5.1.1 Further, what are "intermediary services" has been lucidly explained in guidance note 5.9.6 of the Education Guide a part of which reads as follows-

5.9.6 What are "Intermediary Services"?

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

i) the supply between the principal and the third party; and

ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition.

Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as "the main service"), but provides the main service on his own account.

5.2 The relevant Service Level Agreement dated 15.02.2016, which is in supersession to MOU dated 25.03.2013 and amended to align the terms and conditions with the Advance Pricing Agreement dated 13.10.2013 entered between the appellant and CBDT, is the valid agreement for the period 01.04.2015 to 31.03.2018 as per point 6 of the Agreement. Hence, any reliance on the old agreement by the adjudicating authority is unwarranted and irrelevant.

5.2.1 From the Service Agreement dated 15.02.2016, I find that the Service Agreement is between the service provider and service recipient only and the provision of service by the appellant is at their own account and not on behalf of a third party. Further, all the services listed in the service Agreement namely procurement and vendor diligence, quality inspection/ audit couples QA and QC, follow up purchase orders and logistics, IT hardware breakdown support, accounting support, etc. are supportive in nature, outsourced by MPAS to the appellant. Also, consideration for providing the services is not based on an agreed percentage of the sale or purchase price so as to indicate that the appellant has acted as a middleman or commission agent. in fact there is nothing in the Agreement which remotely suggests that appellant's role is that of a middleman. Also, I find nothing in the Agreement to suggest that appellant is arranging or facilitating the provision of service.

5.2.2 Therefore, Service Agreement is the only document here to decide whether appellant has provided intermediary services or not and this document clearly supports the appellant's argument that services provided by them cannot be termed as intermediary services. As a consequence, rule 9 of POPS Rules becomes inapplicable and place of provision of service is to be decided in terms of default rule 3 of POPS Rules according to which location of service recipient shall be the place of provision of service. The service recipient being located outside India, the place of provision of services does not come in the way of according export status to

the services provided. Resultantly, the impugned order denying refund on the ground that services provided by the appellant were not export of services requires to be set aside with consequential relief.

6 Accordingly, I set aside the impugned order and allow the appeal with consequential relief.

7. 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)

Date:

Attested

(Sanwarmal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
M/s. Mifamed Medical Private Limited,
3rd Floor, 315, Zodiac Square, Opp. Gurudwara,
S G Road, Ahmedabad 380 054

Copy to:

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