सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

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

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क फाइल संख्या : File No : V2(ST)/88&89/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-049&050-2018-19**
दिनाँक Date : **31-08-2018** जारी करने की तारीख Date of Issue 18/9/2018

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/60&61/VJP/17-18** दिनाँक: **21/06/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

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

Adani Power 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।

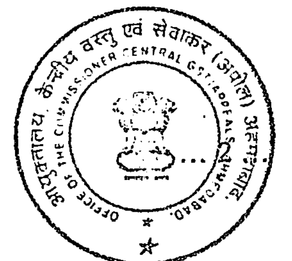
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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



(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.

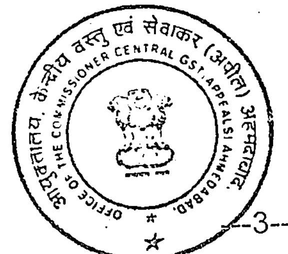
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 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 चहिए 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 अधिन्यिम 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।(Sect on 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

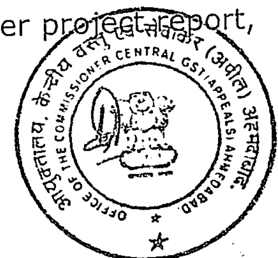
This order arises on account of the two appeals filed by M/s. Adani Power Ltd., Shikhar Building, Near Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad (hereinafter referred to as "*the appellants*"), against the following two Orders-in-Original (hereinafter referred to as the "*impugned orders*") passed by the then Assistant Commissioner, Service Tax, Division-II, Ahmedabad (hereinafter referred to as the "Adjudicating Authority");

Sr. No.	OIO No.	OIO date	Amount of refund claimed (₹)	Period of the refund claim
1	SD-02/Ref-61/VIP/2017-18	21.06.2017	14,11,52,826	Oct-Dec'16
2	SD-02/Ref-60/VIP/2017-18	21.06.2017	9,61,09,319	July-Sept'16

2. The facts of the case, in brief, are that the appellants were registered with the then Service Tax department having registration number AABCA2957LST001. The appellants had filed the above mentioned refund claims in terms of Notification No. 12/2013-ST.

3. The adjudicating authority, after scrutiny of the claims, noticed certain discrepancies. The appellants did not provide proper documentary evidence to prove that the input services were exclusively used in the SEZ. Also, the appellants failed to establish the fact that they had not passed on the incidence of the amount claimed and hence, it was assumed that unjust enrichment might be involved in the claims. As the appellants could not submit the required information along with the refund claims, the adjudicating authority rejected the said claims, vide the above mentioned impugned orders, concluding that the appellants had failed to follow the provisions as mentioned in the Notification number 12/2013-ST dated 01.07.2013.

4. Being aggrieved with the impugned orders, the appellants filed the present appeals before me. The appellants contended that the impugned orders were passed in gross violation of the principles of natural justice as the same were passed ex-parte, without granting them the opportunity to be heard or to represent the case. Regarding the issue that the supply of power by the appellants to the DTA is outside the purview of authorized operations, the appellants submitted copy of the letter dated 19.06.2007, issued by the Ministry of Commerce, showing that power generation, as per project report, is one of the items constituting the authorized operations.



5. Personal hearing in the cases was granted to the appellants on 11.01.2018, 31.01.2018, 12.02.2018, 15.03.2018, 11.06.2018, 26.06.2018 and 24.07.2018 but no one, on behalf of the appellants appeared before me nor was any letter, for adjournment of personal hearing, submitted to me.

6. I have carefully gone through the facts of the case on records and grounds of appeal in the Appeal Memorandums. I find that the appellants were granted enough chance of personal hearing for representing their case or submit additional documents before me. However, as they failed to avail the benefit of personal hearing, I hereby, take up the matter *ex parte*, purely on merit and available documents.

7. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and further written submissions and oral submissions made by the appellants at the time of personal hearing. I find that the adjudicating authority has rejected the entire claim on the ground that the appellants were engaged in SEZ operations as well as DTA operations and other business, concluding that, services received cannot be considered as wholly consumed within the SEZ unit. In this matter the appellants have defended that the adjudicating authority has considered the construction of transmission line and supply of power to DTA as DTA operation while the appellants have constructed the transmission line for their own use for supply of power generated by the appellants at the SEZ; that the supply of power is one of the activities authorized to the appellants; similarly the appellants sell powers to other units in terms of letters issued for authorized operations and Rule 47(3) of the SEZ Rules.

8. In above context, it is important to understand legislative intent manifested through notification and see how the relevant notifications have undergone changes.

The relevant portions of Notification No. 12/2013-ST dated 01.07.2013 are;

"2. The exemption shall be provided by way of refund of service tax paid on the specified services received by the SEZ Unit or the Developer and used for the authorised operations:

Provided that where the specified services received by the SEZ Unit or the Developer are used exclusively for the authorised operations, the person liable to pay service tax has the option not to pay the service tax ab initio, subject to the conditions and procedure as stated below.

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.

(II) The ab-initio exemption on the specified services received by the SEZ Unit or the Developer and used exclusively for the authorised operation shall be allowed subject to the following procedure and conditions, namely:-

(a) the SEZ Unit or the Developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, along with the list of specified services in terms of condition (I);

(b) on the basis of declaration made in Form A-1, an authorisation shall be issued by the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be to the SEZ Unit or the Developer, in Form A-2;

(c) the SEZ Unit or the Developer shall provide a copy of said authorisation to the provider of specified services. On the basis of the said authorisation, the service provider shall provide the specified services to the SEZ Unit or the Developer without payment of service tax;

(d) the SEZ Unit or the Developer shall furnish to the jurisdictional Superintendent of Central Excise a quarterly statement, in Form A-3, furnishing the details of specified services received by it without payment of service tax;

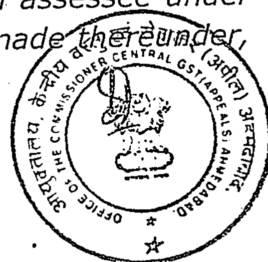
(e) the SEZ Unit or the Developer shall furnish an undertaking, in Form A-1, that in case the specified services on which exemption has been claimed are not exclusively used for authorised operation or were found not to have been used exclusively for authorised operation, it shall pay to the government an amount that is claimed by way of exemption from service tax and cesses along with interest as applicable on delayed payment of service tax under the provisions of the said Act read with the rules made thereunder.

(III) The refund of service tax on (i) the specified services that are not exclusively used for authorised operation, or (ii) the specified services on which ab-initio exemption is admissible but not claimed, shall be allowed subject to the following procedure and conditions, namely:-

(a) the service tax paid on the specified services that are common to the authorised operation in an SEZ and the operation in domestic tariff area [DTA unit(s)] shall be distributed amongst the SEZ Unit or the Developer and the DTA unit (s) in the manner as prescribed in rule 7 of the Cenvat Credit Rules. For the purpose of distribution, the turnover of the SEZ Unit or the Developer shall be taken as the turnover of authorised operation during the relevant period.

(b) the SEZ Unit or the Developer shall be entitled to refund of the service tax paid on (i) the specified services on which ab-initio exemption is admissible but not claimed, and (ii) the amount distributed to it in terms of clause (a).

(c) the SEZ Unit or Developer who is registered as an assessee under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder,



or the said Act or the rules made thereunder, shall file the claim for refund to the jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, the as the case may be, in Form A-4;

(d) the amount indicated in the invoice, bill or, as the case may be, challan, on the basis of which this refund is being claimed, including the service tax payable thereon shall have been paid to the person liable to pay the service tax thereon, or as the case may be, the amount of service tax payable under reverse charge shall have been paid under the provisions of the said Act;

(e) the claim for refund shall be filed within one year from the end of the month in which actual payment of service tax was made by such Developer or SEZ Unit to the registered service provider or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit;

(f) the SEZ Unit or the Developer shall submit only one claim of refund under this notification for every quarter:

Explanation.- For the purposes of this notification "quarter" means a period of three consecutive months with the first quarter beginning from 1st April of every year, second quarter from 1st July, third quarter from 1st October and fourth quarter from 1st January of every year.

(g) the SEZ Unit or the Developer who is not so registered under the provisions referred to in clause (c), shall, before filing a claim for refund under this notification, make an application for registration under rule 4 of the Service Tax Rules, 1994.

(h) if there are more than one SEZ Unit registered under a common service tax registration, a common refund may be filed at the option of the assessee.

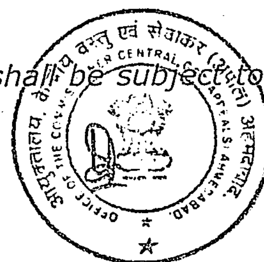
(IV) The SEZ Unit or Developer, who intends to avail exemption or refund under this notification, shall maintain proper account of receipt and use of the specified services, on which exemption or refund is claimed, for authorised operations in the SEZ.

4. Where any sum of service tax paid on specified services is erroneously refunded for any reason whatsoever, such service tax refunded shall be recoverable under the provisions of the said Act and the rules made there under, as if it is recovery of service tax erroneously refunded;

5. Notwithstanding anything contained in this notification, SEZ Unit or the Developer shall have the option not to avail of this exemption and instead take CENVAT credit on the specified services in accordance with the CENVAT Credit Rules, 2004."

The relevant portions of Notification No. 40/2012-ST dated 20.06.2012 are;

" 2. The exemption contained in this notification shall be subject to the following conditions, namely:-



(a) the exemption shall be provided by way of refund of service tax paid on the specified services received by a unit located in a SEZ or the developer of SEZ and used for the authorised operations:

Provided that where the specified services received in SEZ and used for the authorised operations are wholly consumed within the SEZ, the person liable to pay service tax has the option not to pay the service tax ab initio instead of the SEZ unit or the developer claiming exemption by way of refund in terms of this notification.

Explanation.- For the purposes of this notification, the expression "wholly consumed" refers to such specified services received by the unit of a SEZ or the developer and used for the authorised operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012(hereinafter referred as the POP Rules) is as under:-

(i) in respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ ; or

(ii) in respect of services specified in rule 5 of the POP Rules, the place where the property is located or intended to be located is within the SEZ; or

(iii) in respect of services other than those falling under clauses (i) and (ii), the recipient does not own or carry on any business other than the operations in SEZ;

(b) where the specified services received by the unit of a SEZ or developer are not wholly consumed within SEZ, maximum refund shall be restricted to the extent of the ratio of export turnover of goods and services multiplied by the service tax paid on services other than wholly consumed services to the total turnover for the given period to which the claim relates, i.e.,

(Export turnover of goods + Services of SEZ Unit/Developer) X Service tax paid on services other than wholly consumed Services (both for SEZ and DTA)

Refund amount = --

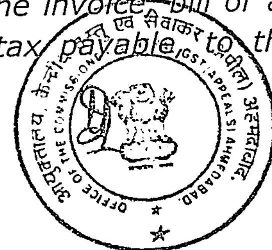
Total turnover for the period

(c) for the purpose of claiming exemption, the Unit of a SEZ or developer shall obtain a list of services that are liable to service tax as are required for the authorised operations approved by the Approval Committee (hereinafter referred to as the specified services) of the concerned SEZ;

(d) for the purpose of claiming ab initio exemption, the unit of a SEZ or developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, in addition to the list specified under condition (c); the unit of a SEZ or developer who does not own or carry on any business other than the operations in SEZ, shall declare to that effect in Form A-1;

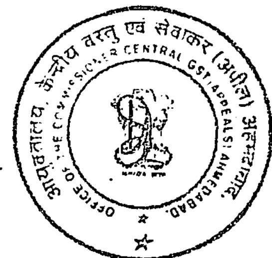
(e) the unit of a SEZ or developer claiming the exemption shall declare that the specified services on which exemption and/ or refund is claimed, have been used for the authorised operations;

(f) the unit of a SEZ or developer claiming the exemption by way of refund, should have paid the amount indicated in the invoice, bill or as the case may be, challan, including the service tax payable to the



person liable to pay the said tax or the amount of service tax payable under reverse charge, as the case may be, under the provisions of the said Act;
(g) no CENVAT credit of service tax paid on the specified services used for the authorised operations in a SEZ has been taken under the CENVAT Credit Rules, 2004;
(h) no refund shall be available on services wholly consumed for operations in the Domestic Tariff Area (DTA) worked out in the same manner as clauses (i) and (ii) of the explanation to condition (a);
(i) exemption or refund of service tax paid on the specified services other than wholly consumed services used for the authorised operations in a SEZ shall not be claimed except under this notification;
(j) the unit of a SEZ or developer, who intends to avail exemption and or refund under this notification, shall maintain proper account of receipt and use of the specified services on which exemption is claimed, for authorised operations in the SEZ.
***3.** The following procedure should be adopted for claiming the benefit of the exemption contained in this notification, namely:-*
(a) the unit of a SEZ or developer, who has paid the service tax leviable under section 66B of the said Act shall avail the exemption by filling a claim for refund of service tax paid on specified services used for the authorised operations;
(b) the unit of a SEZ or developer who is registered as an assessee under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, or the said Act or the rules made thereunder, shall file the claim for refund to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the SEZ or registered office or the head office of the SEZ unit or developer, as the case may be, in Form A-2;
(c) the unit of a SEZ or developer who is not so registered under the provisions referred to in clause (b), shall, before filing a claim for refund under this notification, file a declaration with the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the SEZ or registered office or the head office of the SEZ unit or developer, as the case may be, in Form A-3;
(d) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall, after due verification, allot a service tax code number to the unit of a SEZ or developer, referred to in clause (c), within seven days from the date of receipt of the said declaration, in Form A-3;
(e) claim for refund shall be filed, within one year from the end of the month in which actual payment of service tax was made by such developer or unit, to the registered service provider or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit."

9. In view of the above, now I will compare the change in the relevant notifications during the relevant period and examine the issue involved in the matter.



Difference between Old and New Notification:

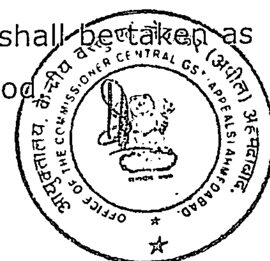
S. No.	New 12/2013	Old 40/2012
1	Condition of "Wholly Consumed" has been done away with. If the approved services are used exclusively for authorized operations, service provider need not charge service tax and if charged and service tax paid, full refund would be available.	If such services are "Wholly consumed" within SEZ, service provider need not charged service tax and if charged and service tax paid, full refund would be availbale. For the expression wholly consumed it is required to refer place of provision of Service Rule, 2012.
2	In the case of common services i.e. services are used both for SEZ & DTA units, service tax in proportion to ratio of SEZ turnover to total turnover is to be allowed as refund for SEZ as per rule 7 of CCR.	In the case of common services i.e. services are used both for SEZ & DTA units, service tax in proportion to the ratio of export turnover to total turnover is to be allowed as refund for SEZ.

The above comparison leads to following conclusion;

(i) One of the important requirements of "wholly consumed in SEZ" for ab-initio exemption has been replaced with the requirement of "exclusively used for authorized operation". Hence the concept of 'Place of use' has been substituted for "purpose of use" of the services. Now SEZ Unit or Developer can claim ab-initio exemption of all the services which are exclusively used for authorized operations.

(ii) The ab-initio exemption is optional and if the same is not availed, the refund route will be applicable. If neither ab-initio exemption nor refund route is to be availed then SEZ unit or the Developer has the option to take CENVAT credit on the specified services in accordance with the CENVAT Credit Rules, 2004.

(iii) The service tax paid on the specified services that are common to the authorized operation in an SEZ and the operation in DTA units shall be distributed as per Rule 7 of the CENVAT Credit Rules. For the purpose of distribution, the turnover of the SEZ unit or the Developer shall be taken as the turnover of authorised operation during the relevant period.



(iv) Condition (III) (a) of Notification No. 12/2013 is applicable only when there are "Shared Services" meaning thereby, common services which are used by the same recipient of services for DTA as well as SEZ Units belonging to the service recipients. In my view, the adjudicating authority should have appreciated that the extant refund claim was filed under Notification No. 12/2013-ST dated 01.07.2013. The above Notification came into force from 01.07.2013. Before such Notification, Notification No. 40/2012-ST dated 20.06.2012 was in existence wherein the maximum refund was restricted to the extent of the ratio of export turnover of the goods and services to the turnover in case the specified service received by unit of SEZ or Developer that were not wholly consumed within SEZ. The said Notification was superseded by Notification No. 12/2013 (supra) whereby the criteria for export turnover was substituted by turnover of the SEZ unit or the Developer. The Notification provides that service tax paid on the specified services that are common to the authorized operation in SEZ and the operation in DTA shall be distributed among the SEZ unit or Developer and the DTA unit in the manner as prescribed under rule 7 of CENVAT Credit Rules. There is no concept of "export turnover" under the said notification 12/2013 (supra) and what is important is the turnover of SEZ unit for their authorized operation which has already been proved by the Appellant in their reply filed to the Respondent.

10. I find that the adjudicating authority has rejected the claim on three grounds viz. 'the specified service for which the refund claim is filed appears to be not used exclusively for the authorized operation by the SEZ'. This ground has been discussed by me in the previous paragraphs. The second observation of the adjudicating authority is that 'the appellants have also sold electricity in DTA'. In this regard, I would like to say that the notification number 12/2013-ST nowhere puts any binding as to how much should be used in the SEZ area and how much should be sold in DTA. In view of the above, the objection raised by the adjudicating authority does not hold any ground. The third objection of the adjudicating authority is that 'the appellants have not submitted enough documentary evidences in support of their claim' (paragraph 16 of the impugned order). When the adjudicating authority, while deciding the cases, found that the appellants have not submitted sufficient documents, he should have called for the same. In absence of certain relevant documents, I believe that, the adjudicating authority could not have done justice to the claims. Further, I find that the adjudicating authority, in absence of required documents, concluded the case on the basis of assumption and presumption.

11. I find that the observation of the adjudicating authority is not proper at all. The appellants have submitted a letter approved by the Ministry of

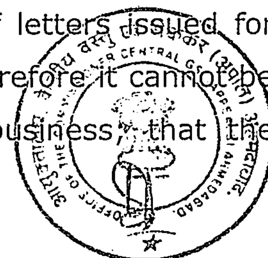
Commerce having number F.2/487/2006-SEZ dated 19.06.2007 permitting the appellants to set up a sector specified SEZ for power sector for supply of powers at Vill. Tunda & Siracha, Tal. Mundra, also permitted the said powers can be supplied to SEZs, EOUs in Gujarat and other SEZs, EOUs & others. Hence it is clear that the power generation & supply of the power is the authorized operation of the appellants. In this regard the Rule 47(3) of SEZ Rule 2006 specify that:

(3) Surplus power generated in a Special Economic Zone's Developer's Power Plant in the SEZ or Unit's captive power plant or diesel generating set may be transferred to Domestic Tariff Area on payment of duty on consumables and raw materials used for generation of power subject to the following conditions, namely:—
(a) proposal for sale of surplus power received by the Development Commissioner shall be examined in consultation with the State Electricity Board, wherever considered necessary: Provided that consultation with State Electricity Board shall not be required for sale of power within the same Special Economic Zone;
(b) norms for production of a unit of power shall be approved by the Approval Committee;
(c) sale of surplus power to other Unit or Developer in the same or other Special Economic Zone or to Export Oriented Unit or to Electronic Hardware Technology Park Unit or to Software Technology Park Unit or Bio-technology Park Unit, shall be without payment of duty;
(d) for sale of surplus power in Domestic Tariff Area, the Unit shall obtain permission from the Specified Officer and the State Government authority concerned;
(e) duty on sale of surplus power to the Domestic Tariff Area shall be as provided for in this rule.

12. As per the above, the appellants can sell surplus power to DTA on fulfillment of the conditions. Hence, here it is clear that the appellants are generating power which is their authorized operation and they have utilized this power as per the approval letter of the Ministry of Commerce and as some surplus power is also generated, it is supplied to the DTA which is also permitted under Rule 47(3) of SEZ Rule 2006. So the appellant has supplied the surplus power outside SEZ as per the SEZ Rules only. As per the SEZ Act "*Domestic Tariff Area*" means the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones; and therefore DTA operation means operations at outside Special Economic Zones. I find that the appellants are not involved in any other activity which is not authorized operation as per SEZ Rules. In this context I am not in agreement with the findings of the adjudicating authority. The observations of the adjudicating authority that they have transferred power to the DTA which, again falls within the ambit of authorized operation as per approval granted by ministry of Commerce & Industry under letter of permission no. F. 2/487/2006-SEZ dated 19.06.2007 and Rule 47(3) of SEZ Rules does not vitiate their entitlement. Hence, in this case it cannot be said that the services utilized are shared between the SEZ operation as well as

DTA operation & other business. Further the adjudicating authority has observed that the said claimant is also engaged in other business such as construction of transmission line outside SEZ area and therefore the service received cannot be considered as exclusively used for authorized operation in SEZ. In this matter I find that this observation of the adjudicating authority is not right, as construction of transmission line cannot be equated with DTA business. The appellants had constructed the Transmission lines outside the SEZ only for supply of power generated by them in the SEZ area. It would be worth considering the fact that sub-rule © of Rule 47(3) of SEZ Rules ibid, stipulates sale of surplus powers to other SEZ, EOUs or to EHTP etc. If this provision is considered, then existence of transmission line becomes business neutral infrastructural facility i.e., having no nexus with power being supplied to SEZ etc units [as per sub-rule © above] or to DTA. It is a fact that power generated cannot be transmitted from one place to another place without these transmission lines. Therefore, it is necessary for the appellants to construct the transmission line for supply of power which is generated by them. The construction of transmission line is must for supplying power from the SEZ units to areas approved by the competent authority. I find that transmission of surplus power outside SEZ in DTA is permitted vide Rule 47(3) of SEZ Rules, 2006 *ibid* and therefore, for such transmission, construction and installation of transmission line is a necessity which has been done by the appellants. Further, the said transmission line which is owned by the appellant's SEZ unit is used exclusively for transmission of power generated within the SEZ by the appellants. Further I find that the appellants, in reply to the SCN, have also produced a Chartered Accountants certificate, to declare that they have no separate income from transmission line. The mere activity of construction cannot be said to be a business activity owing to the fact that the construction has not been done for any other entity but has been done for their own authorized operations. Hence, it cannot be said that the construction of transmission line in this case is other business of the appellants and not authorized operation. Hence appeal survives very much on this ground.

13. Further the adjudicating authority has mentioned in his findings that it is not clear how the input services are utilized as the appellants have both DTA and SEZ operations. In this matter the appellants in their defense in the appeal memorandum have stated that the Ministry of Commerce vide their letter No. F.2/487/2006-SEZ dated 19.06.2007 permitted the appellants to set up a sector specific SEZ for power sector for supply of power and the above referred letters permitted them to supply powers generated in SEZ to DTA; that the appellants sell powers to DTA in terms of letters issued for authorized operation and Rule 47(3) of the SEZ Rules, therefore it cannot be said that the appellants own or carry on any other business, that the



appellants have submitted that they constructed their own dedicated transmission lines for supply of power generated by them and they have not generated any separate income from transmission lines. I find that the adjudicating authority has not discussed anything regarding this in his findings and rejected the claim on the ground that the appellants were carrying other business other than "authorized operation" in SEZ. I find that the appellants were not having any other business other than the generation and supply of the power which is authorized operation of the SEZ, and the supply to DTA and construction of transmission lines which was considered the other business by the adjudicating authority was not the other business but it is the authorized operation of SEZ only as discussed in earlier paragraph. I find that the appellants have received all the specified services for SEZ operation and consumed the services in the "authorized operation" of the SEZ only. It is not shared between the authorized operation in SEZ unit and DTA unit. The appellants were supplying the surplus power in the DTA which was generated as "authorized operation" in the SEZ unit and which was permissible under Rule 47(3) of SEZ Rules, 2006. Further the Construction of transmission line is must for the supply of the power generated by them and the appellant is not generated any separate income from transmission lines, hence, it cannot be called other than SEZ business. Hence it is clear that the appellants have rightly filed the claim as per Notification No. 12/2013-ST, dated 01.07.2013. Further I find that the adjudicating authority's finding is not correct and without any basis, even otherwise if the taxable services which do not fall in the category of 'wholly consumed service' and also are not 'shared service' the right procedure for claiming exemption is refund route. The CBEC Circular No. 142/11/2011-ST, dt. 18.05.2011 clarifies that:

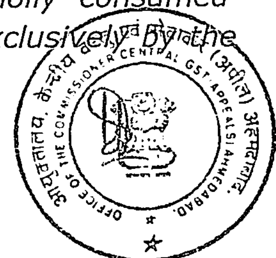
" *Question: In the notification, what is the treatment for service tax paid on taxable services which do not fall in the category of "wholly consumed services", and also are not 'shared services' ? Is refund available?*

Answer:

All taxable services (under section 66 or section 66A) received by a SEZ Unit/Developer for the authorised operations, have been exempted in the first paragraph of notification 17/2011-ST, subject to conditions.

In Paragraph 2, conditions attached to this exemption are prescribed. In terms of paragraph 2(a), refund route is the default option for all who intend to claim the exemption granted by the notification in its first paragraph. However, an exception is provided in the form of ab initio (upfront) exemption, to the 'wholly consumed' services.

Services which fall outside the definition of 'wholly consumed' services can be categorized as those which are used exclusively by the



SEZ Unit/Developer, for the authorised operations in SEZ or shared with DTA operations.

Para 2(d) of the notification is applicable to refund arising from 'shared services' only.

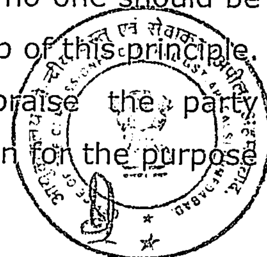
Thus exemption to services exclusively used for the authorised operations of SEZ Unit/Developer, will continue to be available by way of refund, as specified in paragraph 2(a) itself, subject to other conditions. To claim this refund, Table-A, provided in Form A-2 may be used.

It is clarified that only such services shall be considered as exclusively used by SEZ Unit/Developer, for the authorised operations, as they satisfy the following criteria:

(i) Invoice is raised in the name of the SEZ Unit/Developer or in the invoice, it is mentioned that the taxable services are supplied to the SEZ Unit/Developer for the authorised operations;
(ii) Such services are approved by the 'Unit Approval Committee(UAC)', as required for the authorised operations;
(iii) Receipt and use of such services in the authorised operations are accounted for in the books of accounts of the SEZ Unit/Developer."

Hence from the above clarification, it is clear that for the services exclusively used for the authorized operation in SEZ, exemption will be compensated by way of refund. Hence the rejection of the claim is without any basis.

14. Now remains the final issue which the appellants have pleaded before me that the adjudicating authority has rejected the refund claims without giving them the opportunity to represent their case and hence, they were devoid of the benefit of natural justice. As regards the issue that the appellants were not given any opportunity to present their case personally as per the principle of natural justice; I consider that the adjudication proceedings shall be conducted by observing principles of natural justice. The principles of natural justice must be followed by the authorities at all levels in all proceedings under the Act or Rules and the order passed in violation of the principles of natural justice is liable to be set aside by Appellate Authority. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice. Natural justice has certain cardinal principles, which must be followed in every proceeding. Judicial and quasi-judicial authorities should exercise their powers fairly, reasonably and impartially in a just manner and they should not decide a matter on the basis of an enquiry unknown to the party, but should decide on the basis of material and evidence on record. Thus, according to me, the decisions should not be biased arbitrary or based on mere conjectures and surmises. The first and foremost principle is what is commonly known as *audi alteram partem* rule. It says that no one should be condemned unheard. The Show Cause Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Further, time given for the purpose

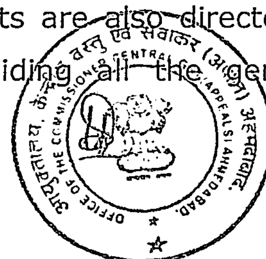


should be adequate so as to enable an assessee to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. Secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. The Supreme Court in the case of S.N. Mukherjee vs Union of India [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". The Hon'ble Supreme Court has further elaborated the legal position in the case of Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr. [AIR 1976 SC 1785], as under: -

> *".......If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ...".*

The adjudicating authority should, therefore, bear in mind that no material should be relied in the adjudication order to support a finding against the interests of the party unless the party has been given an opportunity to rebut that material. Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

15. Therefore, in view of the discussion held above, I consider that both the cases should be remanded back to the adjudicating authority a fresh decision. While adjudicating the case, the adjudicating authority must ask for all the relevant documents required for concluding the cases. There should not be any doubt on the part of the adjudicating authority to conclude the cases on assumption and presumption. The appellants are also directed to cooperate with the adjudicating authority by providing all the genuine



documents pertaining to the claim and remaining present during the course of personal hearing.

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

16. The appeals filed by the appellants stand disposed off in above terms.

(उमा शंकर)

CENTRAL TAX (Appeals),

AHMEDABAD.

ATTESTED

(S. DUTTA)

SUPERINTENDENT,

CENTRAL TAX (APPEALS),

AHMEDABAD.

BY R.P.A.D.

To,
M/s. Adani Power Ltd.,
Shikhar Building, Near Adani House,
Near Mithakhali Six Roads, Navrangpura,
Ahmedabad -380 009

Copy To:-

1. The Chief Commissioner, Central Tax, Ahmedabad zone.
2. The Commissioner, Central Tax, Ahmedabad-South.
3. The Asstt./ Dy. Commissioner, Central Tax, Div-VI, Ahmedabad-South.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad-South.
5. Guard File.
6. P.A. File.