आयुक्त (अपील) का कार्यालय
Office of the Commissioner (Appeals)
केंद्रीय जीएसटी अपील आयुक्तालय - अहमदाबाद
Central GST Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 26305065-079 : टेलेफैक्स26305136 - 079 :

DIN-20220464SW0000015374

स्पीड पोस्ट

क फाइल संख्या : File No :GAPPL/COM/STP/1049/2021 1709 - 713

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-001-APP-058/2021-22**
दिनाँक Date : 30.03.2022 जारी करने की तारीख Date of Issue : 29.04.2022.

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No.CGST-VI/Ref-30/APML/DC/DRS/2020-21 dated 18.12.2020 passed by the Deputy Commissioner, Central GST, Division-VI, Ahmedabad South Commissionerate.

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

M/s Adani Power (Mundra) Ltd.,
Adani Corporate House, Shantigram,
Vaishnodevi Circle, S.G.Highway,
Ahmedabad-382421.

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 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, 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.

(क) 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।

(A) 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.

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

(B) 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।

(c) 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 एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत के अंतर्गत:–

Under Section 35B/ 35E of Central Excise Act, 1944 or Under Section 86 of the Finance Act, 1994 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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of 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 adjudicating authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इस 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 contained 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 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 Adani Power (Mundra) Ltd., Adani House, Near Mithakhali Circle, Navrangpura, Ahmedabad-380009 [New address: Adani Corporate House, Shantigram, Vaishnodevi Circle, S.G. Highway, Ahmedabad-382421] (hereinafter referred to as "*the appellant*") against Order-in-Original No. CGST-VI/Ref-30/APML/DC/DRS/2020-21 dated 18.12.2020 (hereinafter referred to as the "*impugned order*") passed by the Deputy Commissioner, CGST, Division-VI, Ahmedabad South (hereinafter referred to as the "Adjudicating Authority").

2. The appellant is a Co-Developer and was registered as service recipient in terms of the provisions of Section 68(2) of the Finance Act, 1994 (hereinafter referred to as '*the Act*') having Registration No. AABCA2957LST001, under the taxable category of services viz. 'Management Consultancy Service', 'Consulting Engineering Service', 'Underwriting Service', 'Banking & Financial Service', 'Scientific & Technical Consultancy Service', 'Sponsorship Service', 'Transport of Goods by Road Service', 'Online Information and Data Service', 'Renting of Immovable Property Service', 'Erection, Commissioning & Installation Service', etc.

2.1 Briefly stated, the facts of the case are that the appellant is a subsidiary of M/s Adani Power Ltd. (in short '*APL*'), who is a co-developer of multi-product Special Economic Zone, viz. Adani Ports and Special Economic Zone (in short '*SEZ*'), which has been set up in the village of Tundra and Siracha, Taluka-Mundra, Distt. Kutch, Gujarat. In terms of a scheme of arrangement between APL and the appellant, which has been sanctioned by the National Company Law Tribunal vide their Common Orders dated 03.11.2017, APL has transferred their Mundra Power Generating Undertaking along with all its assets and liabilities to the appellant on a going concern on slum exchange basis effective from the appointed date of 31.03.2017. APL's request for transfer of the Letter of Approval including Authorised Operations, assets & liabilities pertaining to its Mundra Power Plant facilities to the appellant was approved by the Board of Approval of Ministry of Commerce and Industry, Department of Commerce, Government of India subject to conditions mentioned in letter dated 15.12.2017. Therefore, the right to the refund of tax in the present matter had been transferred to the appellant and accordingly, the present refund has been filed.

2.2 APL had originally filed a refund claim for an amount of Rs.32,98,792/- on 27.11.2010 in terms of Notification No.09/2009-ST dated 03.03.2009 for refund of service tax paid on the various services received and utilized for authorized operation in the SEZ. The said refund claim was adjudicated vide Order-in-Original No.SD-02/Ref-73/11-12 dated 27.01.2012 wherein an amount of Rs.14,26,870/- was sanctioned and the rest of the amount of Rs.18,71,921/- was rejected. On being aggrieved, they had filed an appeal before the Commissioner (Appeals-IV), Central Excise, Ahmedabad who vide

Order-in-Appeal (in short '*OIA*') No.87/2013 (STC)/ SKS/Commr.(A)/Ahd. dated 01.05.2013 partially allowed and partially rejected the appeal filed by the appellant. Being aggrieved with the rejection part of the OIA, an appeal was filed by the appellant before the Hon'ble Tribunal, Ahmedabad. The said appeal filed was decided by the Hon'ble CESTAT, Ahmedabad vide their Order No. A/10147-10187/2016 dated 02.02.2016 along with other appeals filed by the appellant as well as department on similar issue pertaining to different period. The Hon'ble Tribunal, vide their said Order dated 02.02.2016, has disposed off the appeals filed by the appellant by way of remand to the adjudicating authority and has rejected the appeals filed by the department. Based on the Hon'ble Tribunal's above mentioned order, the appellant had filed a refund claim for an amount of Rs.1,36,00,379/- on 10.08.2018, which covered amounts of refund rejected in eighteen (18) refund claims originally filed by them in the matter. The said claim was rejected by the adjudicating authority vide Order-in-Original No. CGST-VI/Ref-114/SKC/Adani Power/18-19 dated 30.11.2018 on the ground of time limit as prescribed under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act,1994. On an appeal filed by the appellant against the said OIO dated 30.11.2018, the Commissioner (Appeals), Ahmedabad vide OIA No.AHM-EXCUS-001-APP-069-2019-20 dated 29.11.2019 issued on 03.12.2019 has remanded back the case to the adjudicating authority for re-examining the whole issue on merit in de-novo proceeding. Accordingly, the adjudicating authority has passed the impugned order in de-novo proceedings, which pertained to the refund for an amount of Rs.8,38,047/- rejected by the appellate authority vide OIA No. 87/2013 (STC)/ SKS/Commr.(A)/Ahd. dated 01.05.2013 with reference to the refund claim of Rs.32,98,792/- filed on 27.11.2010. The adjudicating authority, during de-novo proceedings, found the refund claimed as not admissible and hence rejected the same.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal on the following grounds:

- Ld. Deputy Commissioner grievously erred in law as well as facts in rejecting the refund claim with respect to services of transportation of passengers by Air, more particularly described in Annexure C. It is the contention of ld. Adjudicating Authority that the category of service was inserted in the approved list w.e.f. 01.07.2010 whereas the invoices were issued prior thereto and therefore refund claim was not tenable. The services of transportation of passengers by air was included in the list of approved services with effect from 01.07.2010 vide Letter dated 03.06.2013 bearing No.MPSEZ/P&C/5/74/00 Vol II, copy of which was already available on record with ld. Adjudicating Authority. It was, therefore, gravely incorrect and false on part of ld. Adjudicating Authority that the service of transportation of passengers by air was not included in the list of approved services. Transactions for which refund claim was sought by the appellant were undisputedly in the nature of transportation of passengers by air and therefore, the appellant rightly

claimed the refund. It is to submit for sake of abundant clarity that ld. Adjudicating authority had not disputed the primary facts i.e. nature of services, actual receipt of services for authorized operations, payment of tax, etc. and no infirmity has been found in claim of refund by the ld. Adjudicating authority with regard thereto. The ld. Adjudicating authority has failed in paying due respect to the ratio decided by Hon'ble Tribunal in their own case. From plain reading of the findings of Hon'ble Tribunal, it clearly transpires that Hon'ble Tribunal has prima facie appreciated and accepted eligibility of the refund claim subject to verification. Nowhere Hon'ble Tribunal had denied the eligibility of the refund claimed or expressed ineligibility of whatsoever nature. Ld. Adjudicating authority must not have attempted to review the primary aspect concerning to the transaction which has otherwise been appraised by Hon'ble Tribunal. Without prejudice to foregoing, it is to further submit that ld. Adjudicating authority has completely overlooked and disregarded the decision in Order-in-Appeal No.AHM-SVTAX-000-APP-051-14-15 dated 28.05.2014 allowing the refund claim for identical facts. Ld. Adjudicating authority is ought to have violated the principles of judicial discipline inasmuch as he departed from the decision already taken in favour of the appellant and brought to his notice by the appellant. In case of the appellant the issue cannot be deemed to be *res integra* and therefore ld. Adjudicating authority was bound by the decision of Commissioner (Appeals). Hence, the very act of rejecting the refund claim on arbitrary and frivolous ground and departure from the settled position by disregarding the decision of higher forum is appearing to be a bias and prejudiced decision and therefore liable to be assailed;

- Ld. Adjudicating authority has rejected the refund with respect to out of pocket expenses, more particularly described in Annexure D, by contending that the reimbursement of out of pocket expenses were not in relation to the authorized operations in SEZ and therefore the refund claim was not admissible. It was required to be appreciated that the out-of-pocket expenses were relating to the transactions involving supply of services to the appellant for authorized operations. In terms of Rule 5 of Service Tax (Determination of Value) Rules, 2006, the out-of-pocket expenses reimbursed by the service recipient were required to be included in the value of underlying services and therefore the amount of out-of-pocket expenses assimilates into the value of respective services. It is required to be appreciated that the tax involved in the value of out-of-pocket expenses cannot be disintegrated from the tax involved in the respective services as it was by operation of the Rules merged together while determination of the value of the respective services. Hence, it is required that the tax paid on the value of out-of-pocket expenses was the tax paid on the underlying services and cannot be segregated. It was not permissible on part of ld. Adjudicating authority to vivisect the value of the underlying services and evaluate the eligibility of the refund claim with respect to the tax paid on the value of out-of-pocket expenses. Therefore, it is submitted that the very act of ld. Adjudicating authority to deny the refund claim by proclaiming the out-of-pocket

expenses not relating to the authorized operations in SEZ is arbitrary as well as contrary to the framework of law. Nowhere in the impugned Order, ld. Adjudicating authority has disputed the nexus of respective services for which out-of-pocket expenses were incurred by the service provider, with authorized operations. In absence, thereof, ld. Adjudicating authority must not challenged the relationship of the out-of-pocket expenses with the authorized operations. It is to submit that no contention be taken as regards the situs of the out-of-pocket expenses for the reasons that the claim of refund is arising with respect to the underlying services and therefore the conditions if any required to be evaluated shall be *qua* the respective underlying services and not the out-of-pocket expenses. It is to reiterate without extra emphasis that out-of-pocket expenses were subjected to the taxation by virtue of valuation mechanism and not otherwise and therefore test of eligibility shall be applied only to the respective underlying transactions;

- Ld. Adjudicating authority has rejected the refund with respect to Financial Services, more particularly described in Annexure E, by contending that the Financial Services were not in relation to the authorized operations in SEZ and therefore refund claim was not admissible. Appellant wishes to submit that Bank Guarantee was given pursuant to the Order passed by the Hon'ble High Court for the purpose of payment of customs duty on clearance of power from SEZ; the service availed from the Bank for issuance of Bank Guarantee cannot be said that the same has not been used in relation to Authorized Operation. The sale of power is one of the activities mentioned under the Authorized operation. Central Government Notification No.25/2010 dated 27.02.2010 levied customs duty on clearance of the power from SEZ to DTA. The appellants challenged the said Notification before the Hon'ble High Court. The Hon'ble High Court vide interim order permitted the appellants to clear the power without payment of duty subject to submission of Bank Guarantee. The appellants approached the bank for issuance of the Bank Guarantee. Since the Bank Guarantee has been issued for securing the customs duty on sale of power to DTA and sale of power is one of the activities of Authorized Operation, finding of the Ld. Adjudicating Authority that services availed from bank is not in relation to Authorized operation is contrary to the facts since the Services are used exclusively for authorized operations of SEZ;
- The refund claim with respect to services, more particularly described in Annexure F, was rejected by contending that the services procured by way of the stated transactions were not in the Approved List. It is to submit that the Appellant had made a categorical submission to ld. Adjudicating Authority separately for each of the transactions stated in the Annexure and explained the true nature of transactions and demonstrated that the said service duly covered by the approved list. Ld. Adjudicating authority was therefore not justified in ignoring the plausible explanations provided by the Appellant while dealing with the refund claims;
- The ld. Adjudicating Authority failed to appreciate that the service tax as involved in the refund claim was exemption from payment by virtue of the provisions of Special

Economic Zones Act, 2005. Provisions of the Special Economic Zones Act, 2005 are non-obstante inasmuch as taxation is concerned and therefore it is the mandate of the parliament to the taxpayer. Appellant being governed by the provisions of Special Economic Zones Act, 2005 entitled for the exemption as well as the benefit arising from the exemption is unconditional and non-qualifying manner. It is no matter of dispute in the entire refund claim that the services were procured by the Appellant as SEZ and thus all such services were subjected to the provisions of Special Economic Zones Act, 2005 and hence entitled for exemption. Ld. Adjudicating Authority has, in the impugned Order, attempted to deprive the Appellant from the substantive benefit of exemption otherwise granted by the statutory provisions which is sheer violation on his part. Moreover, it is to submit that Article 265 of the Constitution of India required that the tax shall not be collected otherwise than by way of an authority of law. In the present case, the tax collected and retained by the exchequer is in sheer contradiction to the provisions of law;

- Ld. Adjudicating Authority had travelled beyond his powers and jurisdiction in rejecting the refund claim on premises of minor deficiencies in the invoices prepared and issued by the Service Provider. The appellant had satisfied all the conditions of Notification, which is a self-contained code and does not deny the benefit of refund for minor or venial mistakes/deficiencies in the invoices. It was also to be appreciated by Ld. Adjudicating Authority that the services were duly received by the Appellant for authorized operations in SEZ and the facts clearly emanated from the invoices. Hence, the very act of rejecting the refund claim was in sheer contravention of the Notification and therefore liable to be assailed. It is also to be appreciated that the preparation and issuance of the invoice was beyond the control of the Appellant being a recipient. Responsibility to prepare and issue the Invoice as per Rule 4A was on the Service Provider and the Appellant being recipient of service cannot control. Hence, the mistakes made by the Service Provider cannot be the basis to deny substantive benefit otherwise available to the Appellant;
- Ld. Adjudicating Authority ought to have sanctioned the refund claim along with interest as applicable from the date of refund claim originally filed; and
- Ld. Deputy Commissioner, Division-VI, Ahmedabad-South failed to appreciate that all the transactions involved in the refund claim were used for the authorized operations in SEZ and satisfied the conditions of the Notification and falling within the list of approved services and hence act of denial of refund without fortifying plausible reasons and corroborative evidences is ought to be in violation of law.

4. Personal hearing in the matter was held on 27.10.2021. S/Shri Rahul Patel, Shyam Makwana, Praveen Shetty and Sachin Agarwal, Chartered Accountants, appeared on behalf of the appellant for hearing. They reiterated the submissions made in the grounds of appeal.

5. I have carefully gone through the facts of the case available on records and submissions made by the appellant in the Appeal Memorandum and oral submissions made at the time of personal hearing. The issue to be decided in the case is whether in the facts and circumstances of the case, the impugned order passed by the adjudicating authority rejecting refund of service tax claimed by the appellant in terms of Notification No.9/2009-ST dated 03.03.2009 as amended, is legally correct and proper or not.

6. It is observed that the refund under dispute in the present case was rejected by the appellate authority in the earlier round of litigation and the same came to be re-examined and decided again in denovo adjudication in terms of directions of the Hon'ble Tribunal vide their Order No. A/10747-10187/2016 dated 02.02.2016. The said order of the Hon'ble Tribunal was with reference to various appeals filed by the claimant (viz. appellant) as well as department on similar issue pertaining to different period. The Hon'ble Tribunal vide their said order dated 02.02.2016, has disposed off the appeals filed by the claimant by way of remand to the adjudicating authority and has rejected the appeals filed by the department. While remanding the matter under appeals filed by the appellant, the Hon'ble Tribunal has observed as under:

> *" 22. The learned Senior Advocate submits that there is a subsequent development on these issues, which they have stated in their respective appeals, such as; rejection of refund on the documents of M/s Karnavati Aviation Pvt. Ltd., considering the service under the category of "passenger embarking in India for international journey". Subsequently, it was classified by the Revenue under the category of "Supply of Tangible Goods". We find that the Commissioner (Appeals) already remanded some portion of the refund for verification. So, it is appropriate that the Adjudicating authority should also examine the above issues on merit in de-novo Adjudication."*

7. I find that the amount of refund claim under dispute in the present appeal is Rs.8,38,047/- involving service tax paid on different services, which are grouped under four Annexures – C, D, E & F by the appellant in their appeal on the basis of grounds of rejection cited by the adjudicating authority. I take up the issue accordingly one by one.

7.1 Of the total refund claim of Rs.8,38,047/- under dispute in the present case, an amount of Rs.7,46,750/- pertained to invoices issued by M/s Karnavati Aviation Pvt. Ltd., as detailed in Annexure-C to the appeal, in respect of services rendered under the category 'Transport of Passengers embarking in India for international journey". The adjudicating authority has rejected the claim of refund on the said services on the ground that the said invoices were issued for domestic journey performed prior to 01.07.2010 and the said service was included in the Service Tax net with effect from 01.07.2010 and further that the said service was not included in the approved list of services at the time of filing the refund claim. The appellant has contended that the services of transportation of passengers by air was included in the list of approved services with effect from

01.07.2010 vide Letter F.No.MPSEZ/P&C/5/74/00 Vol II dated 03.06.2013 and therefore, the adjudicating authority's view that the said service was not included in the approved list of services was gravely incorrect and false. It was further contended that transactions for which refund claim was sought by the appellant were undisputedly in the nature of transportation of passengers by air and therefore, the appellant rightly claimed the refund. In this regard, I have gone through the copy of above referred letter dated 03.06.2013 issued by the Specified Officer, Office of the Development Commissioner, MPSEZ submitted by the appellant and find that the category at Sr.No.58 of the specified default list of service, which was originally named as 'Transport of Passenger Embarking India for International Journey by Air', stands amended and renamed as 'Transport of Passengers by Air' with effect from 01.07.2010 in line with the amendment dated 01.07.2010 effected in Clause 65(105)(zzzo) of the Finance Act, 1994. It is observed that since the approval for the above amendment of service category was given effect from 01.07.2010, the adjudicating authority's view that the said service was not included in the approved list of services at the time of filing the refund claim is not factually correct and accordingly, I find force in the contention of the appellant in this regard.

7.1.1 However, I find that the adjudicating authority has rejected the refund basically on the ground that the said services were pertaining to domestic journey performed prior to 01.07.2010 and the said services were brought into service tax net only with effect from 01.07.2010. I find that there is no denial to this finding of the adjudicating authority by the appellant in the appeal. It is a fact that as per the legal provisions prior to amendment effected in Section 65(105) (zzzo) of the Act with effect from 01.07.2010, the taxable service covered thereunder pertained to those services provided with reference to **International Journey** only. Such services provided with reference to domestic journey were not falling within the ambit of the above section and hence were not exigible to service tax for the period prior to the date of 01.07.2010. They came to be taxable under the Act only after the amendment made in 65(105) (zzzo) of the Act with effect from 01.07.2010. Therefore, no service tax was leviable on those services, viz. Transport of Passengers by Air, provided with reference to domestic journey, for the period prior to 01.07.2010 being not taxable. When the service in question is not taxable, there cannot arise any question/situation of granting exemption. Consequently, Notification No.9/2009-ST dated 03.03.2009 would not have any application in such cases as it applies only to taxable services. It is a well settled legal principle that no tax shall be levied or collected except by the authority of law and that only Government has the right to impose and collect taxes in the country. Therefore, if any service tax had been charged and collected by the service provider on services which were not taxable, then such collection of service tax would be illegal in nature. The recipient of service cannot claim refund of such service tax paid under Notification No.9/2009-ST ibid on the pretext of service tax being paid by them on such services. Levy and Payment of tax on own volition on services not taxable would not make such services as taxable for it being

without any authority of law. Refund of such tax paid does not fall under the ambit of Notification No.9/2009-ST dated 03.03.2009. Therefore, the appellant's claim for refund of service tax paid on services of Transport of Passengers by Air, for domestic journey performed for the period prior to 01.07.2010 in terms of exemption envisaged under the provisions of Notification No.9/2009-ST ibid is not legally admissible and is liable for rejection.

7.1.2 The appellant further contended that from the plain reading of the findings of Hon'ble Tribunal, it clearly transpires that the Hon'ble Tribunal has prima facie appreciated and accepted eligibility of the refund claim subject to verification. It is also contended that nowhere Hon'ble Tribunal had denied eligibility of the refund claim filed by them or expressed ineligibility of whatsoever nature. I find that the above contention of the appellant is totally fallacious and incongruous as the Hon'ble Tribunal's findings/observation referred to by the appellant, which is reproduced at Para 6 above, had nowhere made any comment on the eligibility and correctness of the refund claimed by the appellant in their appeal. It is only the case that since the Commissioner (Appeals) already remanded some portion of the refund for verification, the Hon'ble Tribunal found it appropriate that the adjudicating authority should also examine the issues raised by the appellant on merit in de-novo adjudication. The Hon'ble Tribunal has neither appreciated nor accepted the contention of the appellant on merits in any manner. The observation of the Hon'ble Tribunal does not indicate any such intention as contended by the appellant by any stretch of imagination. In view thereof, I do not find any merit in the above contention of the appellant.

7.1.3 Similarly, the reliance placed by the appellant on the Order-in-Appeal No.AHM-SVTAX-000-APP-051-14-15 dated 28.05.2014 on the contention of refund claim being allowed for identical facts, does not help their cause for refund in the present case for the rejection of refund in both the cases being on different grounds. In the said case, the claim for refund was initially rejected on the ground that the said service was not included in the approved list of services and the appellate authority has allowed the refund in the case as amendment with respect to the specific entry of the service under dispute was given effect with effect from 01.07.2010. In the facts of the present claim, the refund was basically rejected on the ground that the impugned services were pertaining to domestic journey performed prior to 01.07.2010 and the said services were not taxable prior to 01.07.2010 owing to which no service tax was leviable or payable in the case and no refund arises in terms of Notification No.9/2009-ST ibid under the provisions of which the refund claim was filed. Therefore, the facts and the reasons for rejection for refund are not identical in both the cases. Accordingly, I do not find any merit in the contention of the appellant on violation of principles of judicial discipline by the adjudicating authority in the case and is, therefore, rejected.

7.2 As regards the claim for refund of service tax on out of pocket expenses, as detailed in Annexure-D to the appeal, it is observed that the claim pertained to expenses like travelling, communication and convenience charges, etc. collected by the service provider. The amount of refund of service tax claimed in the case is Rs.5,383/- involving three invoices issued by M/s Lahmeyer International (I) Pvt. Ltd. The adjudicating authority has rejected the refund by observing that the said expenses were not in relation to the authorized operation in SEZ and hence refund is not admissible. The appellant has contended that in terms of Rule 5 of Service Tax (Determination of Value) Rules, 2006, the out-of-pocket expenses reimbursed by the service recipient were required to be included in the value of underlying services and therefore the amount of out-of-pocket expenses assimilates into the value of respective services. I find that the expenses under dispute in the present case were expenses incurred by the service provider which were re-imbursed by the appellant as out-of-pocket expenses. The services, to which these expenses were related to, were received and used by the service provider or its employees and not by the appellant. Therefore, such out-of-pocket expenses in no way can be considered as done in relation to the authorized operations in SEZ. Further, such services received and used by the service provider were not qualified for exemption under Notification No.9/2009-ST dated 03.03.2009 for being not covered there under. The exemption envisaged under the said Notification is applicable only to those taxable services which are received by a Developer or units of Special Economic Zone. When the services, to which the expenses under dispute in the case relates to, were not eligible for exemption under Notification No.9/2009-ST dated 03.03.2009, no case of refund arises in the matter as what is granted as refund under the said Notification was nothing but the exemption envisaged therein. In view thereof, the refund of service tax claimed by the appellant on out-of-pocket expenses in the case is not admissible in terms of Notification No.9/2009-ST dated 03.03.2009 ibid and is liable for rejection. The reliance placed by the appellant on Rule 5 of Service Tax (Determination of Value) Rules, 2006 does not help their cause in the case for being not tenable in view of the Hon'ble Supreme Court's decision in the case of Union of India and Anr. Vs. Inter Continental Consultants and Technocrafts Pvt. Ltd. [2018 (10) GSTL 401 (SC)] wherein provision of Rule 5(1) ibid was held as *ultra vires* Section 67 of the Act for the period prior to 14.05.2015. The Hon'ble Supreme Court in their above decision has categorically held that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service and the service tax is to be paid only on the services actually provided by the service provider. Therefore, the contentions raised by the appellant in this regard do not sustain legally and is liable for rejection for being devoid of any merit.

7.3 With reference to the claim for refund of service tax on 'Banking or Financial Services', as detailed in Annexure-E to the appeal, it is observed that the claim pertained

to service tax of Rs.52,324/- paid on charges paid to Corporation Bank for execution of Bank Guarantees (in short '*BGs*'). These BGs were given as per the order of the High Court for the purpose of payment of custom duty on clearance of power from SEZ and for issuance of BGs they had availed the services of the Bank. The adjudicating authority has rejected the refund on the ground that the services received from the Bank in the case were not in relation to the authorized operations in SEZ and, therefore, the refund was not admissible. The appellant has contended that since the Bank Guarantee had been issued for securing the customs duty on sale of power to DTA and sale of power is one of the activities of Authorized operation, finding of the respondent that services availed from Corporation Bank is not in relation to Authorized operation is contrary to the facts. I find that the execution of Bank Guarantees by the appellant in the case was nothing but compliance of the direction of the Hon'ble High Court and was with reference to levy of custom duty on clearance of power from SEZ. The authorized operation of SEZ in the case is generation and supply of power and the taxability issue of the power supplied from SEZ to DTA is not a part of the authorized operations. The authorized operations of the SEZ and the levy and payment of customs duty are two different issues and hence any dispute with respect to levy or payment of customs duty cannot be said to be related to authorized operation. Consequently, the services availed by the appellant from the Bank for the purpose of execution of BGs in the case cannot be considered as a service received in relation to the authorized operations of the SEZ. Therefore, the refund of service tax claimed by the appellant in the case of above mentioned services received is clearly not admissible in terms of Notification No.9/2009-ST dated 03.03.2009 for being not related to the authorized operation.

7.4 As regards the refund of service tax claimed on services as detailed in Annexure-F to the appeal, it is observed that the claim pertained to different services received viz. Maintenance or Repair Services, Security Agency Services and Construction Services wherein the total amount of service tax involved is Rs.33,590/-.

7.3.1 The adjudicating authority has rejected the refund in the case of invoices (stated to have reflected at Sr.No. 23, 31 & 60 of Work Sheet as per Table-A of Para 14 of the impugned order) issued by M/s Viral Floor Care Centre on the ground that the services rendered in the case related to maintenance and repair of their office premises situated at Sambhav Building, Ahmedabad and hence the same is not in relation and not consumed to the authorized operations in SEZ. The appellant has submitted that the service provider has rendered the maintenance and repair service of the carpets at Ahmedabad office, which is their administrative office, and since the services were used for the administrative office of the appellants, the refund ought to have been allowed. In this regard, I find that in the facts of the case, it is undisputed that the services in question were received and utilized in the administrative office of the appellant at Ahmedabad. Further, the impugned service of maintenance and repair of carpet in the appellant's

administrative office cannot be treated as an activity related to the authorized operation of the SEZ by any stretch of imagination. Thus, obviously the said services were not in relation to the authorized operations in the SEZ. I find that the exemption envisaged vide the Notification under reference is applicable only to specified services provided in relation to authorized operations **in the SEZ.** Therefore, the services provided for use outside the SEZ would clearly be out of purview of the above exemption. In the facts of the present case, it is amply clear that the said services were provided not in relation to authorized operations in the SEZ but were provided indisputably in the appellant's office at Ahmedabad. It is pertinent to observe that the letter dated 26.06.2009 issued by the Office of the Development Commissioner, MPSEZ on the subject of 'Approval of list of Specified Services for Authorized Operations' granted the approval on the condition that '*This approval list of services* ***is not for providing services of the delineated area of Mundra Port & SEZ***'. In view thereof, I find that the impugned services are not eligible for exemption under Notification No.9/2009-ST dated 03.03.2009 and consequently the refund claimed for Rs.25,584/- against the said services is not admissible and hence liable for rejection.

7.3.2 It is observed that the refund claimed in respect of the invoice issued by M/s Pioneer Security & Allied Services (stated to have reflected at Sr.No.49 of Work Sheet as per Table-A of Para 14 of the impugned order) pertained to providing security guard (used as a receptionist) at the Sambhav Builiding at Ahmedabad, which is the administrative office of the appellant. The refund was rejected by the adjudicating authority on the ground that the services were used at office of the appellant at Ahmedabad and were not in relation to the authorized operations in SEZ and also the services of 'Receptionist' do not cover under the category of 'Security Services'. The appellant has contended that since the services were used in relation to the administrative office, they are used in relation to authorized operations of SEZ and refund ought to be sanctioned. I find that in the facts of the case, the impugned services, irrespective of their nature of service, were indisputably provided and utilized with respect to operations of the administrative office of the appellant at Ahmedabad and hence were clearly not in relation to the authorized operations in the SEZ at Mundra. The refund of service tax of Rs.685/- claimed in the case against the said invoice is, therefore, not admissible for the very same reasons discussed in the previous para.

7.3.3 The refund claimed in respect of the remaining invoice, issued by M/s Shree Ganesh Constructions (stated to have reflected at Sr.No.67 of Work Sheet as per Table-A of Para 14 of the impugned order), pertained to service of demolition and reconstruction of Shiv Temple in a place situated outside the SEZ. The appellant has contended that the said activity of demolition and construction of Shiv Temple was done as a part of 'Corporate Social Responsibility' (CSR) and since the services are part of regular CSR activity mandatory for the company, it should be considered as used in relation to

authorized operation and refund ought to be allowed. The adjudicating authority has rejected the refund claimed on the ground that construction of Shiv Temple cannot be considered as consumed in relation to the authorized operations of the SEZ. I find that the activities undertaken as a part of Corporate Social Responsibility has nothing to do with the authorized operations in the SEZ, for which only the benefit of exemption of tax under reference is available. It is not the case that all activities of the appellant would be covered under the ambit of authorized operations. The construction of Temple in the instant case clearly has no relation whatsoever to the authorized operations in the SEZ and hence in no way can be considered as services provided in relation to authorized operations in the SEZ for claiming benefit of exemption under Notification N.9/2009-ST dated 03.03.2009. Therefore, the refund of service tax of Rs.7,320/- claimed by the appellant in the case of above mentioned service received is clearly not admissible in terms of Notification No.9/2009-ST dated 03.03.2009 for being not related to the authorized operation and was rightly rejected by the adjudicating authority.

8. The appellant has further contended that they, being governed by the provisions of Special Economic Zones Act, 2005, are entitled for the exemption as well as the benefit arising from the exemption in unconditional and non-qualifying manner and the adjudicating authority has attempted to deprive the appellant from the substantive benefit of exemption otherwise granted by the statutory provisions, which is violation on his part. It is observed that the appellant in the present case has claimed the benefit of exemption as provided under the Notification No.9/2009-ST dated 03.03.2009 and not as per the provisions of SEZ Act, 2005. Therefore, the eligibility and admissibility of the exemption claimed has to be examined and decided in terms of the Notification under which it was claimed. There is no scope for an alternative claim that the exemption claimed was even otherwise eligible as per another/different law or notification. It is settled law that an exemption notification has to be construed in a strict manner and it is for the claimant to prove that they fall within the four corners of the exemption claimed. The Hon'ble Supreme Court in their decision in the case of Commissioner of Customs (Import), Mumbai Vs. M/s Dilipkumar & Company [2018 (361) E.L.T. 577 (SC)] has settled the legal position in this regard wherein it was held that *"Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification"*. Further, the eligibility/admissibility of the exemption in terms of SEZ Act is not an issue under dispute in the present case. In view thereof, I do not find any merit in the above contention raised by the appellant in the case.

9. It is further observed that the appellant has also raised a contention that the refund claim was rejected on the ground of deficiencies in the Invoice issued by the Service Provider vis-à-vis Rule 4A. I find that in the impugned order there is no such ground for

rejection of the refund claim in the case and hence the said contention of the appellant does not have any relevance to the facts of the present case and accordingly, it is rejected.

10. In view of the above discussions, I do not find any merit in the contentions raised by the appellant in the appeal. As such, I find no reason to interfere with the decision taken by the adjudicating authority vide the impugned order. Accordingly, the impugned order is upheld and the appeal filed by the appellant is rejected for being devoid of merits.

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

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

30 March, 2022

(**Akhilesh Kumar**)
Commissioner (Appeals)
Date: 30.03.2022

Attested

(Anilkumar P.)
Superintendent (Appeals),
CGST, Ahmedabad.

BY R.P.A.D./SPEED POST

To

M/s. Adani Power (Mundra) Ltd.,
Adani House, Near Mithakhali Circle,
Navrangpura, Ahmedabad380009.

[New Address: Adani Corporate House, Shantigram, Vaishnodevi Circle, S.G.Highway, Ahmedabad-382421]

Copy To:-

1. The Chief Commissioner, Central GST & Central Excise, Ahmedabad zone.
2. The Principal Commissioner, Central GST & Central Excise , Ahmedabad South.
3. The Assistant Commissioner (System), Central GST & Central Excise, Ahmedabad South.
4. The Deputy / Asstt. Commissioner, Central GST , Division-VI, Ahmedabad South.
5. Guard File.
6. P.A. File.