

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद— 380015.

क फाइल संख्या : File No : V2(ST)60/A-II/2015-16 / 7094 to 7098
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-001-15-16
दिनांक Date : 31.03.2016 जारी करने की तारीख Date of Issue 26/04/16

श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

ग _____ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं
_____ दिनांक : _____ से सृजित
Arising out of Order-in-Original No SD-01/4-243/Ref/Accordian/2014-15 Dated 08.06.2015
Issued by Assistant Commissioner, Div-I, Service Tax, Ahmedabad

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

M/s. Accordion Systems Pvt Ltd Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

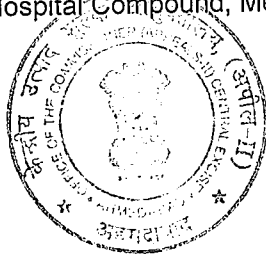
सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-

Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल
हॉस्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at
O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.



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(ii) अपीलिय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए .5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219k केन्द्रीय उत्पाद शुल्क, अपीलिय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

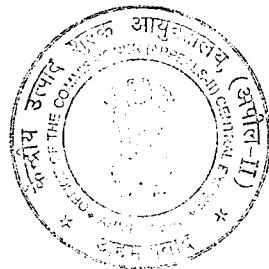
(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलिय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

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3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है. द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है. बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है-

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

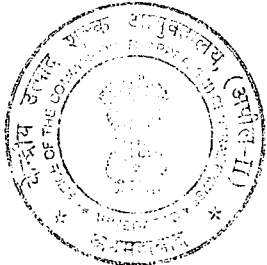
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.



Order-In- Appeal

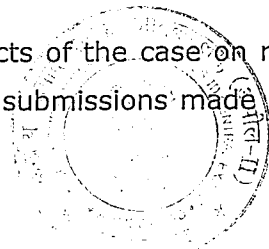
This order arises on account of an appeal filed by M/s. Accordion Systems Pvt. Ltd., SAMKIT, Nr. 44 Shantinagar Society, Juna Vadaj, Ahmedabad (hereinafter referred to as the 'the Appellants' for sake of brevity) against Order-In-Original No. SD-01/Ref/26/AC/Accordion/2015-16 dated 08.06.2015 (hereinafter referred to as the "impugned order" for the sake of brevity) passed by the Assistant Commissioner, Service Tax, Division-I, Ahmedabad (hereinafter referred to as the "Adjudicating Authority" for the sake of brevity).

2. Briefly stated the facts of the case are that the appellants are duly registered with the Service Tax Department with Service tax Registration No. AAKCA6879JSD001. They filed a refund claim on 29.12.2014 of ₹59,15,269/- for the quarter January 2014 to March 2014. The appellants were issued a show cause notice on 30.03.2015 which was adjudicated by the adjudicating authority vide the impugned order by sanctioning ₹40,015/- and rejecting ₹58,75,254/- out of the total refund amount of ₹59,15,269/-.

3. Being aggrieved with the impugned order, the appellants filed the present appeal. The appellants argued that the impugned order was passed without providing opportunity of being heard to them. They further stated that the adjudicating authority has rejected part of the claim as no correlation between input service and output service could be established. This view of the adjudicating authority is incorrect. They claimed that they have only one client i.e. M/s. Aerospace, USA and hence, all the input services availed by the appellants are naturally for providing output service to the said client only. Regarding rejection of claim by the adjudicating authority on the ground that the GAR-7 challans produced by the appellants show that the duty under reverse charge mechanism was paid under the Business Auxiliary Services instead of Information Technology Services, the appellants claim that actually the payment was made for Information Technology Services however, inadvertently, they have mentioned a wrong head i.e Business Auxiliary Services.

4. Personal hearing in the case was granted on 09.03.2016 wherein Shri Chintan Shah, Chartered Accountant, appeared on behalf of the appellants and reiterated the contents of the appeal memorandum. Shri Shah urged that they are not hit by limitation because adjudicating authority has wrongly taken the invoice date instead of the date of receipt of service or date of payment of Service Tax. He also pointed out that they have made some clerical mistake while making payment of Service Tax which is a procedural and curable mistake. He has deposited further written submission in support of his argument.

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



6. In view of the above, I would, first of all, discuss the issue where the appellants have pleaded that that the adjudicating authority has passed the impugned order without providing opportunity of being heard to them. Accordingly, I would like to draw the attention of the appellants to the last part of para 6 of the impugned order where it is mentioned that the appellants had attended the personal hearing on 27.05.2015 and submitted further documents on 29.05.2015 (para 7 of the impugned order). Thus, I do not agree to the statement of the appellants that they were not offered any opportunity to be heard.

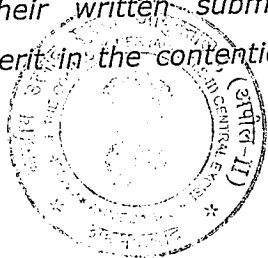
7. Regarding their argument that they are not hit by limitation because adjudicating authority has wrongly taken invoice date instead of date of receipt of service or date of payment of Service Tax, I would like to draw their attention to sub para (a) of para 8 of the impugned order where the adjudicating authority has accepted their contention and allowed their submission against the allegation of time bar as put in the show cause notice.

8. Further, I find that the show cause notice was issued only on the ground of limitation as per Section 11B of the Central Excise Act, 1944 applicable to the Finance Act, 1994 vide Section 83. Para 5 of the said show cause notice is produced as below;

"5. Therefore, M/s. Accordion Systems Private Limited, SAMKIT, Nr. 44 Shantinagar Society, Juna Vadaj, Ahmedabad- 380013 are hereby called upon to show cause to the Assistant Commissioner, Service Tax, Division-I, 7th Floor, B.D. Patel House, Nr. DR Amin Cross Road, Naranpura, Ahmedabad, so as to why the refund claim to the extent of Rs. 43,57,446/-, on account of above mentioned discrepancies should not be rejected under Section 11B of the Central Excise Act, 1944 read with Section 83 of Finance Act' 1994 in as much as they have failed to fulfill the conditions as stipulated under the Notification No. 27/2012-ST dated 18.06.2012".

The adjudicating authority has decided the said issue of limitation. In view of the above, I would like to quote some excerpt from sub para (a) of Para 8 of the impugned order as below;

"(a) It has been alleged in the SCN that the claimant is not eligible for refund in respect of Five invoices of M/s. Bluefin Inc-USA mentioned from serial number 1 to 5, in the Table-A herein above, as the claim in respect of these invoices is hit by limitation clause as per Section 11B of Central Excise Act, 1944 applicable to the Finance Act, 1994 vide Section 83. I find that all the five invoices are in respect of input services said to be received by the claimant. In view of the reply of the claimant as contained in their written submissions as also relevant legal provisions, I find merit in the contention of the claimant and allow his submission".



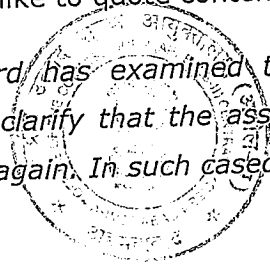
However, the adjudicating authority has travelled beyond the scope of the show cause notice and has rejected the refund on two altogether different issues which were not discussed in the show cause notice. This is a gross violation of Rules and procedures as laid down by the Board. In the case of M/s. Jetlite (India) Ltd. vs. CCE, New Delhi, the CESTAT, West Block, New Delhi very clearly says that "*Adjudicating Authority cannot travel beyond SCN ; the adjudicating authority, did travel beyond the scope of the show cause notice while deciding the matter. The authority below clearly erred in imposing such liability upon the appellants. Apart from traveling beyond the scope of the show cause notice, undoubtedly, the department has failed to produce any evidence regarding the basic ingredient of Section 65(19)(ii) of the said Act so as to justify classification of whatever activity carried out by the appellants in the form of display of logo being classifiable under the category of business auxiliary service*". The above two issues should have been taken by the adjudicating authority after issuance of proper show cause notice and offering personal hearing to the appellants. However, same has not been done by the adjudicating authority thus denying the appellants the chance of natural justice. On this ground itself, the impugned order is not sustainable. However, as the adjudicating authority, though not following proper procedures has raised two altogether different issues I would like to discuss both of them on merit.

9. The adjudicating authority has rejected part of the claim as no correlation between input service and output service could be established. Although, this issue is out of the scope of the show cause notice, I would like to discuss this on merit itself. As defined under Rule 2(1), input service means, *any service, - (i) used by a provider of taxable service for providing an output service; or (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.* Input service is used by the service provider to provide output service. Tax paid on the input service can be utilised as CENVAT Credit. The definition of input service as provided under Rule 2(1)(I) has been replaced by the Finance Act, 2011 with a new definition which is comparatively more restrictive and excludes some of the services clearly out of its purview. The new definition provides as follows: "input service" means any service, — (i) used by a provider of taxable service for providing an output service; or (ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal. It is significant to note that in the main part of the definition, while defining input service for a manufacturer, it is said that 'input service' means any service used by a manufacturer whether directly or indirectly, in or in relation to the manufacture of final products....' and while defining the same for a service provider, it is said that 'input service' means any service used by a provider of taxable service for providing

an output service. Thus while the words 'directly or indirectly' have been used in context of a manufacturer, the same have not been used in context of a service provider. This may be in the light of the fact that the goods being tangible, it is possible to establish direct or indirect nexus of input services to the output goods, but the services being intangible, establishing nexus of input services with output services may not be a feasible option all the time and also may not be warranted for determining goods input credit. Thus, the main part of the definition provides that input service is any service used for the provision of output service which can practically lead to an interpretation where all legitimate input services procured for business can get covered under the definition. Therefore the credit of service tax paid on activities although not directly or indirectly related to manufacture of goods, is admissible as input service credit to the appellants treating the same as activities in relation to business. The denial of such credit by the adjudicating authority is illegal and without any justification. In view of the discussion above, I do not agree with the views of the adjudicating authority.

9.1. The second issue of rejection is that the adjudicating authority was unable to correlate the services said to be imported and used in the export of services by the appellants. In this regard, I have already said in para 9 that in case of services establishing nexus of input services with output services is not a feasible option. It has been a confirmed fact that the output services have been totally exported by the appellants and hence all the input services have been consumed in providing the output service of Information Technology Software service only. If at all they have shown Business Auxiliary Services instead of Information Technology Software service, it hardly affects the output service as provided under Rule 2(1). The appellant's contention in this regard is that due to clerical error, they have paid Service Tax on a wrong head. Instead of Information Technology Services, they have paid the duty in Business Auxiliary Service. I find that the adjudicating authority, in the impugned order, has said that the appellants have not paid Service Tax on Information Technology Software service said to be received by them. Instead, they have produced GAR-7 challans pertaining to payment of Service Tax on Business support service which they have not received. It seems that the adjudicating authority has not taken the pain to verify whether the amount of Service Tax paid by the appellants in Business Support Service is same what they were supposed to pay under Information Technology Software service or otherwise. He admits, in the impugned order, that the appellants had not received Business Support Service. Also, in the list of services shown in Table-1 of the impugned order, the name of Business Support Service is not mentioned. There may be a chance of clerical error in this issue which the adjudicating authority has not verified. The Board has already clarified this issue of payment of Service Tax in a wrong head in the Circular No. 58/7/2003-ST dated 20.05.2003. I would like to quote contents of para 2 of the said circular as below;


"2. The Board has examined the issue. In this connection, I am directed to clarify that the assessee need not be asked to pay the service tax again. In such cases the matter should be sorted with the



P.A.O. As regards to the cases where the assessee was asked to pay service tax again, the amount thus paid may be refunded by the concerned divisional Asst. Commissioner/Deputy Commissioner."


Thus, the observation of the adjudicating authority is outright wrong and not tenable in the eyes of law.

10. In view of my foregoing conclusions, I reject the impugned order and allow the appeal in above terms.


(UMA SHANKER)

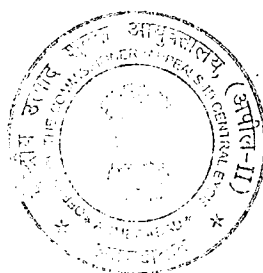
COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTA) 040416

SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

To,
M/s. Accordion Systems Pvt. Ltd.,
SAMKIT, Nr. 44 Shantinagar Society, Juna Vadaj,
Ahmedabad- 380 013



Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Dy./Asst. Commissioner, Service Tax, Division-I, Ahmedabad.
- 4) The Asst. Commissioner(System), Service Tax Hq, Ahmedabad.
- 5) Guard File.
- 6) P. A. File.