

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)149 /A-II/2015-16 / 2153 to 2157

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-0104 -16-17

दिनांक Date : 28.09.2016 जारी करने की तारीख Date of Issue 05/10/16

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-02/REF-163/DRM/2015-16 Dated 06.11.2015

Issued by Asstt. Commr., STC, Div-II, Service Tax, Ahmedabad

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

M/s. Adani Power 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 हास्पिटल 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.

(ii) अपीलीय 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.

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(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, अपीलीय 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 अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 43 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 रुपए से अधिक न हो

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

- (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 अर्ज़ी 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. Adani Power Ltd., Shikhar Building, Near Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad (hereinafter referred to as "the appellants"), against Order-in-Original number SD-02/Ref-163/DRM/2015-16 dated 06.11.2015 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, Division-II, Service Tax, Ahmedabad (hereinafter referred to as the "Adjudicating Authority").

2. The facts of the case, in brief, are that the appellants are registered with service tax department having registration number AABCA2957LST001. The appellants had originally filed a refund claim of ₹ 1,18,13,835/- on 03.02.2011 in terms of Notification No. 09/2009-ST dated 03.03.2009.

3. The adjudicating authority after scrutiny of the claim, vide Order-in-Original number SD-02/Ref-68/2011-12 dated 27.01.2012, sanctioned an amount of ₹ 1,09,26,331/- (out of the total refund claim of ₹ 1,18,13,835/-) and rejected rest of the amount of ₹ 8,87,504/-. The appellants subsequently filed an appeal before the then Commissioner (Appeals-IV). The then Commissioner (Appeals-IV), vide Order-in-Appeal number 101/2013(STC)/SKS/Commr.(A)/Ahd. dated 04.06.2013, allowed an amount of ₹ 1,60,993/-, disallowed an amount of ₹ 5,62,445/- and remanded back the case to the adjudicating authority for an amount of ₹ 84,748/-. The adjudicating authority, vide the impugned order, sanctioned an amount of ₹ 2,24,073/- and rejected an amount of ₹ 21,668/-.

4. Being aggrieved with the impugned order of rejecting the refund amount of ₹ 21,668/-, the appellants filed the present appeal. The appellants have submitted that the adjudicating authority was not correct in rejecting the amount of ₹ 21,668/- as they have submitted all required documents to show that their claim is well covered by the terms and conditions of the Notification number 09/2009-ST dated 03.03.2009 read with Section 11B of the Central Excise Act, 1944. They further stated that the adjudicating authority did not appreciate the fact that the appellants did not own or carry out any business other than the authorized operations in the SEZ during the said period. The appellants further clarified that they had not generated any separate income other than the authorized operation. They also claimed that in case of sanction of refund beyond the normal period of three months, an Interest needs to be sanctioned as per the existing circulars/instructions issued by CBEC.

5. Personal hearing in the case was granted on 04.07.2016 wherein Shri Rahul Patel, Chartered Accountant, on behalf of the appellants appeared before me and reiterated the contents of appeal memorandum. He also tabled additional submission before me.

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants at the time of personal hearing. Now, let me examine the reasons of rejection and the defense reply given by the appellants.

7. To start with, I find that the adjudicating authority has rejected the refund amount of ₹ 21,668/- citing reasons which are mentioned in the next page;



- (a) ₹6,592/- was rejected on the ground that the Legal Consultancy Service is not covered under the approved list of specified services.
- (b) ₹8,240/- was rejected on the ground that Manpower Supply Service was availed by the appellants at Sambhav Building, Ahmedabad.
- © ₹98/- was rejected on the ground that the invoice is not in accordance of Rule 4A of the Service Tax Rules, 1994 as it is not bearing full address of the appellants.
- (d) ₹3,926/- was rejected on the ground that the services of renting of cab were availed outside the SEZ and not in relation to authorized operation.
- (e) ₹2,812/- was rejected on the ground that the services mentioned in the invoice and the appellant's submission did not match and hence could not be considered in relation to authorized operation of the SEZ.

Now I will discuss all the above issues point wise in detail.

8.1. I will now take up the first issue which is rejection of ₹6,592/- on the ground that the Legal Consultancy Service is not covered under the approved list of specified services. In this regard, the appellants have submitted before me the old approval list of authorized services, dated 26.06.2009, and the new approval list of authorized services, dated 24.05.2012. In the old list, the Legal Consultancy Service is not approved but in the new list it has been approved. The adjudicating authority has not accepted the appellant's argument that Legal Consultancy Service has been approved lately in the approval list dated 24.05.2012 and rejected the amount of ₹6,592/-. But surprisingly, in paragraph 14 of the impugned order, the adjudicating authority has allowed the refund for the service category 'Commercial Training and Coaching Service' on the ground that same has been approved by the approval list dated 24.05.2012. I am unable to accept the contradictory view of the adjudicating authority and find that once he has accepted a particular condition in one case, he cannot deny the same condition in another case. In view of the above, I assert that the refund of ₹6,592/- is admissible to the appellants. Thus, I allow the appeal for refund of ₹6,592/-.

8.2. Regarding the second issue of rejection of ₹8,240/- on the ground that Manpower Supply Service was availed by the appellants at Sambhav Building, Ahmedabad, the adjudicating authority has stated in the impugned order that he has verified the concerned invoice number 20/20.10.2010 and he concludes that as the service was exclusively consumed in Ahmedabad, it cannot be considered in relation to authorized operation of the SEZ. The appellants argue that the said manpower service was used in the operation of a module called import management in SAP in respect of Letters of Credit at Sambhav office in Ahmedabad. In view of the above, I come to understand that during the aforesaid period, the appellants were carrying out single business of power generation and supply relating to authorized operations in SEZ. As they were not carrying out any other business, the manpower supply service availed by them in the operation of a module called import management in SAP in respect of Letters of Credit at Sambhav office is related to the authorized operations. Further, in the Notification number 09/2009-ST dated 03.03.2009, it is very clearly said that the taxable service can be provided inside or outside the SEZ. The excerpts of the said notification are produced as below;



"(E)- In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the notification of the Government of India, Ministry of Finance (Department of Revenue), No. 4/2004-ST dated the 31st March, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) dated the 31st March, 2004, vide G.S.R. 248 (E), dated the 31st March, 2004, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in Clause (105) of Section 65 of the said Finance Act, which are provided in relation to the authorized operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, **whether or not the said taxable service are provided inside the Special Economic Zone, from the whole of the Service Tax leviable thereon under Section 66 of the said Finance Act**".

The Notification is very clear about the fact that whether the service related to the authorized operation was availed in the office of the appellants or inside the Special Economic Zone, they are entitled for the refund. In view of the above, I allow the appeal for the refund claim of ₹8,240/-.

8.3. Regarding the third issue where the adjudicating authority has rejected the claim of ₹98/- on the ground that the invoice is not showing the address of the appellants. He also states that the services rendered related to monthly maintenance charges for cable connection at Ahmedabad office. In this regard, I proclaim that the invoice not showing address is a procedural issue for which the refund cannot be denied to the appellants. I also agree to the argument of the appellants that the service of maintenance of cable connection at Ahmedabad office which is the administrative office of the appellants is legal as they carried only one business during the said period which is power generation and supply which is their authorized operation. Thus, I allow the appeal for refund of ₹98/-.

8.4. Regarding the fourth issue where the adjudicating authority has rejected the amount of ₹3,926/- on the ground that the services of renting of cab were availed outside the SEZ and not in relation to authorized operation, the appellants contended that they availed the service of rent-a-cab on requirement basis. They further claimed that during the period in question, they carried out only one business which is power generation and supply which is the authorized operation and hence, irrespective of the fact whether the cab service was availed for Mundra or any other place, the service was availed for the conduct of SEZ business only. In this regard, I believe that this is a baseless argument tabled by the appellants. Instead of clarifying how the cab service for the places 'Ahmedabad to Baroda and back' and 'airport to residence-Bopal' is related to their authorized services, they have claimed that any activity performed by them should be considered as part of authorized service. Their view, in this regard, is not correct because the services availed by them should appear to have been utilized in relation to the authorized operation. They have not countered the adjudicating authority with any acceptable documentary evidence and in absence of that, I uphold the views of the adjudicating authority and reject the appeal of the appellants.



8.5. Regarding the fifth issue where the adjudicating authority has rejected the refund amount of ₹2,812/- on the ground that the services mentioned in the invoice and the appellant's submission did not match and hence could not be considered in relation to authorized operation of the SEZ, I am of the view that whether the service was availed by the appellants for testing and analysis of fuel oil and lube oil or availed for testing of coal, the service availed was part of the authorized service. If the service of testing mismatch, this may be considered as a procedural lapse and should have been overlooked by the adjudicating authority and the refund should not have been rejected. I, in view of the above, allow the appeal filed by the appellants.

9. Regarding the third and final issue that whether the appellants are eligible for the interest for the delayed sanction of refund or not, I find that initially the refund claim was filed on 03.02.2011. The refund claim, ultimately, was sanctioned/granted vide the impugned order dated 06.11.2015. Thus, the appellants pleaded before me for the interest for delayed sanction of refund claim.

9.1. I find that payment of interest on sanctioning of refund beyond three months from the date of receipt of the application of refund claim till the date of refund of such duty is governed by the provisions of Section 11BB of the Central Excise Act, 1944 made applicable to the Service Tax cases vide Section 83 of the Finance Act, 1994. Section 11BB *ibid* is reproduced as under for better appreciation of the issue in appeal;

*"SECTION [Interest on delayed refunds. 11BB. — If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, [not below five per cent] and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by Notification in the Official Gazette], on such duty **from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty**"*

Further, payment of interest on sanctioning of refund beyond three months from the date of receipt of the application of refund claim till the date of refund of such duty is a settled issue in pursuance to the various judgments passed by the higher judicial forums as well as the issue has already been clarified by the CBEC also from time to time. The CBEC Circular No.670/61/2002-CX dated 01.10.2002 being relevant in this case, is *interalia* reproduced as under;

"In this connection, Board would like to stress that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned beyond a period of three months. The jurisdictional Central Excise Officers are not required to wait for instructions from any superior officers or to look for instructions in the orders of higher appellate authority for grant of interest."

Further, I find that the issue in question is also decided by the higher judicial forums in the following judgments, wherein it is held that the interest should



be paid from the expiry of three months from the date of receipt of refund application.

- J.K.cement Works V/s ACC- 2004(170) ELT 4 (Raj. H.C.)- Also maintained by S.C.-2005 (179) ELT A150 (S.C.)
- Ranbaxy laboratories V/s Union of India, 2011 (273) ELT.3.(SC)
- Kerala Chemicals & Protines Ltd.- 2007 (211) ELT 259- (Tri. Bang.)
- CEX,Pune-III V/s Movilex Irrigation Ltd.-2007 (207) ELT 617 (Tri. Mumbai)

9.2. In view of above, I find force in the contention of the appellants. Accordingly, I hold that the appellants are eligible of the interest at such rate for the time being fixed by the Central Government by Notification in the Official Gazette on such refund amount from the date immediately after the expiry of three months from the date of such application of refund till the date of refund of such Service Tax.

10. The appeal is hereby disposed off in terms of the discussion held above.

Uma Shanker

(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED

S. Dutta
(S. DUTTA) 02/10/16

SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, 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 Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Assistant Commissioner, system, Service Tax, Ahmedabad
4. The Asstt./ Deputy Commissioner, Service Tax, Division-II, Ahmedabad.
5. Guard File.
6. P.A. File.



