

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)177 /A-III/2015-16 / 2136 to 2140
ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-0105 -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-212/2015-16 Dated 31.12.2015

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 :-

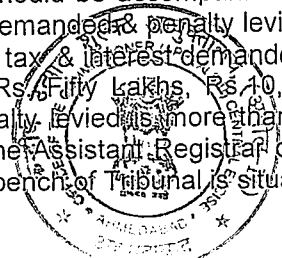
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

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 रूपे 5 लाख या उससे कम है वहाँ रूपे 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपे 5 लाख या 50 लाख तक हो तो रूपे 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपे 50 लाख या उससे ज्यादा है वहाँ रूपे 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 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 83 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 अर्ज़ों एवं अपील को लागू नहीं होगा।

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।

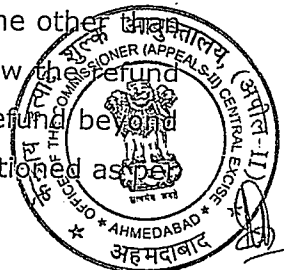
4(1) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.



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-212/DRM/2015-16 dated 31.12.2015 (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 ₹ 2,72,56,999/- on 21.07.2010 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-82/2011-12 dated 13.02.2012, sanctioned an amount of ₹ 2,17,77,563/- (out of the total refund claim of ₹ 2,72,56,999/-) and rejected rest of the amount of ₹ 54,79,436/-. The appellants subsequently filed an appeal before the then Commissioner (Appeals-IV). The then Commissioner (Appeals-IV), vide Order-in-Appeal number 85/2013(STC)/SKS/Commr.(A)/Ahd. dated 29.04.2013, allowed an amount of ₹ 4,25,514/-, disallowed an amount of ₹ 1,58,016/- and remanded back the case to the adjudicating authority for an amount of ₹ 48,94,570/-. The adjudicating authority, vide the impugned order, sanctioned an amount of ₹ 47,06,001/- (including the amount sanctioned in the earlier OIA) and rejected an amount of ₹ 5,94,993/-.
4. Being aggrieved with the impugned order of rejecting the refund amount of ₹ 5,94,993/-, the appellants filed the present appeal. The appellants have submitted that the adjudicating authority was not correct in rejecting the amount of ₹ 5,94,993/- 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. 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 and accordingly they requested to allow the refund of ₹ 5,94,993/-. 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 ₹5,94,993/- citing reasons which are mentioned below;

(a) ₹5,253/- was rejected on the ground that the appellants had claimed the refund on the ground that the service availed by them was related to the training given to their employees. However, other than invoice, the appellants had not submitted anything to justify their claim.

(b) ₹5,150/- was rejected on the ground that the appellants had claimed the refund under Information Technology Software Service but looking to the conditions surrounding the invoice, the service should have been correctly classifiable under Commercial Coaching and Training Service and the latter was not covered under the approved list of specified services at that particular time.

(c) ₹11,247/- was rejected on the ground that the claim was related to the service provided under the category of Banking and Financial Service by M/s. ICICI Bank Ltd. The said service was provided with regard to Bank Guarantee. However, it was not clear from the invoice that the said service was in relation with the authorized operation in SEZ.

(d) ₹20,600/- was rejected on the ground that looking to the invoice it was not forthcoming whether the said service was rendered with relation to the authorized operation in SEZ or otherwise.

(e) ₹5,40,750/- was rejected on the ground that the appellants had claimed the refund falling under the service related to Transport of Passenger Embarking in India for International Journey. However, the invoice was unable to clarify whether the said service was used in relation to the authorized operation or otherwise. The appellants had failed to produce any corroborative evidence to prove so.

(g) ₹11,993/- was rejected on the ground that it was not possible to conclude whether the services of renting of cab were availed outside the SEZ or not.

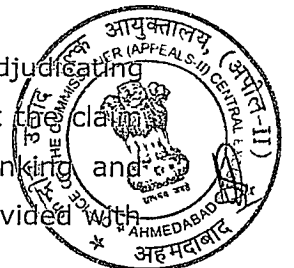
Now I will discuss all the above issues point wise in detail.



8.1. I will now take up the first issue which is rejection of ₹5,253/- on the ground that the appellants had availed the service related to the training given to their employees. However, other than invoice, the appellants had not submitted anything to justify their claim. The adjudicating authority, in the impugned order, claimed that other than invoice, the appellants had not produced anything and thus, it was difficult for him to draw a link of the service provided under the said invoice with the authorized operation. In this regard, the adjudicating authority, being unable to relate the service with the authorized operation, could have asked the appellants to provide more evidences in support of their claim. But instead of that he straightway rejected the claim denying proper justice to the appellants. I find that my predecessor, in his OIA, was quite sure about the said service and its relation to the authorized operation. The adjudicating authority also did not deny the legitimacy of the invoice produced by the appellants. The only issue was he was quite naive not to understand the legality of the invoice. In this regard, I am quite sure about the service and its relation to the authorized operation and accordingly I allow the appeal for refund of ₹5,253/-.

8.2. The second issue of rejection of ₹5,150/- was on the ground that the appellants had claimed the refund under Information Technology Software Service but looking to the conditions surrounding the invoice, the service should have been correctly classifiable under Commercial Coaching and Training Service and the latter was not covered under the approved list of specified services at that particular time. In this regard, my predecessor, in his OIA, was quite convinced that the service was classifiable under Information Technology Software Service as Commercial Coaching and Training Service must be provided by any institution, which appears to be absent in this case. The adjudicating authority, strangely, without providing any evidence to counter the argument of my predecessor, concluded that the service should be rightly classifiable under Commercial Coaching and Training Service. This shows utter disregard to the order of a Commissioner (Appeals) by an Assistant Commissioner. The verdict of the adjudicating authority reeks with prejudice and amounts to judicial indiscipline. It seems that he has rejected the claim with a biased mindset denying justice to the appellants disobeying the order of the than Commissioner (Appeals) which was not open for him to contest. In view of the above, I allow the appeal for refund of ₹5,150/-.

8.3. The third issue pertains to the condition where the adjudicating authority has rejected the claim of ₹11,247/- on the ground that the claim was related to the service provided under the category of Banking and Financial Service by M/s. ICICI Bank Ltd. The said service was provided with

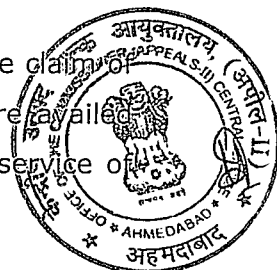


regard to Bank Guarantee. However, it was not clear from the invoice that the said service was in relation with the authorized operation in SEZ. In this regard, the appellants have submitted before me a swift message issued by M/s. ICICI Bank and also a letter dated 14.09.2011 where it is very clearly shown the details of commission and Service Tax recovered for the Bank Guarantee number 0024bg00079709 in the month of June 2010. I am very much convinced that the service was consumed in relation to the authorized operation and thus, allow the appeal for refund of ₹11,247/-.

8.4. The fourth issue pertains to the situation where the adjudicating authority has rejected the amount of ₹20,600/- on the ground that the invoice issued by M/s. Mrunal N. Shah & Co. was not clear as to whether the service was rendered with relation to authorized operation in SEZ or otherwise. In this regard, I find that M/s. Mrunal N. Shah & Co. had provided consultation service towards international and domestic tax issues of M/s. Adani power Ltd. during 2009-10. It is very clear that during the said period, the appellants were carrying out only one activity i.e. power generation and supply. The said activity being the authorized operation, the consultation service was definitely used in relation to the authorized operation, unless proven otherwise by the adjudicating authority. The adjudicating authority has failed to convince me in his account; as any statement without legitimate evidence is mere hogwash in the eye of the law. In view of the discussion above, I allow the appeal of ₹20,600/- to the appellants.

8.5. The fifth issue pertains to the rejection of ₹5,40,750/- on the ground that the appellants had claimed the refund falling under the service related to Transport of Passenger Embarking in India for International Journey. However, the invoice was unable to clarify whether the said service was used in relation to the authorized operation or otherwise. The appellants had failed to produce any corroborative evidence to prove so. It is strange that the adjudicating authority has tried to find relation in the invoice with the service provided to the authorized operation. The invoice issued by M/s. Karnavati Aviation Pvt. Ltd. shows the details of destination, fare and Service tax. To relate the same with the authorized operation, the adjudicating authority should have called for other documents from the appellants. The appellants stated before me that they had submitted the invoice along with log book etc. I find that the trip was conducted by the employees of M/s. Adani Power Ltd. to procure coal for generation of electricity which is the authorized operation of the appellants. Therefore, I allow the appeal of ₹5,40,750/- to the appellants.

8.6. On the final issue, the adjudicating authority has rejected the claim of ₹11,993/- on the ground that the services of renting of cab were provided outside the SEZ and not in relation to authorized operation. The service of



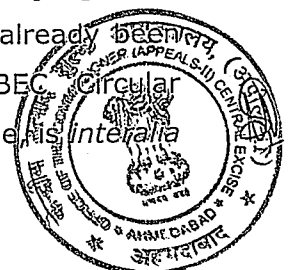
Rent-a-Cab was provided by M/s. Akbar Travels and M/s. Bhoomi Tours & Travels. The appellants have submitted copies of all the invoices before me. On going through the said invoices, I find that in many instances the cabs were used in the city of Ahmedabad (viz. Guest House, Residence, Sambhav Press, Gurudwara, Airport etc.) only or from Ahmedabad to other cities Mundra, Gandhinagar, Vadodara, Rajasthan, Santalpur, Dhrangdhra, Rajkot etc. For the places other than Mundra, the appellants cannot justify their cause as the authorized operations cannot be performed in Gurudwara, Vadodara, Gandhinagar, Rajkot or Rajasthan. In view of the above, I partially allow the refund claim of ₹6,229/- and reject ₹5,764/-.

9. Regarding the issue of 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 21.07.2010. The refund claim, ultimately, was sanctioned/granted vide the impugned order dated 31.12.2015. 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 reproduced as under;



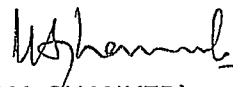
"In this connection, Board would like to stress that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned beyond a period of three months. The jurisdictional Central Excise Officers are not required to wait for instructions from any superior 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)

COMMISSIONER (APPEAL-II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTA)

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



BY R.P.A.D.

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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.

