

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)150 /A-II/2015-16 / 2163 to 2167
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-0106 -16-17
दिनांक Date : 29.09.2016 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-174/NT/2015-16 Dated 27.11.2015

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

ध 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 :-

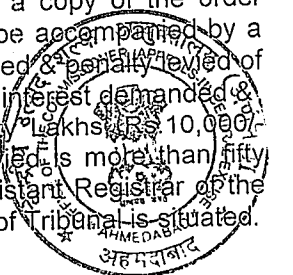
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

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 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.

A file



(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 34क के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 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 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 अर्जा 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,

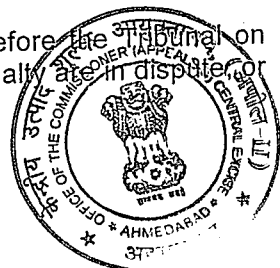
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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 Appellate 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-157/DRM/2015-16 dated 29.10.2015 (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 ₹ 3,55,43,160/- on 03.01.2011 in terms of Notification No. 09/2009-ST dated 03.03.2009.

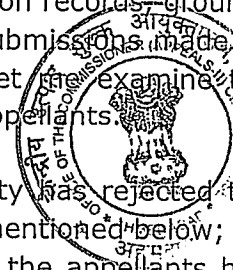
3. The adjudicating authority after scrutiny of the claim, vide Order-in-Original number SD-02/Ref-66/2011-12 dated 25.01.2012, sanctioned an amount of ₹ 3,39,92,448/- (out of the total refund claim of ₹ 3,55,43,160/-) and rejected rest of the amount of ₹ 15,50,712/-. The appellants subsequently filed an appeal before the then Commissioner (Appeals-IV). The then Commissioner (Appeals-IV), vide Order-in-Appeal number 100/2013(STC)/SKS/Commr.(A)/Ahd. dated 31.05.2013, allowed an amount of ₹ 8,98,427/-, disallowed an amount of ₹ 4,44,157/- and remanded back the case to the adjudicating authority for an amount of ₹ 1,72,026/-. The adjudicating authority, vide the impugned order, sanctioned an amount of ₹ 10,590/- and rejected an amount of ₹ 1,61,436/-.

4. Being aggrieved with the impugned order of rejecting the refund amount of ₹ 1,61,436/-, the appellants filed the present appeal. The appellants have submitted that the adjudicating authority was not correct in rejecting the amount of ₹ 1,61,436/- 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 pleaded to allow the refund of ₹ 1,61,436/- along with interest. They 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 rejected the refund amount of ₹ 1,61,436/- citing reasons which are mentioned below;
 (a) ₹ 1,57,308/- was rejected on the ground that the appellants had claimed refund under Banking and Financial Service but looking to the



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conditions surrounding the issuer of the invoice, the service should have been correctly classifiable under Legal Consultancy Service and the Legal Consultancy Service was not covered under the approved list of specified services at that particular time.

(b) ₹ 247/- was rejected on the ground that the appellants had claimed refund under Business Consultancy Service but looking to the conditions surrounding the issuer of the invoice, the service should have been correctly classifiable under Legal Consultancy Service and the Legal Consultancy Service was not covered under the approved list of specified services at that particular time.

(c) ₹ 2,575/- was rejected on the ground that looking to the appellants had claimed refund under Technical Inspection & Certification Service but looking to the conditions surrounding the issuer of the invoice, the service should have been correctly classifiable under Legal Consultancy Service and the Legal Consultancy Service was not covered under the approved list of specified services at that particular time.

(d) ₹ 659/- was rejected on the ground that the Service Tax was paid for participating in a seminar at Mumbai i.e. outside the SEZ area.

(e) ₹ 470/- was rejected on the ground that the appellants had claimed refund under Technical Inspection & Certification Service but looking to the conditions surrounding the issuer of the invoice, the service should have been correctly classifiable under Scientific & Technical Consultancy Service and the said Service was not covered under the approved list of specified services at that particular time.

(g) ₹ 177/- was rejected on the ground that the services of renting of cab were availed outside 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 ₹ 1,57,308/- on the ground that the appellants had claimed refund under Banking and Financial Service but looking to the conditions surrounding the issuer of the invoice, the service should have been correctly classifiable under Legal Consultancy Service and the latter was not covered under the approved list of specified services at that particular time. This is strange that just because the invoices were issued by legal entities the adjudicating authority has concluded that the said services would fall under the category of Legal Consultancy Service. The argument that any service provided by any law firm in any branch of law is liable for classification under Legal Consultancy Service is not acceptable. The adjudicating authority has not clearly discussed as to how the service can not fall under Banking and Financial Service. Further, if at all we agree that the said services should fall under Legal Consultancy Service, I find that the said service was approved as an authorized service in the approval list of authorized services, dated 24.05.2012. 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 was not approved but in the new list it has been approved. The adjudicating authority, in his own Order-in-Original number SD-02/Ref-163/DRM/2015-16 dated 06.11.2015, in paragraph 14, 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. In view of the above, I assert that the refund of ₹ 1,57,308/- is admissible to the appellants. Thus, I allow the appeal for refund of ₹ 1,57,308/-.



8.2. Regarding the second issue of rejection of ₹ 247/- on the ground that the appellants had claimed refund under Business Consultancy Service but looking to the conditions surrounding the issuer of the invoice, the service should have been correctly classifiable under Legal Consultancy Service and the Legal Consultancy Service was not covered under the approved list of specified services at that particular time I once again state that the Legal Consultancy Service was approved and included in the list of authorized services on 24.05.2012 and hence we cannot reject the refund of the appellants. Thus, in regard to my view and discussion in paragraph 8.1, I allow the appeal for refund of ₹ 247/-.

8.3. Regarding the third issue where the adjudicating authority has rejected the claim of ₹ 2,575/- on the ground that the appellants had claimed refund under Technical Inspection & Certification Service but looking to the conditions surrounding the issuer of the invoice, the service should have been correctly classifiable under Legal Consultancy Service and the Legal Consultancy Service was not covered under the approved list of specified services at that particular time I once again state that the Legal Consultancy Service was approved and included in the list of authorized services on 24.05.2012 and hence we cannot reject the refund of the appellants. Thus, in regard to my view and discussion in paragraph 8.1, I allow the appeal for refund of ₹ 2,575/-.

8.4. In the fourth issue I find that the claim ₹ 659/- was rejected because the appellants paid the Service Tax for participating a seminar at Mumbai i.e. outside the SEZ area. The adjudicating authority, in paragraph 19 of the impugned order, agrees that the sole purpose of such participation on the part of the appellants was nothing but to derive knowledge and information for intensification of their business. Here, it is very much clear that during the period in question, the appellants were not involved in any business other than the authorized operation in the SEZ. Thus, whatever knowledge and information they had gathered in the said seminar for intensification of their business, were supposed to be utilized in the authorized operation. The claim was rejected only because the seminar was conducted at Mumbai and not in the SEZ area. In this regard, I would like to quote below the excerpts declared in the first paragraph of the Notification number 9/2009-ST dated 03.03.2009;

*".....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 services are provided inside the Special Economic Zone**, from the whole of the Service Tax leviable thereon under Section 66 of the said Finance Act".*

In view of the above, I find that the said service was utilized in the works related to the authorized operation in the SEZ and hence, I allow the appeal for refund of ₹ 659/-.

8.5. Regarding the fifth issue of rejection of claim amounting to ₹ 470/-, I find that the appellants had claimed refund under Technical Inspection & Certification Service but looking to the conditions surrounding the issuer of the invoice, the adjudicating authority classified the said service under Scientific & Technical Consultancy Service and the said service was not covered under the approved list of specified services at that particular time.



11

In this regard the appellants have produced before me the new approval list of authorized services, dated 24.05.2012 which includes the said service. Thus, as the said service was approved and included in the list of authorized services on 24.05.2012, we cannot reject the refund of the appellants. Thus, in regard to my view and discussion in paragraph 8.1, I allow the appeal for refund of ₹470/-.

8.6. On the final issue, the adjudicating authority has rejected the claim of ₹177/- on the ground that the services of renting of cab were availed outside the SEZ and not in relation to authorized operation. In this regard, I agree to the view of the adjudicating authority that the cabs were booked for Vadodara from Ahmedabad and from Airport to residence and same cannot be treated to be used in the authorized operation. Had the cabs plied from Ahmedabad to Mundra or *vice versa* or to Adani House, Ahmedabad, it could have been presumed that the said service was in relation to the authorized operation but from airport to residence or to Vadodara, it is not possible to relate the same with the authorized operation. In view of the above, I disallow the appeal pertaining to rent-a-cab service amounting to ₹177/-.

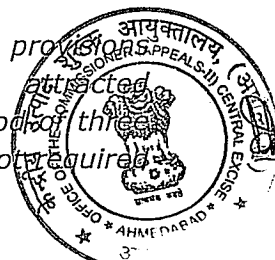
9. Regarding the issue of whether the appellants are eligible for the interest for the delayed sanction of refund or not, I find that initially the refund claim was filed on 03.01.2011. The refund claim, ultimately, was sanctioned/granted vide the impugned order dated 27.11.2015. Thus, the appellants 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



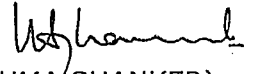
to wait for instructions from any superior officers or to look for instructions in the orders of higher appellate authority for grant of interest."

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. GUPTA) 29/08/16
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.



