

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/2016-17 / 2/31 to 2/35
ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-01119-16-17
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-259/DRM/2015-16 Dated 26.02.2016
Issued by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Adani Bunkering 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 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 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 is is more Rs.5000/- where the amount of service tax & interest demanded & penalty levied 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 at the place where the bench of Tribunal is situated.

A. J.



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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. यथारंशोधित 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 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 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 अर्जा 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.



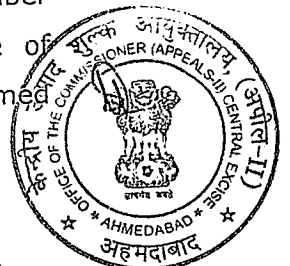
ORDER-IN-APPEAL

This order arises on account of an appeal filed by M/s. Adani Bunkering Pvt. Ltd. (previously known as M/s. Chemoil Adani Pvt. Ltd.), Adani House, Near Mithakhali Six Roads, Navrangpura, Ahmedabad (hereinafter referred to as "the appellants"), against Order-in-Original number SD-02/Ref-259/DRM/2015-16 dated 26.02.2016 (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 AADCC3765GST001. The appellants had originally filed a refund claim of ₹42,61,627/- on 02.02.2010 in terms of Notification No. 09/2009-ST dated 03.03.2009 as amended by the Notification number 15/2009-ST dated 20.05.2009.

3. The adjudicating authority after scrutiny of the claim, vide Order-in-Original number SD-02/Ref-107/2011-12 dated 30.03.2012, restricted the claim to ₹33,73,638/-. Thereafter, sanctioned an amount of ₹20,94,014/- (out of total refund claim of ₹33,73,638/-) and rejected rest of the amount of ₹12,76,624/-. The appellants subsequently filed an appeal before the then Commissioner (Appeals-IV). The then Commissioner (Appeals-IV), vide Order-in-Appeal number AHM-SVTAX-000-APP-234-13-14 dated 12.11.2013, allowed an amount of ₹46,616/-, disallowed an amount of ₹9,16,481/- and remanded back the case was to the adjudicating authority for an amount of ₹12,05,147/-. The adjudicating authority, vide the impugned order, sanctioned an amount of ₹10,89,503/- and rejected an amount of ₹1,62,260/-. Further, out of the sanctioned amount of ₹10,89,503/-, the adjudicating authority credited an amount of ₹9,520/- to the Consumer Welfare Fund.

4. Being aggrieved with the impugned order of rejecting the refund amount of ₹1,62,260/- and crediting ₹9,520/- to the Consumer Welfare Fund, the appellants filed the present appeal. The appellants have submitted that the adjudicating authority was not correct in rejecting the amount of ₹1,62,260/- as they have submitted all required documents to show that their claim is well covered by the period of notification. Further, the adjudicating authority was duly empowered to condone the delay in accordance with the provisions of Section 11B of the Central Excise Act. The appellants also claimed that in similar situation the same adjudicating authority had condoned the delay in filing of refund claim vide Order-in-Original number SD-02/REF-222/DRM/2015-16 dated 19.01.2016. Regarding the issue of crediting ₹9,520/- to the Consumer Welfare Fund, the appellants claim



that the adjudicating authority did not consider the evidences (including a certificate from a chartered accountant) submitted by the appellants to establish that incidence of tax has not been passed to others.

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 submissions made by the appellants at the time of personal hearing. I find that the adjudicating authority has rejected the refund claim on the ground of limitation. 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 ₹1,62,260/- citing reasons which are mentioned below;

(a) ₹65,343/- (pertaining to the invoices issued by M/s. Sai Clearing & Forwarding Agency) rejected on the ground that the appellants have failed to submit the evidence for the payment.

(b) ₹4,326/- (pertaining to the invoices issued by M/s. Oceanic Dolphin Shipping & Logistics) rejected on the ground that the appellants have failed to submit the evidence for the payment.

(c) ₹91,981/- (pertaining to the payment of Service tax against various foreign brokers) rejected on the ground that the claim was hit by limitation of time.

(d) ₹9,520/- was allowed but credited to Consumer Welfare Fund on account of unjust enrichment.

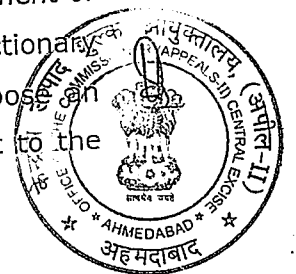
Now I will discuss all the above issues point wise in detail.

8.1. I will now take up the first issue which is rejection of ₹65,343/- on the ground of non-submission of evidence for the payment. The appellants have submitted before me the copies of the invoices issued by M/s. Sai Clearing & Forwarding Agency and details of payments particulars. I have verified the said invoices and found that the payment has been made vide cheques number 110203, 19264, 168303, 168308 and 19280 which includes Service Tax of ₹65,343/-. In view of the above, I have no doubt about the legitimacy of the payment particulars submitted by the appellants and accordingly I assert that the refund of ₹65,343/- is admissible to the appellants. Thus, I allow the appeal for refund of ₹65,343/-.



8.2. Regarding the second issue of rejection of ₹4,326/- on the ground of non-submission of evidence for the payment. The appellants have submitted before me the copies of the invoices issued by M/s. Oceanic Dolphin Shipping & Logistics and details of payments particulars. I have verified the said invoices and found that the payment has been made vide cheques number 19293 and 19298 which includes Service Tax of ₹4,326/-. In view of the above, I have no doubt about the legitimacy of the payment particulars submitted by the appellants and accordingly I assert that the refund of ₹4,326/- is admissible to the appellants. Thus, I allow the appeal for refund of ₹4,326/-.

8.3. Regarding the third issue where the adjudicating authority has rejected the claim of ₹91,981/- on the ground that the claim was hit by limitation of time (as per the provisions of Notification number 09/2009-ST dated 03.03.2009), the appellants have pleaded that the adjudicating authority was duly empowered to condone the delay when the claim is not substantially longer. The appellants further claimed that the same adjudicating authority, vide Order-in-Original number SD-02/REF-222/DRM/2015-16 dated 19.01.2016, had allowed the refund of ₹1,28,609/- after condoning delay in filing of refund claim. In this regard, I would like to discuss the conditions under which the adjudicating authority had condoned the delay while allowing the refund claim vide Order-in-Original number SD-02/REF-222/DRM/2015-16 dated 19.01.2016. In paragraph 16.1 of the said Order-in-Original, it is mentioned that the reason for delay in filing refund was because there was a joint venture between M/s. Adani Enterprise Ltd. and M/s. Chemoil Energy Ltd. in February 2009 and a new company M/s. Chemoil Adani Pvt. Ltd. was formed. The entire financial and accounting modules, which were maintained in SAP by M/s. Adani Enterprise Ltd., were changed to OBIS. The staff was not acquainted with OBIS software. During the joint venture process, all documents were shifted to Chennai and when refund claim was to be submitted, the documents were again brought back to Ahmedabad from Chennai. Further, the concerned person who used to compile the data and file the refund claim, left the company and the new person took time to compile the data and file the refund. Looking to the above conditions, the adjudicating authority condoned the delay and allowed the appeal. In paragraph 2(f) of the Notification number 09/2009-ST dated 03.03.2009, it is very clearly mentioned that *"the claim for refund shall be filed within six months or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit, from the date of actual payment of Service Tax by such developer or unit to service provider"*. The dictionary meaning (Legalwriting.net) of the word "shall" is to 'seemingly impose an obligation'. It further clarifies that "to correctly use 'shall', confine it to the

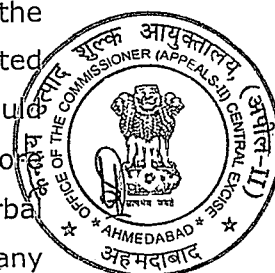


meaning 'has a duty to' and uses it to impose a duty on a capable actor (i.e. be able to do something). This means the adjudicating authority is duty bound to condone the delay if he is able to do so. To reject the claim on limitation, the onus is on the adjudicating authority to establish, with acceptable conditions, as to why the appellants request for condonation of delay cannot be acknowledged. The adjudicating authority has not given any reason for rejection of the claim on limitation. The discretionary powers given to the Assistant Commissioner have to be exercised by application of mind to the facts of the case. When the delay in filing the claim was sought to be condoned by the appellants, the adjudicating authority has to examine and decide whether such delay can be accepted or otherwise. The reasons for allowing or rejecting the request for condonation are to be recorded. Showing the very reason the Hon'ble CESTAT, New Delhi Bench had rejected the argument of the department in the case of M/s. A. P. K. Identification vs. Commissioner of Central Excise. The CESTAT had pronounced that;

"I do not agree with the argument that the time-limit under Notification dated 1-3-2011 cannot be made applicable to the claims filed before that date and pending on that date. I also consider the fact that even under the earlier notification, the Deputy Commissioner had power to condone the delay. The delay involved was only 17 days and when a public authority is given any power, he is expected to exercise it unless there is a reason for not exercising such power. No reason has been recorded in the impugned order. In the facts and circumstances of the case, I consider that thisa case where he should have considered the claim as per the proviso of Notification No. 17/2011-S.T, dated 1-3-2011 which was in force on the date when he issued the order".

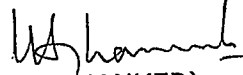
Thus, I find that the refund claim was rejected only on the pretext that the claim was hit by time bar and beyond the stipulated period of six months. In view of the discussion above, I allow the appeal of ₹91,981/- filed by the appellants.

8.4. Regarding the final issue where the adjudicating authority has credited the amount of ₹9,520/- to Consumer Welfare Fund, the appellants claimed that they have not passed on the incidence of tax to other. They further stated that the adjudicating authority has considered the certificate of a chartered accountant in respect of other claims. The argument of the appellants sound very ridiculous to me as to how the CA certificate, dated 28th September, 2011, submitted by them in respect of other claims, would be applicable to the present case. Moreover, they have not submitted, before me, any documentary evidence in support of their claim. Mere verbal statement would not suffice their purpose if it is not backed by any



documentary evidence. Therefore, I consider that the adjudicating authority has rightly transferred the amount to Consumer Welfare Fund on the ground of unjust enrichment.

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


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTA)

29/09/16
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

BY R.P.A.D.

To, M/s. Adani Bunkering Pvt. Ltd.,
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.



