

रजिस्टर्ड डाक ए.डी. द्वारा

दूरभाष : 26305065

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) 29/RA/A-II/2016-17 / 3274-79
ख अपील आदेश संख्या Order-In-Appeal No. AHM-SVTAX-000-APP-0169-16-17

दिनांक Date : 30.11.2016 जारी करने की तारीख Date of Issue 05/12/16

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-21/DRM/2016-17 Date : 20.09.2016

Issued by Asst Commr Div-II STC Abad, Service Tax, Ahmedabad

घ प्रतिवादी का नाम / Name & Address of the Respondent
M/s. Intas Pharmacuetical 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 :-

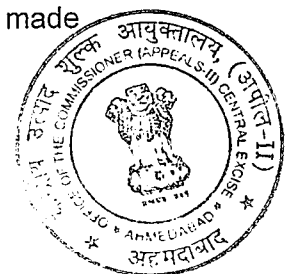
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड,
मेघाणी नगर, अहमदाबाद-380016
The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal
(CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, 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। स्टे के लिए आवेदन- पत्र के साथ
रूपए 500/- 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. Application made
for grant of stay shall be accompanied by a fee of Rs.500/-.

On file



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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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 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 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त 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) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्त 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 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,

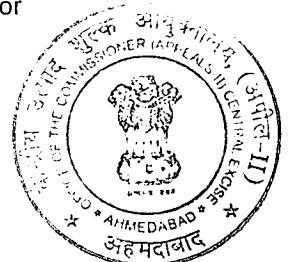
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

Revenue have filed the present appeals against the Order-in-Original number SD-02/Ref-21/DRM/2016-17 dated 27.04.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax Div-II, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*) in respect of M/s. Intas Pharmaceuticals Ltd., 2nd floor, Chinubhai Center, Off Nehru Bridge, Ashram Road, Ahmedabad (*hereinafter referred to as 'respondents'*)

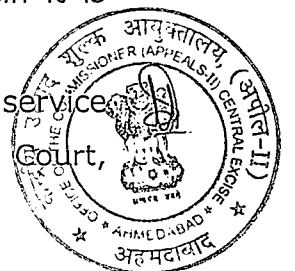
2. The facts of the case, in brief, are that the respondent and Intas Lifescince, Dehradun, Uttara Khand was merged in pursuance of Hon`ble Gujarat High Court order dated 03.10.2015 with retrospective effect from 01.04.2014. Service rendered from 01.04.2014 to 03.10.2015 by respondent to erstwhile Intas Lifescince, Dehradun is service to self, hence not liable for service tax. Intas Lifescince, Dehradun, Uttara Khand was availing duty exemption under Noti No. 49/2003-CE, therefore it was not in position to avail and utilize credit. Therefore respondent filed refund claim on 22.01.2016 of Rs. 1,46,75,059/- for such self service rendered . .

3. Adjudicating justified the claim to be correct on following conclusions whole claim was sanctioned vide impugned OIO -

- I. Claim is the consequence of judgment of Hon`ble High Court order date (03.10.2015). Therefore relevant date (i.e. date from which one year time period is to be considered) in terms of sub-sub-clause (ec) of sub- clause (e) of clause (B) of Section 11B of CEA, 1944 is date of order and refund was adjudged to be filed within time period of one year from relevant date.
- II. Further, it is held that, service tax has not been recovered from any third party therefore no unjust enrichment.
- III. By virtue of Hon`ble High Court order service provider and receiver were held to be single legal entity. Service rendered from 01.04.2014 to 03.10.2015 was held to be self service; therefore it merits refund as claimed.

4. Being aggrieved with the impugned order, the revenue preferred an appeal on 20.09.2016 before the Commissioner (Appeals-II) wherein it is contended that-

- I. The question of service tax payment or taxability or livability of service tax was not the issue in merger petition filed in Hon`ble High Court,



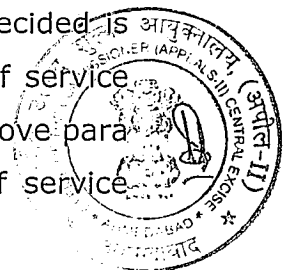
therefore refund claim can not be considered arise as a consequence of judgment on application of amalgamation. Adjudicating authority has erred in considering order date as relevant date. Sub-sub-clause (ec) of sub-clause (e) of clause (B) of Section 11B of CEA, 1944 is not applicable. Relevant date is date of payment of duty therefore sub-clause (f) clause (B) of Section 11B is applicable.

- II. Intas Lifescince, Dehradun, Uttara Khand was availing duty exemption under Noti No. 49/2003-CE, therefore it was not in position to avail and utilize credit. As a natural corollary , element of such service tax born by the Dehradun unit might have been accounted for under the head "expenditure" and consequently such service tax "expenditure" might have influenced the selling price of goods of Dehradun unit. Incidence of service tax stands passed on to consumers. Reimbursement such "expenditure" would be unjust enrichment. The same view is taken in Hon'ble Supereme Cout in case of Mafatlal Industries Ltd. [1997(89) ELT 247 (SC).
- III. Respondent have paid service tax on self assessment. They have never challenged the self assessment. The department has also not questioned the self assessment. Self assessment was required to be challenged and nullified before making claim. Revenue cited judgment is case of M/s KEC International [2006(4) STR 473 (Tri. Del.)] and M/s Maharashtra Cylinders Pvt. Ltd. [2010 (259) ELT 369 (Bom.)]

5. Personal hearing in the case was granted on 04.11.2016 and Shri Madhu Jain, CA, appeared before me and submitted compilation of cases but no written submission is given to substantiate how and why submitted judgment's are applicable in instance case.

DISUSSION AND FINDINGS

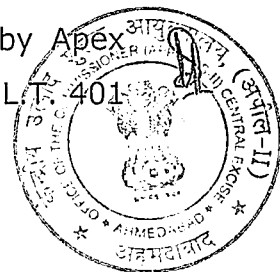
6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum of revenue and compilation of cases submitted by the respondent at the time of personal hearing. Sort question to be decided is whether or not date of order is relevant date for the purpose of section 11B- [above para 3(I) issue]. Another question to be decided is whether there is unjust enrichment in as much as "expenditure" of service tax paid has been passed on to the customers of Dehradun unit-[above para 3(II) issue]. In resent appeal Revenue is not challenging the self service issue as stated in above para 3(III).



7. Regarding relevant date issue [above para 3(I) issue], it is to specifically mention that respondent became eligible to file claim only after order of court. Had the order been issued early, the respondent would have filed claim within time. For filing claim within one year of payment duty, circumstances were beyond the control of respondent. It is well settled principal of law that law does not compel a man to do that which he can not possibly do and the said principal is well expressed in legal maxim "lex non cogit ad impossibilia". The unforeseen circumstances beyond the control of the respondent resulted in filing of refund claim on so called late date on 22.01.2016. Revenue contention that date of payment of duty to be "relevant date" in terms of sub-clause (f) of clause (B) of 11B is not acceptable as refund in such cases can only be filed after date of order. Though the HC petition is not for dispute related to service tax paid or levied which is claimed as refund, but the refund has arise only after HC order approving the amalgamation. Therefore said order has paved the way for filing refund. I hold that "relevant date" for filing claim is date of Hon'ble High Court order date (03.10.2015) in terms of Sub-sub-clause (ec) of sub-clause (e) of clause (B) of Section 11B of CEA, 1944. My view is supported by judgment in the case of Indian Oil Corporation Ltd. [2015 (37) S.T.R. 575 (Tri.- Mumbai)]. I uphold the impugned OIO as far limitation of time is concerned.

8. Every refund has to be tested on the yardstick of the doctrine of unjust enrichment in terms of Section 11B of Central Excise Act read with Section 83 of the Finance Act, 1994. The onus is on the respondent to show that the burden was not passed on and such onus has not been discharged by the appellant at the time of claiming refund as well as in present appeal before me. There is a force in argument of revenue that Intas Lifescince, Dehradun, Uttara Khand was availing duty exemption under Noti No. 49/2003-CE, therefore it was not in position to avail and utilize credit. As a natural corollary , element of such service tax born by the Dehradun unit might have been accounted for under the head "expenditure" and consequently such service tax "expenditure" might have influenced the selling price of goods of Dehradun unit. Incidence of service tax stands passed on to consumers.

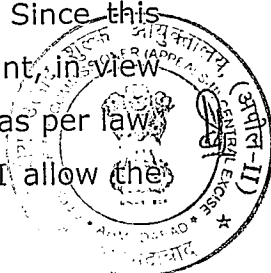
9. There should not be either direct or indirect passing of incidence of burden to other. Including the service tax paid in "expenditure" would tantamount to indirect passing of burden. My view is supported by Apex Court Judgment in case SOLAR PESTICIDE PVT. LTD.- 2000 (116) E.L.T. 401 (S.C.) , wherein it is held that-



"The use of the words 'incidence of duty....' is significant. The words 'incidence of such duty' mean the burden of duty. Section 27(1) talks of the incidence of duty being passed on and not the duty as such being passed on to another person. The expression 'incidence of such duty' in relation to its being passed on to another person would take within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of duty on the raw material would stand passed on to the purchaser of the finished product. It would follow that when the whole or part of the duty which is incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27(1). [para 17]"

10. Presumption contained under Section 12B of the Central Excise Act made applicable to Service Tax Act is attracted in the present case as respondent has never produced proof that incidence of duty has not been passed on to other person. The burden of proof is on the appellant to establish that they had not passed on the incidence of duty paid on services received at Dehradun unit to their customers. This onerous burden should have been discharged by adducing primary evidence in the terms of Section 12A of the Central Excise Act. Respondent have failed to prove that expenditure of tax paid is not included in costing of goods/service sold. A certificate of Chartered Accountant/Cost Accountant is just a corroborative evidence only as held by the Hon'ble High Court vided 2010 (256) E.L.T 216 (Kar.). Therefore, in the total absence of proof that service tax paid is not included in costing of goods manufactured/service rendered by Dehradun Unit, the Chartered Account certificate will have no evidentiary value. The Cost Accountant's certificates are, at best, only corroborative evidence. They cannot be sole or conclusive evidence. In the present case in the given circumstances the claim is hit by the doctrine of unjust enrichment.

11. Regarding self assessment issue raised by revenue in appeal memo, I find that respondent has never challenged the self assessment. Since this issue was not raised earlier but being point of law, I allow this point, in view of settled position of law and direct original authority to deal with as per law. It is required to be nullified before filing claim. In this regards I allow (the

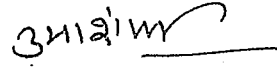


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 appeal of revenue. Judgment cited [above para 3(III)] by revenue in appeal memo is squarely applicable in this issue.

12. In view of above, appeal filed by the revenue is partly allowed as far as unjust enrichment issue is concerned [above para 3(II) issue] and self assessment issue [above para 3(III) issue].


13. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

13. The appeals filed by the revenue stand disposed off in above terms.


 (उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED


 (R.R. PATEL)

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

To,

M/s. Intas Pharmaceuticals Ltd.,
 2nd floor, Chinubhai Center,
 Off Nehru Bridge, Ashram Road,
 Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax ,Ahmedabad-.
- 3) The Additional Commissioner, Service Tax, Ahmedabad
- 4) The Asst. Commissioner, Service Tax Div-II, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.



