

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) 28/RA/A-II/2015-16 / 3393-97

ख अपील आदेश संख्या Order-In-Appeal No. AHM-SVTAX-000-APP-00174-16-17

दिनांक Date : 30.11.2016 जारी करने की तारीख Date of Issue 06/12/16

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-186/DRM/2015-16 Date : 30.11.2015

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

ध प्रतिवादी का नाम / Name & Address of the Respondent

M/s. Interactive Manpower Solution 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 हॉस्पिटल कम्पाउण्ड, मेधाणी 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 इसके 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 is 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.10000/- 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/-.



C. J. 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 (सीस्टेट) 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, 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 दरा करोड़ रूपए 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 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 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.

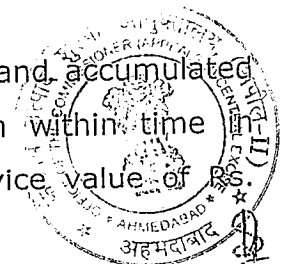


ORDER IN APPEAL

Revenue have filed the present appeals against the Order-in-Original number SD-02/REF-186/DRM/2015-16 dated 30.11.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-II, APM Mall, Ahmadabad (*hereinafter referred to as 'adjudicating authority'*) in respect of M/s Interactive Manpower Solution, 301, President Plaza, Near Thaltej cross Road, S.G. Highway, Ahmedabad- 380 054 (*hereinafter referred to as 'Respondent'*) holding service tax registration No. AABCI 4910K ST001.

2. Briefly stated facts of the case are that respondent had filed a refund claim of accumulated credit of ₹3,80,876/- for period April 2014 to June 2014 under Notification No. 27/2012- CE (NT) on 19.06.2015. Refund of Rs. 3,66,479/- was sanctioned where as Rs. 14,397/- was rejected as inadmissible Input service vide impugned OIO. Being Aggrieved Revenue has filed this present appeal for Rs. 3,66,479/-. In appeal memo it is contended as below-

- I. Refund under Notification 27/2012-CE (NT) dated 18.06.2012 is to be filed before expiry of the period specified in Section 11B of CEA, 1944.
- II. Rule 5 of CCR and the Notification issued there under refers to the export of output service is governed by the Export of Service Rules, 2005. As per rule 3(2) of Export of Service Rules, 2005 date would be when the payment is received.
- III. The relevant date to file the refund claim as per Section 11B of CEA, 1944, is the date on which the payment of Foreign Exchange of Export is received. Revenue relied upon the Judgments of CESTAT
 - a. CCE Pune-I Vs Eaton Industries (P) Ltd.-(2011) 30 STT 420
 - b. Apotex Research Pvt. Ltd Vs CC, Banglore-CUS, 2015(3) TMI 346-CESTAT- Banglore
 - c. Hyundai Motor India Engineering Pvt. Ltd. CCE, Hyderabad-I 2014 & TMI 329-CESTAT Bangalore
 - d. M/s Benchtel India Pvt. Ltd, Pune-I Vs CCE, Delhi (2013) 7 TMI 437 (Tri- Delhi)
- IV. The relevant date to file the refund claim as per Section 11B of CEA, 1944, is the date on which the payment of Foreign Exchange of Export is received. Revenue relied upon the Judgments of Commissioner(Appeal-II) Ahmedabad in case of M/s Madhuvan Infotech Pvt. Ltd
- V. For relevant period total turnover is Rs. 5,73,02,306/- and accumulated credit is 4,65,362/-. Respondent has filed refund claim within time respect of only 27 export invoices of total Export service value of Rs.



54,08,305. Other invoices are time barred as refund not filed within one year of export realization. Therefore refund should be restricted to that proportional amount only . Admissible refund is Rs. 43,922/- [=465362 *(5408305/57302306)]. Refund of Rs. 3,22,557/- (3,66,479-43,922/-) has been sanctioned wrongly which is required to be recovered with interest

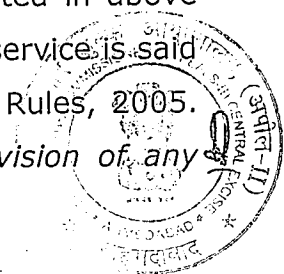
3. Personal hearing in the case was granted on 14.09.2016 wherein Shri Bishan Shah, CA on behalf of the said respondent, appeared before me and reiterated the contention of their submission. In course of hearing Shri Bishan Shah, CA, requested for seven more days for additional submission which is so far not submitted.

DISCUSSION AND FINDING

4. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, the Written Submission filed by the revenue. The services provided/exported after 1.4.2012 will be governed by new Rule 5 of the CCR, 2004 amended vide Notification 18/2012- CE (NT) w.e.f. 01.04.2012 read with Notification No. 5/2006 – CE (N.T.) dated 14 March 2006 up to 17.06.2012 and Notification No. 27/2012 CE-(NT) from 18.06.2012. Present claim is of period April 2014 to June 2014 therefore new amended rule read with Notification No. 27/2012 CE (NT) shall be applicable.

5. There is no relevant date mentioned for refund claim of the unutilized Cenvat credit in Rule 5 of the Credit Rules. In Explanation given in Rule it is stated that for the purpose of this rule Export of Service rules, 2005 should be considered. Notification No. 5/2006-CE (NT) dated March 14, 2006 and subsequent notification 27/2012- CE (NT) dated 18.06.2012 issued under Rule 5 of the Credit Rules refers to Section 11B of the Central Excise Act, 1944 ("the Excise Act"), but there is no 'relevant date' defined or prescribed for refund claim of the unutilized credit.

6. Since there is no direct mention of relevant date [i.e. date from which one year period is to be reckoned] various tribunal judgments, as stated in above paragraph 3(III), have concluded "relevant date" as date on which service is said to be "exported" on the basis of Rule 3(2) of Export of Services Rules, 2005. Rule 3(2) of Export of Services Rules, 2005 states that *The provision of any*

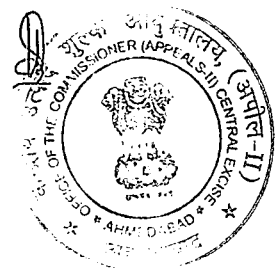


taxable service shall be treated as export of service when payment for such service is received by the service provider in convertible foreign exchange.

7. Government has issued a fresh Notification No. 27/2012 – CE (N.T.) dated 18 June 2012 (the Notification) which has superseded earlier Notification in this regard i.e. Notification No. 5/2006 – CE (N.T.) dated 14 March 2006. All various tribunal judgments, as stated in above paragraph 2(III) on which revenue is relying pertains to erstwhile Notification No. 5/2006 – CE (N.T.) dated 14 March 2006. Therefore said judgments are not applicable to present claim filed under Notification No. 27/2012 – CE (N.T.).

8. Para 2(a) of Notification 27/2012-CE (NT) mandates to file only one claim for quarter, therefore for export turnover of services of a relevant quarter the refund can not be filed in between of relevant quarter. Exporter can file claim earliest only at the end of quarter. Moreover appellant is not allowed to file refund before quarter is completed, and in that case, the relevant date for computing 1 year for the purpose of Section 11B shall be from end of quarter. Therefore I hold that end of quarter is relevant date (i.e date from which one year period is reckoned) to file the claim. My view is supported by CESTAT judgment delivered with respect to Notification 27/2012-CE (NT) in the case of CCE V/s Navistar International Pvt. Ltd.-(2016)-TIOL-1055-CESTAT-MUM where in it is held that an exporter can file refund claim within one year from the last date of relevant quarter. Revenue relying on judgment delivered by Commissioner (Appeal-II) Ahmadabad with respect to Notification 27/2012-CE (NT) in case of M/s Madhuvan Infotech Pvt. Ltd is of no use when identical issue CESTAT has delivered the verdict in case of CCE V/s Navistar International Pvt. Ltd.

9. Judgments cited by revenue have concluded that date of receipt of export payment as "relevant date" on the basis of Rule 3(2) of Export of Services Rules, 2005. Notification No. 28/2012 Service Tax dated 20th June, 2012 introduced "Place of Provision of Services Rules, 2012" w.e.f. 01.07.2012 which superseded "Export of Service Rules 2005" introduced earlier vide Notification No. 9/2005-Service Tax. When "Export of Service Rules 2005" itself is superseded w.e.f 01.07.2012 there is no relevance of conclusion drawn of "relevant date" from it in the era of "Place of Provision of Services Rules, 2012".



10. Revenue has given the list of admissible invoices for refund in appeal memo but has not given list of invoices on which refund is not admissible. What is alleged is not substantiated by the revenue by producing inadmissible invoices or a copy of refund claim along with invoices. Impugned OIO is also not having list of invoices on which claim is sanctioned. In absence of such documentary evidence this appeal itself is liable for rejection.

11. Revenue has failed to establish their point in view of above discussion. I do not find any reason to interfere in impugned OIO.

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

12. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED

R.R. Patel
(R.R. PATEL)

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

To

M/s Interactive Manpower Solution,
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Near Thaltej cross Road,
S.G. Highway,
Ahmedabad- 380 054

Copy to:

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

