

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) 24/RA/A-II/2015-16/4416 to 4421

ख अपील आदेश संख्या Order-In-Appeal No. AHM-SVTAX-000-APP-0177-16-17

दिनांक Date : 22.11.2016 जारी करने की तारीख Date of Issue 12/01/17

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. Datalyst(India) 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, 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/-.

C. 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 एरा.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 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 13 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 अर्ज़ी 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 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 department has filed the present appeals on 04.02.2016 against the Order-in-Original number STC/Ref/78/HCV/Datalyst/Div-III/2015-16 dated 09.11.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-III, APM Mall, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*) in respect of M/s. Datalyst (India) Pvt. Ltd., A/5, G/F, Safal Profitair, Opp. Prahladnagar Gardan, Corporate Road, Ahmedabad- 15 (*hereinafter referred to as 'respondents'*);

2. Respondent has filed a refund claim under rule 5 of CCR, 2004 for refund of unutilized and accumulated CENVAT credit of Rs. 2.30,514/- for quarter April 2014 – June 2014 vide letter dated 30.09.2014 and received by revenue on 07.04.2015. Refund was sanctioned by the adjudicating authority vide impugned OIO.

3. Being aggrieved with the impugned order, the revenue preferred an appeal on 04.02.2016 before the Commissioner (Appeals-II) wherein it is argued that-

- I. In case of export invoice No. DIPL/DECEMBER/13-14 dated 16.12.2013, the foreign inward remittance amounting to USD 6990.00, has been received on 02.04.2014 which is evident from FIRC certificate No. 1367SR00000115 issued by ICICI Bank. Date of receipt of FIRC is considered as date of export of services and such date is relevant date for the purpose of refund under section 11B of CEA, 1944. Refund is filed on 07.04.2015 therefore in the instance invoice refund is filled beyond one year of relevant date. Proportionate refund of Rs. 21,663/- worked out in appeal memo for instant invoice is not admissible as time barred.
- II. Supreme Court has delivered judgment in case of M/s Sarita Handa Exports (P) Ltd.[2015 (321) E.L.T. 206 (S.C.)] wherein it is held that "application filed beyond specified period under section 11B of CEA, 1944, not to be entertained."
- III. There are catenas of judgments as narrated below wherein it is held that time limit to be computed from the date on which refund/rebate is filed.
 - a. M/s Spectramix Plastics reported in E.L.T. 2014 (307) E.L.T. 353 (Tri. Ahmed.)



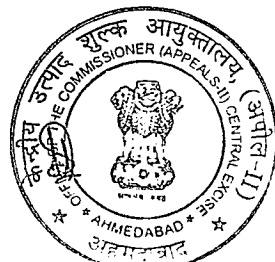
- b. M/s Jain Manufacturer reported in E.L.T. 2013 (293) E.L.T. 122 (Tri. Ahmed.)
- c. M/s Valson Polyester Ltd. reported in E.L.T. 2011 (274) E.L.T. 444 (Tri. Ahmed.)
- d. M/s Soccer International Pvt. Ltd reported in E.L.T. 2014 (33) S.T.R. 334 (Tri. Delhi.)

4. Personal hearing in the case was granted on 08.11.2016. Ms. Palak P. Sheth CA, on behalf of respondent appeared before me. Ms. Palak P. Sheth CA reiterated the grounds of appeal and also submitted defense submission wherein it is stated that-

- I. As per rule 6A "Export of services" the services provided shall be treated as export of service if all the conditions prescribed therein rule are satisfied. One of the conditions at clause (e) of rule 6A is that "the payment for such services has been received by the provider of the services in convertible foreign exchange".
- II. As per rule 5 of CCR, 2004 read with condition (b) of Notification read with condition (e) of rule 6A of SER, 1994, the relevant date is date of receipt of foreign exchange. Foreign inward remittance was received on 02.04.2014 therefore period of filing refund ended on 02.04.2015. But there was public holiday on that day and following days and hence service tax department was closed and hence could not be filled.

Date	Day	Holiday
02.04.2015	Thursday	Mahavir Jayanti
03.04.2015	Friday	Good Friday
04.04.2015	Saturday	Saturday
05.04.2015	Sunday	Sunday

- III. Respondent had approached Div-II of service tax on 06.04.2015 but respondent file was transferred to division III. Hence Division II did not accept the refund claim. As the respondent's name was not reflected in division III, they also could not accept the claim. Once the system of division III reflected the respondent's name, they accepted the claim on 07.04.2015. Hence delay of one more day.
- IV. As per section 10 of General clause Act, 1987, the last day of period of limitation under section 11B of CEA, 1944 being holiday, the refund claim filed under said section 11B on the next day would be deemed to have been filed within time. CESTAT Judgment in case of Mec



Lubricants & Petrochemicals Pvt Ltd Vs. CCE, Ahmedabad, (2004)(3) TMI 674.

V. 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 filling of refund claim on 07.04.2015.

5. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, the Written Submission filed by the revenue and oral/written submissions made by the respondents at the time of personal hearing. 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 5 read with Notification No. 27/2012 CE (NT) shall be applicable.

6. 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 in 11B for refund claim of the unutilized credit.

7. Since there is no direct mention of relevant date [i.e. date from which one year period is to be reckoned] either in rule 5 or notification issued under rule 5, various tribunal judgments, as stated in above paragraph 3(III), have concluded "relevant date" as the date on which service is said to be "exported". Conclusion in judgments is drawn 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.

8. 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



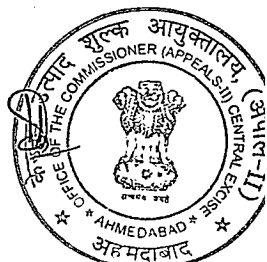
regard i.e. Notification No. 5/2006 – CE (N.T.) dated 14 March 2006. All various tribunal judgments, as stated in above paragraph 2(III) on which revenue is relying does not pertain to 27/2012 – CE (N.T.) dated 14 March 2006. Therefore said judgments are not applicable to present claim filed under Notification No. 27/2012 – CE (N.T.).

9. 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.

10. The last date of relevant quarter i.e April-2014- June 2014 is 30.06.2014. Therefore for all the exports wherein foreign remittance is received in April-2014- June 2014 "relevant date" in terms of said CESTAT judgment in the case of CCE V/s Navistar International Pvt. is 01.07.2014 and the last date to file claim would be 30.06.2015. In case of export invoice No. DIPL/DECEMBER/13-14 dated 16.12.2013 , the foreign inward remittance has been received on 02.04.2014 therefore the last date of filling claim would be 30.06.2015. Claim is filed on 07.04.2015, therefore I hold that claim in respect of said invoice No. DIPL/DECEMBER/13-14 dated 16.12.2013 is filled within time limit prescribed in 11B of CEA 1994. I hold that refund of Rs. 21,663/- is admissible to the respondent.

11. Judgments cited by revenue are not applicable in instance case due to following reasons.

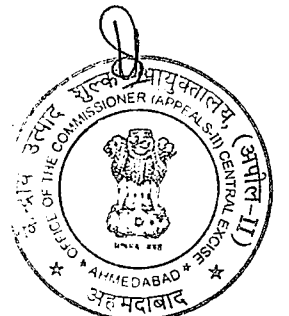
Sr.	Judgments	Why not applicable in instance case
1	M/s Spectramix Plastics reported in E.L.T. 2014 (307)	Judgment is respect of refund Of accumulated credit. Judgment



	E.L.T. 353 (Tri. Ahmed.)	is of noti. No. 5/2006- CE- (NT)
2	M/s Jain Manufacturer reported in E.L.T. 2013 (293) E.L.T. 122 (Tri. Ahmed.)	Judgment is not in respect of refund Of accumulated credit. Judgment is of 1998 period. refund arrived due to judgment arrived in party favor.
3	M/s Valson Polyester Ltd. reported in E.L.T. 2011 (274) E.L.T. 444 (Tri. Ahmed.)	Judgment is not in respect of refund Of accumulated credit. Judgment is of noti. No. 31/2004-CE . It Pertains to refund of AED from PLA.
4	M/s Soccer International Pvt. reported in E.L.T. 2014 (33) S. 334 (Tri. Delhi.)	Judgment is not in respect of refund Of accumulated credit. Judgment is of noti. No. 17/2009-ST. Relevant date pronounced is six months from Date of export.

12. No judgment is produced is issued with respect to relevant date for notification 27/2012- CE (NT). Judgment at sr. No. 2,3 and 4 are not regarding refund of accumulated credit. Judgment at sr. No. 1 of M/s Spectramix Plastics reported in E.L.T. 2014 (307) E.L.T. 353 (Tri. Ahmed.) is regarding refund of accumulated credit but for preceding notification 5/2006- CE (NT). Therefore judgments cited above are not applicable in instance case.

13. Judgments cited by revenue at sr. No. 1 of M/s Spectramix Plastics has 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". Therefore conclusion of "relevant date" pronounced in case of of M/s Spectramix Plastics is not applicable in instance case.



14. Supreme Court judgment in case of M/s Sarita Handa Exports (P) Ltd.[2015 (321) a 206 (S.C.)] cited by revenue is not applicable in instance case as refund is filled within one year. Adjudicated authority has entertained within one year time limit.

15. In view of above, I upheld the OIO and appeal filed by the respondents is rejected.

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

16. The appeals filed by the revenue stands 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. Datalyst (India) Pvt. Ltd.,
A/5, G/F, Safal Profitair,
Opp. Prahladnagar Gardan,
Corporate Road,
Ahmedabad- 15

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, service tax, Ahmedabad
- 3) The Additional Commissioner, ~~Exc.~~^{S.Tax}, Ahmedabad
- 4) The Dy./Asst. Commissioner, Service tax, Div-III, APM Mall, Ahmedabad.



- 5) The Asst. Commissioner(System), Service tax. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

