

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) 4/RA/A-II/2016-17/4533-38  
ख अपील आदेश संख्या Order-In-Appeal No. AHM-SVTAX-000-APP-0182-16-17

दिनांक Date : 22.12.2016 जारी करने की तारीख Date of Issue 23/01/17

श्री उमा शंकर,, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

G. file

ग \_\_\_\_\_ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं  
\_\_\_\_\_ दिनांक : \_\_\_\_\_ से सृजित

Arising out of Order-in-Original No. STC/REF/123/HCV/Syx/Div-III/15-16 Date : 29.01.2016

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

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

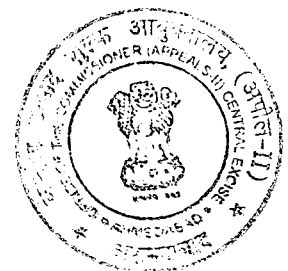
सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-  
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

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,  
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 रूपर 5 लाख या उससे कम है वहाँ रूपर 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 5 लाख या 50 लाख तक हो तो रूपर 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 50 लाख या उससे ज्यादा है वहाँ रूपर 10000/- फीस भेजनी होगी। स्टे के लिए आवेदन- पत्र के साथ रूपर 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/-.



(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 रू 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 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,

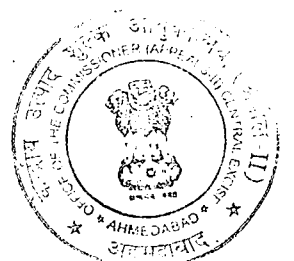
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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 19.04.2016 against the Order-in-Original number STC/Ref/123/HCV/syx/Div-III/2015-16 dated 29.01.2016 (*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. Syx Automation India Pvt. Ltd., House No. 6, Sharman 7, Near Chandan Party Plot, Ahmedabad- 15 (*hereinafter referred to as 'respondents'*);

2. Respondent has filed a refund claim for Rs. 6,50,808/- under Notification No. 27/2012- CE (NT) dated 18.06.2012 read with rule 5 of CCR, 2004 for refund of unutilized and accumulated CENVAT credit for quarter July 2014- to September 2014 on 27.05.2015. Said refund was filed for period prior to obtaining Service tax registration i.e prior to 12.12.2014. It is concluded in impugned OIO that registration is not necessary for refund purpose. Refund of Rs. 6,05,647 was sanctioned by the adjudicating authority vide impugned OIO. Rs. 45,161/- was rejected as invoices shows address of premises other then shown in registration

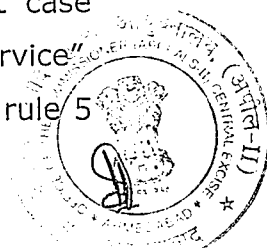
3. Being aggrieved with the impugned order granting refund of Rs. 6,05,647/-, the revenue preferred an appeal on 19.04.2016 before the Commissioner (Appeals-II) wherein it is argued that-

I. Adjudicating authority has relied upon following judgments in allowing the refund for services received and used prior to obtaining registration from the department. Judgments relied upon by adjudicating authority for allowing refund are following but in fact said judgments are not applicable in instance case.

- a. M/s mPortal India Wireless Solution P. Ltd. [2012 (27) STR 134 (Kar.)]- not applicable as CESTAT has remanded case back to adjudicating authority, therefore judgment has not reached finality.
- b. M/s BEICO Industries Ovt , Vapi. [2014-TIOL-2817-CESTA-AHM]- Department has challenged the judgment in Hon'ble High Court of Gujarat.
- c. M/s Imagination Technologies Pvt. Ltd [2011-tiol-719-cestat-mum- department has accepted on law monetary ground and not on merit.



- II. The combined reading of section 66, 69, 70 of Finance Act, 1994 , Rule 4, 7 of Service Tax Rules, 1994 and sub-rule 5, 6 & 9 of Rule 9 of CCR, 2004 substantial meaning emerged are that every person liable for payment of service tax shall require to registered themselves, required to file returns and required to maintain records of receipt and utilization of credit of inputs. In other words any person who intends to provide out put service shall get themselves registered. Without having registered, person can not be considered out put service provider. Therefore credit is not admissible for period prior to registration.
- III. Hon'ble Supreme Court in Central Excise case of Hari Chand shri Gopla and others in Civil Appeal No. 1878-1880 of 2004 with civil appeal Nos. 1631 of 2001 and 568-569 of 2009 decided on 18.11.2010 reported in 2010 (11) LCX 0003- In para 34 it is held that....."34. We find it difficult to sustain the reasoning of the Tribunal that the procedure laid down in Chapter X, is meant only to establish the receipt of goods by the recipient unit and their utilization. The Tribunal completely overlooked the object and purpose of the procedure laid down in Chapter X. The goods manufactured at the supplier end were excisable goods and if a party wants remission of duty, he has to follow certain pre-requisites, the object of which is to see that the goods be not diverted or utilized for some other purpose, on the guise of the exemption notification. Detailed procedures have been laid down in Chapter X so as to curb the diversion and misutilization of goods which are otherwise excisable. The plea of "substantial compliance" and "intended use" is, therefore, rejected for the reasons already stated."
- IV. Tribunal decision in case of M/s Spenta International Pvt. Ltd [2007 (216) ELT 133 (Tri. LB) it is held that there is no provision under the Credit Rules 2004 to allow or permit input credit prior to registration.
- V. In case of Sengunthar Spinning Mill , [1998 (99) ELT 409] it is held that modvat credit on capital goods has to be determined at the time of receipt of capital goods in factory and if no modvat credit was available at that time, the question of subsequent making available modvat would not arise.
- VI. Refund needs to be recovered with interest.
4. Respondent has filed his defense reply dated 04.07.2016 wherein it is stated that-
- I. For claiming refund of credit under rule 5 of CCR, 2004, a person should be engaged in providing export of service. In present case respondent has engaged in export of "information Technology Service"
- II. By reading the provisions of notification 27/2012- CE 9NT) and rule 5 of CCR, 2004, it is not necessary to take registration.



III. Provider of output service is eligible to avail CENVAT credit on the basis of proper documents issued as per rule 9(1) of CCR. In present case credit is availed under proper invoices issued under rule 4A of service tax rules 1994, by service provider.

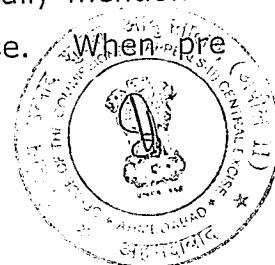
IV. Case law of mPortal India Wireless Solution [ 2012 (27) STR 134] and CST Chennai [2013 (11) TMI 50] are squarely applicable to respondent.

5. Personal hearing in the case was granted on 06.12.2016. Mr. Bhagyashree Bhatt CA and Shri Rasmin Vaja, CA on behalf of respondent appeared before me. They reiterated the defense reply and also submitted copy of judgment in case of Tavant Technologies India Ltd. [ 2016 (43) STR 57 (Kar- HC) and Mportal India Wireless Solution Pvt. Ltd. [ 2012 (27) STR 134 (Kar- HC)].

6. 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.

7. Adjudicating authority has relied upon various judgments in impugned OIO to allow refund even for unregistered exporter. It is contended that rule 5 or notification do not mention of taking registration for availing credit and for refund there of. To this I am not agreeing. Notifications are in form of subordinate legislation which derives its power and authority from parent/main legislation and subordinate legislation can not omit the requirement of parent/main legislation and its provisions also can not be contrary to provisions of parent legislation. Notifications are issued under authority of Central Excise Act/rules and they are required to be read in harmony with the provisions of parent legislation. Notification 27/2012 is not composite notification and has been issued under rule 5 of CCR, 2004. It means that the entire provisions of Cenvat Credit Rules, 2004 automatically becomes applicable along with C. Ex. rules and C.Ex. Provisions of C.Ex. Act/Rules need not be repeated in every notification and it is to be read harmoniously in accordance with the harmonious construction of statute.

8. In Hon'ble Supreme Court judgment in case of Hari Chand Shri Gopal (supra), cited by revenue, it is held that the benefit of the notification could be denied on the ground that the procedure laid down in Chapter X had not been followed. One of the procedures is registration for L-6 License. This judgment is regarding eligibility of exemption notification wherein it is specifically mentioned to register under chapter X procedure and obtain L-6 license.

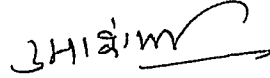


condition for avilment of notification are substantive in nature and it is inbuilt in statue then such pre-conditions are required to be fulfilled to carry out object and purpose of exemption notification. Ratio of judgment in case of Hari Chand Shri Gopal is applicable in present case. Taking registration prior to taking credit was substantial requirement in instance case which appellant have contravened, therefore refund is not admissible. Consequently refund granted is required to be recovered with applicable interest.

9. In view of above, I set aside the OIO and appeal filed by the revenue is allowed.


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

10. The appeals filed by the revenue stands disposed off in above terms.

  
(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED

  
(R.R. PATEL)

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

To,

M/s. Syx Automation India Pvt. Ltd.,  
House No. 6, Sharman 7,  
Near Chandan Party Plot,  
Ahmedabad- 15

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, service tax, Ahmedabad
- 3) The Additional Commissioner, Service 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.

