

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाड़ी, अहमदाबाद— 380015.

क फाइल संख्या : File No : V2(ST)035/A-II/2016-17 / 183-188
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-193-16-17
दिनांक Date : 23.12.2016 जारी करने की तारीख Date of Issue 14/02/17

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

Passed by Shri Uma Shanker Commissioner (Appeals-II)

C. Jale

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

Arising out of Order-in-Original No SD-04/Ref-34/AK/2015-16 Dated 29.01.2016 Issued
by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Astron Packaging 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 :-

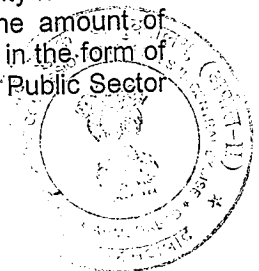
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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, 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 accompany ed 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 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.



(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) (जिसमें 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35फ 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, 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) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट 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 Cenval Credit taken;
- (iii) amount payable under Rule 6 of the Cenval 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

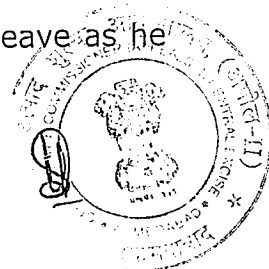
M/s. Astron Packaging Limited, Plot No. 22/23/34-37 , survey No. 427/P , Mahagujarat Industrial Estate, Sarkhej- Bavla Road,, Village Moraiyya, Dist. Ahmedabad- (*hereinafter referred to as 'appellants'*) have filed the present appeals along with condonation of delay, against the Order-in-Original number SD-04/REF-34/AK/2015-16 dated 29.01.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax Div-IV, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellants, The manufacturer exporter engaged in manufacture and export of Corrugated boxes have filed refund claim of Rs. 1,23,434/- under notification No. 41/2012- ST dated 29.06.2012 (*hereinafter referred to as "said notification"*) for refund of service tax paid on specified services like GTA/ Man power recruitment and supply/ CHA /Clearing and forwarding services etc used for export. Entire claim was rejected vide impugned OIO due to following-

- I. Price consideration between buyer and claimant is on FOB basis. In such cases goods have to be delivered on vessel which means the place of delivery is port of shipment. Place of removal in this case is port in terms of section 4(3)9c(iii) read with CBEC circular No. 999/6/2015-CX dated 28.02.2015 read with circular 988/12/2014-CX dated 20.10.2014. As per para 1(a)(A) and 1(a)(B) of Notification 41/2012- ST refund of "specified services" used beyond "place of removal" bet before exportation of goods is admissible. Since services are utilized before place of removal and not after place of removal of goods, refund can not be granted.
- II. Appellant has not produced BRC of goods exported.

3. Being aggrieved with the impugned order, the appellants preferred an appeal on 21.04.2016 before the Commissioner (Appeals-II) wherein it is contended that-

- I. Appeal is filed 16 days late as responsible officer was on leave as he has met with accident.



- II. Notification 41/2012- ST has been amended retrospectively w.e.f. 01.07.2012 by virtue of clause 157 of Finance Bill 2016 vide Noti. No. 01/2016-ST dated 03.02.2016. Explanation at para (1), clause (A) for sub-clause (i) has been substituted by words....*"in the case of excisable goods, taxable service that have been used beyond factory or any other place or premises of production or manufacture of the said , for export;"*. Clause (B) is also omitted vide said amendment.
- III. If the decision of impugned OIO that place of removal in instance case is port is to be upheld then CENVAT credit should be extended to the appellant.
- IV. A substantive benefits conferred upon by jugglery in interpretation of term "place of removal"

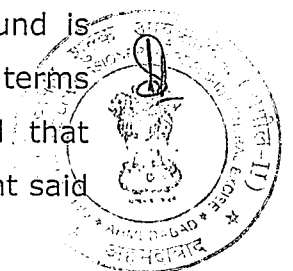
4. Personal hearing in the case was granted on 06.12.2016. Shri M. K. Kothari, consultant of appellant, appeared before me and reiterated the grounds of appeal.

DISUSSION AND FINDINGS

5. 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. Perused condonation of delay application. I am satisfied with the reason put forth for delay. I condone the delay of 16 days in filing appeal. Sort question to be decided is-

- I. Whether or not refund of taxes paid on service is admissible for services used beyond factory gate in exportation of goods in terms of retrospective amendment made vide notification 01/2016-ST dated 03.02.2016 in said notification.
- II. Whether or not refund is granted if BRC are not submitted i.e if sales proceeds have been not received.

6. Regarding first issue of "place of removal" I observe that refund is denied on conclusion that "place of removal" is port of exportation in terms of para 1(a)(A) and 1(a)(B) of Notification 41/2012- ST. I find that amendment made by virtue of clause 157 of Finance Bill 2016 in parent said



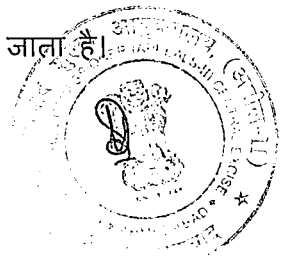
notification vide notification 01/2016-ST dated 03.02.2016 is retrospective in nature. Impugned order is issued prior to enactment. The said amendment makes it abundantly clear that "place of removal" is factory gate in case of manufacturer exporter even for FOB agreement with buyer. I therefore, hold that place of removal is factory gate and consequently refund is admissible for specified input service used after clearance from factory gate for exportation of goods in view of the notification No. 1/2016- ST ibid.

7. It is undisputed fact that the services , for which rebate claim has been filed, have been used by the Appellant after the clearance of goods from factory gate up to port from where goods have been exported. Substantive benefits conferred upon appellant for exporting goods can not be denied by mistakes in interpretation of term "place of removal". Intension of Government is not to export taxes but the goods. To carry out the said object and purpose government has come out with various scheme and notification to see to it that taxes paid on inputs used in final product / service or paid on exportation of final product are refunded to exporter. Appellant has given declaration that they have not availed CENVAT credit as a manufacturer. Manufacturer exporter for export goods can nullify the input service incidence either by taking credit under central excise or by taking refund of it under service tax notification.

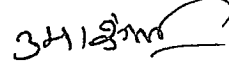
8. Regarding second issue I am of considered view that procuring BRC from banks takes considerable time. Circumstances are beyond the control of exporter submit it in time. One should not compel the exporter to do which is not in his hand. It is well settled principal of law that law does not compel 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. Moreover there is no condition mentioned in said notification or in prescribed form-A under said notification that sales proceeds should have been received before granting rebate. Para 4 of said notification is only recovery provision which required to be resorted in case goods are not exported for recovery of rebate granted.

9. In view of above, appeal filed by the appellants is allowed.

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



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


(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED


(R.R. PATEL)

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

To,
M/s. Astron Packaging Limited,
Plot No. 22/23/34-37 ,
survey No. 427/P ,
Mahagujarat Industrial Estate,
Sarkhej- Bavla Road,
Village Moraiyya,
Dist. 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-IV, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

