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)95/A-II/2015-16**

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-SVTAX-000-APP-020-16-17**

दिनाँक Date : **20.05.2016** जारी करने की तारीख Date of Issue 23/5/16

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 _____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No SD-02/Ref-140/DRM/2015-16 Dated 18.09.2015

Issued by Assistant Commissioner, Div-II, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता **Name & Address of The Appellants**

M/s. Atelier Consultants 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, 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 विरूद्ध 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां 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 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.

(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 A2l9k 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 शर्तो 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 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) 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 होगे।

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

This order arises out of the appeal filed by M/s Atelier Consultants, Spec India Division, Parth Complex, Near Swastik Cross Roads, Navrangpura, Ahmedabad (hereinafter referred to as the "said appellants") against the Order In Original No. SD-02/REF-140/DRM/2015-16 dated 18.09.2015 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner of Service Tax, Division-II, Ahmedabad (hereinafter referred to as the "adjudicating authority").

2. The relevant facts of the case are that the appellants are holding valid Service Tax Registration and filed a refund claim of ₹4,25,696/- on 08.05.2015 for the period from April 2012 to June 2012 under Notification No. 27/2012-CE(NT) dated 18.06.2012 in respect of Service Tax paid on the specific services used for export of goods/ services.

3. In light of discrepancies noticed in the refund claim a Show cause notice was issued on 29.07.2015. The said SCN was adjudicated vide the impugned order wherein the refund claim was rejected by the adjudicating authority on the grounds that claim was hit by the time limitations under the provisions of Section 11B of the Central Excise Act, 1944, hence time barred.

4. Being aggrieved by the above order, the appellants have filed an appeal on the following grounds,

1. The adjudicating authority has observed at Para 14 of the impugned order, that the date of receipt of the payment of export services is the relevant date for Section 11B of the Central Excise Act, 1944 and therefore the refund claim filed after one year from such date is time barred. However, the appellants find that there is no such clause provided in the explanation to the Section 11B, wherein relevant date for the purpose of Section 11B has been specifically defined.
2. The appellants are not providing any services to the domestic customers and the entire IT services provided by them are exported during the relevant period. As such they do not have any opportunity so as to utilize the said Service Tax Credit against any Service Tax liability. Other than IT services they are not providing any other services. Rule 5 of the CCR speaks that "where for any reason such adjustment is not possible, the manufacturer of provider of output services shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification". Hence, the Cenvat Credit of

input Service Tax lying unutilized may be sanctioned in terms of the said notification.

3. The adjudicating authority has wrongly rejected the refund claim on the ground of time bar as the claim was filed on 08.05.2015 after one year from the last date of the quarter ending June 2012. They submitted that there is no time limit prescribed for refund of unutilized credit under Rule 5 of the Cenvat Credit Rules, 2004 under Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax refunds.
4. The appellant had filed the refund claim under the said Notification which specifies that the same should be filed before expiry of the period specified under Section 11B of the Central Excise Act, 1944. However, Section 11 B does not provide for any time limit for claiming refund of credit of Service Tax paid on input services used for export of services.
5. Section 11B(1) states that the refund is required to be filed within one year from the relevant date. For this purpose, 'relevant date' has been defined under Explanation B to the Section 11B as is evident from the definition of 'relevant date', relevant date has not been defined in relation to refund of credit of service tax paid on input services used in export of services.
6. The sub clauses (a) to (eb) of the Explanation B prescribed the relevant date for specific situations which do not cover refund of (accumulated) credit of input taxes which has been claimed by them. Sub clause (f) i.e. 'date of payment of duty' cannot be applied to the refund filed since appellants have not sought refund of duty/taxes paid on its output service but has filed a claim for refund of unutilized Cenvat Credit. Hence the time limit of one year from the relevant date stated under Section 11 B (1) is not applicable to the refund claim filed by them and therefore the refund cannot be rejected on the grounds of time bar. The appellants have further submitted that they had filed the claim under Section 11 B (2)(c) i.e. refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act, for which no time limit has been prescribed under Section 11B. The appellants have placed reliance on the following judgments, wherein it has been categorically held, beyond any doubt, that the time limit under Section 11B is not applicable to the claim for refund of credit of duty paid.

   a) In Re: Patodia Syntex Ltd 2009 – (239)-ELT 0506-Comm(A).
   b) CCE, Ahmedabad-I vs. Anjani Synthetics Ltd. [2001(132) ELT 688 (Tri. Mumbai).

c) Sanghi Textiles Ltd vs. CCE Hyderabad-III [2006 (206) ELT 854].

d) CCE vs. Swagat Synthetics cited in 2008 (232) E.L.T. 413 (Guj.) in Tax Appeal No. 726 of 2008, decided on 14.07.2008.

5. Personal hearing in the matter was granted and held on 19.04.2016. Shri R. Subramnya, Advocate, appeared before me and reiterated the grounds of appeal.

6. I have carefully gone through the Statement of Facts, Grounds of appeal and the impugned order issued in the instant case.

7. I find that the appellant has claimed refund of Cenvat Credit of Input Services utilized during the export of IT Services during the period April 2012 to June 2012 under Notification No. 27/2012-CE(NT) dated 18.06.2012. Further, the impugned order speaks of rejection of the claim on the grounds of time limitations as the same has been filed after the passage of one year of the export of the said Services, contrary to the stipulations under Section 11B of the Central Excise Act, 1944.

8.1 Hence, I would like to examine the basic contention of the adjudicating authority on rejection of the claim on the grounds of time limitation, prescribed under Section 11B of the Central Excise Act, 1944 vis-à-vis the grounds of appeal put forth by the appellant.

8.2 Rule 5 of the CCR speaks of the following,

*"# [5. **Refund of CENVAT credit:** - Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,*

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service,

and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions

and limitations, as may be specified, by the Central Government, by notification:

Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Service Rules, 2005 in respect of such tax.

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act shall be utilised for payment of service tax on any output service.

Explanation: For the purposes of this rule, the word 'output service which is exported' means the output service exported in accordance with the Export of Services Rules, 2005.]

8.3 The mandate of the said rule is very clear inasmuch that the Cenvat credit taken on input services can be utilized for the payment of Service Tax on any output services and where, for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to the safe guards. Further, the relevant rules indicate that the refund is to be isolated only to the extent of the Credit of Service Tax availed and involved in the inputs utilized in the services subsequently exported and which remain unutilized after utilizing the said credit after payment of Service Tax, both under domestic clearances as well as under exports (on payment of taxes under claim of rebate prescribed under Rule 5 of the CCR). In this case, the export of services is no where disputed under the impugned order.

8.4 Further, the Notification No.5/2006-CE (NT) dated 6.3.2006 issued under the above Rule reads as follows,

"In exercise of the powers conferred by rule 5 of the CENVAT Credit Rules, 2004 (hereinafter referred to as the 'said rules'), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.11/2002 - Central Excise (NT), dated 1st March, 2002, published in the Gazette of India Extraordinary, vide number G.S.R. 150(E), dated 1st March, 2002, the Central Government hereby directs that refund of CENVAT credit shall be allowed in respect of:

(a) input or input service used in the manufacture of final product which is cleared for export under bond or letter of undertaking;

(b) input or input service used in providing output service which has been exported without payment of service tax, subject to safeguards, conditions and limitations, set out in the Appendix to this notification.

Appendix

1. The final product or the output service is exported in accordance with the procedure laid down in the Central Excise Rules, 2002, or the Export of Services Rules, 2005, as the case may be.

8.5 Similarly Clause 6 of the Appendix to the aforesaid Notification further stipulates,

6. The application in Form A, along with the prescribed enclosures and the relevant extracts of the records maintained under the Central Excise Rules, 2002, CENVAT Credit Rules, 2004, or the Service Tax Rules, 1994, in original, are filed with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, before the expiry of the period specified in section 11B of the Central Excise Act, 1944(1 of 1944).

8.6 The above law clearly stipulates that refund claimed under this Rule is governed by limitations set under Section 11B of the Act, ibid. Hence, Refund under Rule 5 cannot be independently read for requirement of limitations under Section 11 B of the Act. However, the appellants have appealed contrary to the above in as much as the claim under Rule 5, is not governed by time limitation under Section 11B of the Act, which after the above reading appears to be incorrect.

9. Further, to come to the exact proposition of relevant date, I would like to visit the concerned provision under Export of Service Rules, 2005 as Rule 5 of the CCR and the Notification issued thereunder refers to the Exports of output services governed under the Export of Service Rules, 2005. Rule 3(2) of the Export of Services Rules, 2005 deals with the situation where it has been described that what provisions of export of service are. The same is reproduced as,

"(2) The provision of any taxable service specified in sub-rule (1)

shall be treated as export of service when the following conditions are satisfied, namely : —

(a) [.....]

(b) payment for such service [.....] is received by the service provider in convertible foreign exchange."

10. From the above provisions, it is very much clear in the case of export of service, that the relevant date would be the date when the payment of services exported has been received by the assessee. In this case, I place the reliance on the judgment of Honorable CESTAT WZB, Mumbai in case of COMMISSIONER OF CENTRAL EXCISE, PUNE-I Vs. EATON INDUSTRIES P. LTD. reported under 2011 (22) S.T.R. 223 (Tri. - Mumbai). Further, effective from March 1, 2016, Notification No. 27 is amended vide Notification No. 14/2016 – CE (NT) dated March 1, 2016 so as to provide the time limit for filling application for refund of Cenvat credit under Rule 5 of the Credit Rules, in case of export as under:

- in case of manufacturer, before the expiry of the period specified in Section 11B of the Excise Act,
- in case of service provider, before the expiry of one year from the date of:
- receipt of payment in convertible foreign exchange, where provision of service had been completed prior to receipt of such payment; or
- Issue of invoice, where payment for the service had been received in advance prior to the date of issue of the invoice

This amendment resolves all the disputes, which had originated in course of interpretation of Section 11B of the Excise Act in the case of time limit for filing refund claim on export of services.

11. In view of above, I do not find any reason to interfere in the impugned order and reject the appeal filed by the appellants.

(UMA SHANKER)
COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED

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

BY R.P.A.D

केन्द्रीय उत्पाद शुल्क आयुक्तालय, (अपील-II) OFFICE OF THE COMMISSIONER (APPEALS-II) CENTRAL EXCISE AHMEDABAD अहमदाबाद

BY R.P.A.D

To :-

M/s Atelier Consultants,
Spec India Division, Parth Complex,
Near Swastik Cross Roads, Navrangpura,
Ahmedabad- 380 009.

Copy to:-

1) The Chief Commissioner, Central Excise, Ahmedabad.
2) The Commissioner, Service Tax, Ahmedabad.
3) The Dy./Asst. Commissioner, Service Tax, Division-II, Ahmedabad.
4) The Asst. Commissioner (System), Service Tax Hq, Ahmedabad.
5) Guard File.
6) P. A. File.