

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)093, 94, & 95 /A-II/2016-17
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-248-249-250-16-17
दिनांक Date : 20.03.2017 जारी करने की तारीख Date of Issue 24/3/17

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-301,302/DRM/2015-16 Dated 31.03.2016 Issued
by Assistant Commr STC, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Infostretch Corporation (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 :-

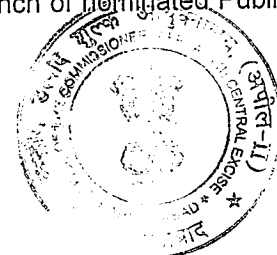
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ 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 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) (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 (सीस्तेत) 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, 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 किररी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जा 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,

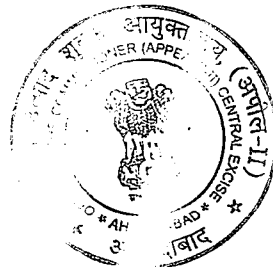
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

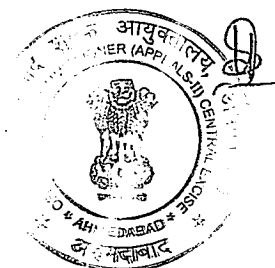
M/s. Infostretch Corporation (India) Pvt. Ltd. , Block-A, 101-105, Neptune Corporate House, B/h Rajpath Club, S.G. Highway, Bodakdev, Ahmedabad- 380054, Ahmedabad- 380 006 (*hereinafter referred to as 'appellants'*), holding ST registration No. AADC I5195G SD001 and valid letter of Approval (LOA) D dated 27.08.2013 issued by SEEPZ-SEZ, Mumbai in the name of M/s Infotech Solution Pvt. Ltd (previous name before amalgamation) have filed the present following three appeals against the following three Order-in-Original (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax Div-II, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

TABLE

OIO No. and DATE	PERIOD	REF AMMT. & FILED ON	APPEAL FILED IN Commr.(A)
SD-02/REF-301/DRM/2015-16 dated 31.12.2016	4/2015 to 6/2015	3,34,687/- 31.12.2015	15.07.2016
SD-02/REF-302/DRM/2015-16 dated 31.03.2016	7/2015 to 9/2015	3,68,404/- 31.12.2015	16.06.2016
SD-02/REF-09/DRM/2016-17 dated 12.04.2016	10/2015	4,84,464/- 12.02.2016	31.06.2016

2. The facts of the case, in brief, are that the appellants were availing exemption of Notification 12/2013-ST dated 01.07.2013 for specified services used in authorized operation in SEZ. Appellants above three refund claims were rejected on following grounds.

- I. Appellant had intimated in refund application A-4, that turnover of the DTA operation in the pervious financial year is 36 crores. As the appellant is engaged in SEZ operation as well as DTA operation & other business, the service received can not be considered used exclusively for SEZ authorized operations. Therefore refund claim should be restricted in terms of para3 (iii)(b)(ii) of Notification No. 12/2013-ST.
- II. Appellant has centralized registration at Ahmadabad office. SEZ operations are monitored and Payments of service are made from Ahmedabad office. The appellant has failed to put forth any documentary evidences to substantiate that the services are exclusively used in SEZ authorized operation.



- III. Both for SEZ sale and DTA sales appellant have same series of Invoice, same authorized signatory and same bank account therefore appellant contention that they are maintaining separate books of account for SEZ and DTA is not acceptable. Proportional claim for SEZ operation was required to be filed which they have not filed.
- IV. Claim was to be filed for payment made in particular as per notification provisions, but in some invoices, whose payment is made in subsequent/other quarter, are included in that particular quarter claim, which is not correct as per para 3(iii)(e) of notification.
- V. Appellant has submitted two claim, albeit of different quarter, in same quarter which is contravention of notification para 3(iii)(e), which permit filing of only quarterly claim in given quarter.
- VI. Appellant has failed to establish that incidence of duty has not been passed on to any other person, consequently it is a case of unjust enrichment.

3. Being aggrieved with the impugned order, the appellants preferred an appeal before the Commissioner (Appeals-II) wherein it is contended that there is no domestic turnover in SEZ, for which refund is claimed. It was by mistake the domestic turnover was mentioned in A-4. We have submitted all documents like invoices, SEZ return, Balance Sheet, P&L A/c of SEZ. Services, like SEZ rent, telephone, security etc used in SEZ can not be used in domestic unit situated in Ahmadabad. In sale SEZ invoices, no service tax is charged therefore, it is not the case of unjust enrichment.

4. Personal hearing in the all three case was granted on 06.01.2017. Shri Sunil Sanghavi, CA, appeared before me and reiterated the grounds of appeal. He stated that subsequent period refund is allowed vide OIO SD-02/REF-216/VIP/2016-17 dated 31.11.2016 for period 01.01.2016 to 31.03.2016, in identical matter where input services were same. Appellant have submitted written submission dated 21.02.2017 wherein it stated that by mistake of typing error they have domestic turnover of Rs. 36 crores as such there is no (NIL) such turnover and services mentioned in claim are exclusively used in SEZ.

DISUSSION AND FINDINGS

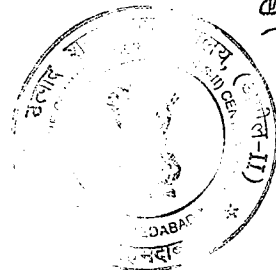
5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants at the time of personal hearing or later on.



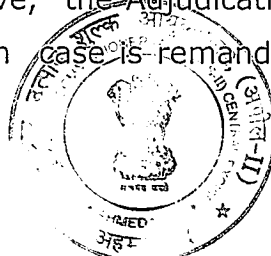
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- I. Regarding para 2(I) above of mentioning of 36 crores domestic turnover in refund application, I find that adjudicating have never bothered to verify the books of account produced to ascertain the claim of appellant that it is a typographical mistake. Without recording concrete finding on plea of appellant, it is injustice to reject refund claim in terms of para 3 (iii)(b)(ii) of Notification No. 12/2013-ST.
- II. Regarding para 2(II) above regarding evidence of exclusive usage of service in SEZ, it is concluded by adjudicating authority in impugned OIO that SEZ operations are monitored and Payments of service are made from Ahmadabad office therefore services are not utilized in SEZ. It is baseless conclusion. I find that CBEC In Circular F. No. 335/30/2011-TRU dated 18.05.2011 has clarified that only such services shall be considered as exclusively used by SEZ Unit/Developer for authorized operation as they satisfy two criteria. (a) Invoice is raised in name of SEZ Unit/Developer or in invoice it is mentioned that the taxable service are supplied to SEZ Unit/ Developer for authorized operation (b) such services are approved by the Unit approval Committee as required for authorized operation. I find that adjudicating authority has not verified the facts keeping in view the above guideline.
- III. Regarding para 2(III), I find adjudicating authority has disregarded the separate books of account for SEZ and DTA maintained and produced on plea that appellant have same series of Invoice, same authorized signatory and same bank account. I find that in said Notification there is no any pre-condition to have for SEZ and DTA unit, the separate set of invoices, the separate authored signatory and the separate Bank Account. Books of A/c maintained separately for SEZ and DTA is sufficient for working out services received and utilized in SEZ. Only substantial requirement as per para 3(IV) of said notification is maintaining proper account of receipt and use of the specified services in SEZ, on which exemption or refund is claimed. para 3(IV) of said notification is as below-

"(IV) The SEZ Unit or Developer, who intends to avail exemption or refund under this notification, shall maintain proper account of receipt and use of the specified services, on which exemption or refund is claimed, for authorised operations in the SEZ."



- IV. I am in agreement with adjudicating authority in respect of above conclusions in para 2(IV) that in claim of particular quarter, say Q2, the claim should be only for the payment made in Q2 only and such claim of Q2 should not contain invoices whose payment is made in previous period Q1 or in subsequent period Q3. This procedural mistake can be ignored if (a) substantial requirement of receipt and usage of service in SEZ is established and (b) said mis-matching quarter invoice [i.e invoice whose payment is done in Q1 or Q3 here in this illustration and included in claim of invoices whose payment is done in claim of Q2] are not again claimed in claim any other claim. Adjudicating authority has never concluded that it is double payment of refund on same invoices.
- V. Conclusion [para 2(V) above] of adjudicating authority that claimant can submit one claim in particular quarter is wrong. In particular quarter, say Q4 quarter, the three claim of Q1, Q2 and Q3 also can be filled. There is no restriction that in Q4 only one claim of Q1 or Q2 or Q3 or of Q4 of previous year, can be filed. Notification para 3(iii)(e) says that claim of particular quarter say Q2 should be filled only once and once claim for Q2 is filled one can not file claim again for Q2.
- VI. I find that adjudicating authority has not properly scrutinized the unjust enrichment issue. Whether credit has been taken , whether service tax payment include in expenses i.e. included in costing or whether service tax recovered fro customers are not scrutinsed. This aspect needs to be verified in detail.
6. Adjudicating authority has never disputed the receipt and have disputed usages of services in SEZ only on assumption and presumption, therefore substantial benefit can not be denied. My view is supported by following judgments-
- Wipro Limited Vs. Union of India [2013] 32 Taxmann.com 113 (Delhi High Court)
 - Kothari Infotech Ltd V/S Commissioner of Central Excise, Surat – [2013] 38 taxmann.com 298 (Ahmadabad – CESTAT)
 - Mannubhai & Co. Vs. Commissioner of Service Tax (2011)(21)STR(65)- CESTAT (Ahmadabad)
 - M/S Mangalore Fertilizers & Chemicals Vs Deputy Commissioner 1991 (55) ELT 437
7. In view of facts and discussion herein above, the Adjudicating Authority is directed to decide the case afresh , for which ~~case is~~ case is remanded back to the



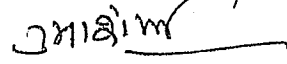
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Adjudicating Authority, after due compliance of the principles of natural justice and after proper appreciation of the evidences that may be put forth by the appellant before him. The appellant is also directed to put all the evidences before the Adjudicating Authority in support of their contention as well as any other details/documents etc. that may be asked for by the Adjudicating Authority when the matter is heard in remand proceedings before the Adjudicating Authority. These findings of mine are supported by the decision/order dated 03.04.2014 of the Hon'ble High Court, Gujarat in the Tax appeal No.276//2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Hotels Ltd. and also by the decision of the Hon'ble CESTAT, WZB Mumbai in case of Commissioner of Central Excise, Pune-I Vs. Sai Advantium Ltd and reported in 2012 (27) STR 46 (Tri. - Mumbai).

8. In view of above, three appeals filed by the appellants are allowed by way of remand.

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

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



(उमा शंकर)

आयुक्त (अपील्स - II)

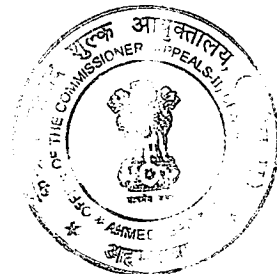
ATTESTED


(R.R. PATEL)

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

To,

M/s. Infostretch Corporation (India) Pvt. Ltd. ,
Block-A, 101-105,
Neptune Corporate House,
B/h Rajpath Club, S.G. Highway,
Bodakdev, Ahmedabad- 380054



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-II, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

