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)19/A-II/2016-17** /1447 to 1451

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-SVTAX-000-APP-074-16-17**

दिनाँक Date : **16.08.2016** जारी करने की तारीख Date of Issue 26/08/16

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 STC/22/ADC/2009 Dated **28.08.2009**

Issued by ADC STC, Service Tax, Ahmedabad

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

M/s. Inductotherm(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 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

1. This order arises out of the appeal filed by M/s. Inductotherm (India) Pvt. Ltd., Shri Kishorebhai D. Vyas Building, Ambli-Bopal Road, Bopal, Ahmedabad (hereinafter referred to as the "*said appellants*") against the Order-In- Original No. STC-22/ADC/2009 dated 28.08.2009 (hereinafter referred to as the "*impugned order*") passed by the Additional Commissioner of Service Tax, Ahmedabad (hereinafter referred to as the "*adjudicating authority*").

2. The facts of the case, in brief, are that the appellants were engaged in the manufacture of goods falling under Chapter 85 of the CETA, 1985. They were also registered with the Service Tax department under the categories of "Maintenance and Repair Service, Commissioning and Installation Service, Business Auxiliary Service and Goods Transport Agency Service" and hold a valid Service Tax Registration number AAACI3672BST001. During the course of audit of the records of the appellants, it was found that the appellants had received taxable services of "Intellectual Property Service" from M/s. Inductotherm Industries Inc., USA, who have business establishment outside India only and do not have any office in India. As per Rule 2(1)(d)(v) of the Service Tax Rules, 1994, person liable for paying Service Tax means "in relation to any taxable service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service was provided or to be provided, or has his permanent address or usual place of residence, in a country other than India, and such service provider does not have any office in India, the person who receives such service and his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence in India." With the insertion of Section 66A vide Notification No. 11/2006 w.e.f. 18.04.2006, the issue was further, specifically and separately included in the Service Tax provisions. Accordingly, the appellants being recipient of the service were liable to pay Service tax for the period from 01.10.2005 to 23.01.2006. During the above period, the appellants made payment of an amount of ₹1,72,69,828/- as royalty to M/s. Inductotherm Industries Inc., USA. It was presumed that the royalty paid by the appellants was taxable under category of 'Intellectual Property Services' w.e.f. 10.09.2004. However, they had not paid any Service Tax on the said amount and neither did they obtain Service Tax registration under this category. The Service Tax thereon, was worked out to ₹8,98,032/- after allowing deduction of R&D cess paid by the appellants. A show cause notice dated 22.04.2008 was, therefore, issued to the appellants demanding Service tax amount of ₹8,98,032/- along with appropriate interest and penalty. The adjudicating authority, vide the impugned order, confirmed the demand of Service Tax of

₹8,98,032/- under Section 73(1) of the Finance Act, 1994 and ordered the recovery of interest under Section 75 of the Act. He also imposed imposed penalties under Sections 76, 77 and 78 of the Act.

3. Being aggrieved with the impugned order, the appellants preferred an appeal before the then Commissioner (Appeals-IV) who, vide Order-In-Appeal number 86/2010(STC)/HKJ/Commr.(A)/Ahd. dated 10.03.2010, rejected the appeal, without going to the merits of the appeal, on the ground of non-compliance of stay order under Section 35F of the Central Excise Act, 1944 made applicable to the Service Tax under Section 83 of the Finance Act, 1994.

4. Being aggrieved with the said OIA, the appellants filed an appeal before the Hon'ble CESTAT, West Zonal Bench, Ahmedabad. The Hon'ble CESTAT, vide order number A/291-292/WZB/AHD/2011 & S/64-65/WZB/AHD/2011 dated 14.02.2011, ordered the appellants to deposit 25% of the Service Tax, confirmed against them, in cash directed the Commissioner (Appeals) to decide the case on merit. The appellants accordingly deposited an amount of ₹4,94,020/- vide challan number 00373 dated 26.02.2011 as directed by the Hon'ble CESTAT.

5. In view of the above judgment of the Hon'ble Tribunal, I take up the case to be decided on merit.

6. Personal hearing in the case was granted on 08.06.2016 and Smt. Shilpa P. Dave, Advocate, appeared before me. Smt. Dave pointed out that technical know-how is not IPR and it is permanent transfer as per agreement. In support of her claim she made additional submissions before me.

7. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum and written submissions made by the appellants. At the very onset I would like to point out that the responsibility of payment of Service Tax was put on the recipient of service in India received from a foreign service provider by virtue of Section 66A of the Finance Act, 1994 with effect from 18.04.2006 vide Notification No. 11/2006-ST dated 18.04.2006. In this regard, the Hon'ble Mumbai High Court in the case of Indian National Ship Owner's Association vs. Union of India has proclaimed the same. It is thus a settled case that Rule 2(1)(d)(iv) of Service Tax Rules, 1994 was not relevant as there was no charging section till 18.04.2006. Thus, I find that as the case pertains to the period from 01.10.2005 to 23.01.2006 i.e., prior to the Notification No. 11/2006-ST dated 19.04.2006, the impugned order requires to be set aside on this issue only. I rely on the

order number A/11031/2015 dated 16.07.2015 of the Tribunal in the appellant's own case by the Ahmedabad Bench.

8. However, as directed by the Hon'ble CESTAT, to discuss the merits of the case, I decide the case on merit. I find that the adjudicating authority, in the impugned order, had concluded that the appellants had received Intellectual Property Service from M/s. Inductotherm Industries Inc., USA. However, in the entire impugned order I could not find any evidence establishing the same. Mere conclusion without facts does not suffice the purpose for which the show cause notice was issued. In the case of M/s. TATA Consultancy Services Ltd. vs. The Commissioner of Service Tax, Mumbai, the Hon'ble CESTAT, West Zonal Bench, Mumbai, proclaimed that the Intellectual Property Right should be a right under the Indian law. Intellectual Property Right not covered by the Indian laws would not be covered under taxable service in the category of Intellectual Property Right Services. Thus, the technical know-how received by the appellants and the royalty payment made by them is nowhere established to result from the use of any Intellectual Property Right. Also, in Circular No. 80/10/2004-ST dated 17.09.2004, it has been clearly mentioned that permanent transfer of intellectual property right does not amount to rendering of service.

> *"The definition of taxable service includes only such IPRs (except copyright) that are prescribed under law for the time being in force. As the phrase "law for the time being in force" implies such laws as are applicable in India, IPRs covered under Indian law in force at present alone are chargeable to service tax and IPRs like integrated circuits or undisclosed information (not covered by Indian law) would not be covered under taxable services.*
>
> *9.2 A permanent transfer of intellectual property right does not amount to rendering of service. On such transfer, the person selling these rights no longer remains a "holder of intellectual property right" so as to come under the purview of taxable service. Thus, there would not be any service tax on permanent transfer of IPRs."*

9. Further, I agree with the explanation of the appellants that the payment of ₹1,46,47,384/- was actually royalty to M/s. Inductotherm Industries Inc., USA as per the agreement between the appellants and M/s. Inductotherm Industries Inc., USA. I find that actually royalty is not payment for any service but it is a share of product or profit reserved by the owner for permitting another use of his property. The definition of the term 'Royalty', according to Investopedia, is "A royalty is a payment to an owner for the use

of property, especially patents, copyrighted works, franchises or natural resources. A royalty payment is made to the legal owner of the property, patent, copyrighted work or franchise by those who wish to make use of it for the purposes of generating revenue or other such desirable activities. In most cases, royalties are designed to compensate the owner for the asset's use, and they are legally binding." Thus, it is quite clear that royalty is paid to use a particular product. In other words, royalty is received for sharing a product (tangible or intangible) with someone. Also, the appellants stated that M/s. Inductotherm Industries Inc., USA was having 99.999% share holding in the appellants. This makes both the companies, a single entity and not two different bodies and thus, serving the same entity does not attract any IPR service. Thus, I find that when M/s. Inductotherm Industries Inc., USA is holding 99.999% share of the appellants, the former becomes practically the owner and as both the companies virtually become one and same entity, no taxable service is rendered. Further, during personal hearing, the appellants pleaded that no right to use any intangible property was given to them by M/s. Inductotherm Industries Inc., USA under the agreement and therefore, the agreement does not fall within the purview of IPR services. Thus, I believe that technical know-how received from M/s. Inductotherm Industries Inc., USA is not an intellectual property right in the eyes of law.

10. In view of the discussion held above, the impugned order is set aside and the appeal is allowed.

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

ATTESTED

22.09.16

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

BY R.P.A.D.

M/s. Inductotherm (India) Pvt. Ltd.,
Shri Kishorebhai D. Vyas Building,
Ambli-Bopal Road, Bopal,
Ahmedabad-380 058

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Additional Commissioner, Service Tax, Ahmedabad
4. The Assistant Commissioner, Systems, Service Tax, Ahmedabad
5. Guard File.
6. P.A. File.