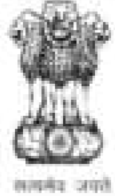
59

::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001

Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com



रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/21/EA2/RAJ/2016	DC/JAM/R-32/2016-17	18.05.2016
	V2/23/EA2/RAJ/2016	DC/JAM/R-70/2016-17	27.05.2016

5202 To 5205

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-087-TO-88 -2017-18

आदेश का दिनांक / Date of Order:	**03.10.2017**	जारी करने की तारीख / Date of issue:	**06.10.2017**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ अपीलकर्ता **& प्रतिवादी** का नाम एवं पता /Name&Address of the Appellant & **Respondent** :-
M/s. International Cargo Terminals & Infrastructure Pvt. Ltd.,.2nd Floor,'Jalpari', Pratap Palace Road, Opp. Guru Datatreya's Temple,.Jamnagar- 361 008

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग ,ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग ,ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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 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/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम

(ii) सेनवेट जमा की ली गई गलत राशि

(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।/

For an appeal to be filed before the CESTAT, 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, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 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.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/

In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए है।/

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।

जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। /

In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /

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.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है। /

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

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::ORDER IN APPEAL ::

The Principal Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the appellant") has filed the present appeals against Order-in-Original No. DC/JAM/R-32/2016-17 dated 18.05.2016 and Order-In-Original No. DC/JAM/R-70/2016-17 dated 27.05.2016 (hereinafter referred to as "the impugned orders") passed by the Deputy Commissioner, Central Excise & Service Tax Division, Jamnagar (hereinafter referred to as 'the lower adjudicating authority') in the case of M/s. International Cargo Terminals & Infrastructure Pvt. Ltd., 2nd floor, 'Jalpari', Pratap Palace Road, Opp. Guru Datattrey's Temple, Jamnagar – 361 008 (hereinafter referred to as "the respondent").

2. The facts of the case are that the respondent had filed two refund claims of Rs. 6,63,384/- and Rs. 3,31,853/- for the period from March, 2015 to October, 2015 and October, 2015 to March, 2016, respectively, under Section 11B of the Central Excise Act, 1944 (made applicable to service tax matter under Section 83 of the Finance Act, 1994) on the ground that they had paid service tax under category of transportation related services for chemical fertilizers, namely, Murate of Potash, however the said services were exempted vide Sr. No. 20 of Notification No. 25/2012-ST dated 20.06.2012 w.e.f. 01.07.2012. The refund claims were sanctioned by the lower adjudicating authority vide the impugned orders.

3. Being aggrieved with the impugned orders, the department filed appeal, *interalia*, on the following grounds: -

(i) A wrong interpretation has been made by the lower adjudicating authority that the respondent paid service tax amount under category of transportation related services. The respondent has not paid any amount towards service tax on the service provided by them to M/s. Indian Potash Limited, Ahmedabad (hereinafter referred to as "M/s. IPL") and so called transportation related services for chemical fertilizer were from Anchorage to Rozy jetty by hired barges in terms of Notification No. 25/2012-ST and hence, no erroneous or excess tax payment was made by the respondent and therefore, the question of refund does not arise.

(ii) The service providers have charged @ Rs. 40/- to Rs. 45/- per metric tonne from the respondent and subsequently the respondent had raised bills and collected Rs. 60/- per metric tonne from M/s. IPL for transportation of goods. In the case, the respondent had acted as an 'agent' for supply of services and had not provided transportation services to M/s. IPL as claimed by them in invoices issued to M/s. IPL. Therefore, in absence of service tax payment they cannot claim refund of service tax collected by their service providers from them for providing services.

(iii) The respondent had claimed refund of the amount charged as service tax on the services received by them from various service providers under the category of 'supply of tangible goods' and 'other services', as same were utilized by them for onward providing of service, which is claimed as exempted by aforesaid Notification. There is no provision to refund the service tax paid on services, which were utilized for providing exempted services except in case of export of goods or export of output services. Thus, the lower adjudicating authority has erred while sanctioning the refund to the respondent.

(iv) The certificate issued by the Chartered Accountant indicates that the respondent had raised Bill to M/s. IPL for the value of services and no service tax was charged and paid. Therefore, in absence of service tax payment, the respondent cannot claim refund of service tax, collected by their service providers from the respondent for providing output services.

(v) The service providers had provided services to the respondent and had recovered charges for hire charges, port charges, reimbursement of light charges and supply of tangible goods service, except one service provided by M/s. Roy Maritime Services, which is not falling under category of exempted service under the said Notification as claimed by the respondent, as the said services are not transport services. Further, the certificate issued by the Chartered Accountant indicates that service provided by the operators are 'supply of tangible goods service' and not 'transportation of goods'.

(vi) The respondent is engaged in providing various services and has availed cenvat credit of duty/tax paid on common inputs or input services for payment of service tax. Therefore, as provided under Rule 6(3)(i), the respondent is required to pay an amount equal to 7% of value of exempted services. Hence, in this case the service tax payment made by the respondent is required to be adjusted against the liability of amount in terms of Rule 6(3)(i).

(vii) The provisions of unjust enrichment have also not been examined properly as to whether the value of so called exempted output services were inclusive of service tax elements or otherwise. The principle of unjust enrichment is applicable in the present case, as the respondent has paid less amount to their service providers and while providing the onward so called exempted service to M/s. IPL, they have collected/charged excess amount by higher rate than they have actually paid. The respondent has earned/charged excess amount from M/s. IPL indirectly considering the element of cum-tax-value which leads to believe that burden of service tax payment made by the respondent to various input service providers has been passed on to the end of service recipient namely M/s. IPL.

4. The respondent filed Memorandum of Cross Objections, *interalia*, on the following grounds: -

(i) They have claimed refund of service tax which was collected from them illegally and without authority of law. Since they have borne the burden of service tax, they have claimed refund of service tax. Certificate of Chartered Accountant certifying that the amount is not charged out to Profit & Loss account but shown as 'service tax refund claim receivable' under the head current assets was submitted.

(ii) The respondent is responsible for loss of cargo during transportation, shortages at landing point on shore, damage to cargo, etc. and all risk towards transportation of cargo through inland water is borne by the respondent being principal service provider and they are not agent of M/s. IPL. Law of agency in India, signifies a relationship, which exists where one person has an authority to act on behalf of other (the principal) to create legal relationship between the principal and third parties. However, every person, who acts on behalf of other, is not necessarily an agent. The respondent was wrongly classified as agent because only those part of whole transportation services, that could not be completed, directly due to scarcity of resources such as No. of barges, timing, manpower, obligation to complete work within time etc. were sub-allotted to other parties. The respondent is wholly liable for loss/damage/shortage of the cargo in transportation. In case, the respondent is agent, there must not be any such liability on the respondent. The respondent has all rights to decide quantity to be loaded in barges, No. of barges to be employed, timing of barges, manpower to be obtained for barges, even some barges are self-owned by the respondent, etc. In all these cases, the respondent is not under supervision of M/s. IPL. The respondent is entirely liable to transport the imported Murate of Potash from ship to shore and not at all under any obligation to have direction from M/s. IPL.

(iii) There is no specific category of service provided in the specified service list. In such situation, service providers instead of mentioning 'other taxable service' has inadvertently described wrong service head of service for which they are registered with service tax department. Confirmation of the service providers that they have provided only transportation of specified goods through barges and at the time of raising of invoices they mentioned more general nature service than specific service has already been submitted to the department. All the bills raised by the service providers are on tonnage of transportation basis and not on time consumption basis. In case the respondent has availed service such as 'supply of tangible goods/equipment for use', charges of the service providers would be on shipped cargo basis and not on the basis of quantity actually transported. Section 66F (2) of the Finance Act, 1994 provides that where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description. Port service is more general description and its use to be avoided as per law as more specific description is 'transportation'. In support of their claim that actual

service consumed by the respondent is only transportation services, they produced copy of Boat Notes. In any case, the ultimate intention of the parties to the contract i.e. respondent, the service providers and M/s. IPL is transportation of cargo from ship to shore. The respondent has paid service tax on transportation services which are exempt under Notification No.25/2012-ST and has not claimed any refund of service tax charged by the supplier of service for any other service.

(iv) The respondent has claimed refund under Section 11B of the Central Excise Act, 1944 as the supplier has charged tax without authority of law. It does not matter whether the services utilized for provision of exempt or taxable services as the tax was collected without authority of law.

(v) The certificate of Chartered Accountant certifying that the amount is not charged out to Profit & Loss account, but shown as 'service tax refund claim receivable' under the head current assets has been submitted with refund application. The respondent has not claimed the refund towards deposit of service tax collected from M/s. IPL.

(vi) The contention of the department that the respondent has claimed refund of service tax which was availed for providing exempted service is wrong. The refund claim filed is for the service tax charged and paid to the Government without authority of law and in violation of Article 265 of the Constitution of India. The respondent has not claimed any refund because of provision of exempt services, the ground is not sustainable. The respondent relied on decisions of Hon'ble Supreme Court in the case of SolonahTea Co. Limited reported as 1987 (12) TMI3 – SC and U.P. Pollution Control Board & Others.

(vii) The respondent has claimed refund of service tax illegally charged to the respondent by their supplier of services without authority of law in violation of Article 265 of the Constitution of India. The respondent while filing the refund claim has not claimed any cenvat credit out of the amount charged by the supplier. Initially, the respondent has claimed cenvat credit which was incorrectly claimed and was reversed by them. Therefore, contention of the department that the respondent has not complied with Cenvat Credit Rules, 2004 is not sustainable.

(vii) The respondent has borne the burden of service tax and hence has claimed refund of service tax. Hon'ble Supreme Court of India has held that in a case where facts are not in dispute, collection of money as cess was itself without authority of law; no case of undue enrichment was made out and the amount of cess paid earlier was ordered to be refunded. The department's contention that the respondent should collect same amount from M/s. IPL that the respondent has paid to their supplier is wrong as the margin of service provider as well as direct and indirect cost and overheads, depreciation, etc. is added to the value of the service. The department made general statement that just because the respondent has charged Rs. 60/- per MT from M/s. IPL and paid Rs. 40/- to Rs. 45/- per MT to various parties whose services have been

consumed by the respondent, the respondent has passed on the burden of service tax to the service recipient. There are various reasons for rate variations. The respondent, due to their huge brand name and creditability is able to charge premium rate to M/s. IPL as compared to other parties charged in the nearby location. The department has only considered direct costing. There are other indirect cost such as supervision charges, custom charges, light rage charges, etc. and direct overhead like depreciation of barges and machinery, indirect overheads, administrative charges, building rent, vehicle expenses, transportation to staff, etc. which are cost and needs to be incurred. All these expenses are required to be considered to ascertain as to whether there is actual surplus collection or not.

5. Personal hearing in the matter was attended to by Shri Dhaval K. Shah, Chartered Accountant, who reiterated submissions made by them in their Memorandum of Cross Objections. He also submitted copy of rate contract with M/s. Indian Potash Limited to substantiate transportation of goods; copies of Boat Notes as per Section 68(1) of the Customs Act, 1962 and Boat Notes Regulations, 1976; Reconciliation chart to establish that service tax on Handing charges, Grab charges, etc. was charged and recovered from M/s. IPL; that the orders passed by refund sanctioning authority is correct and should be upheld. No one appeared from the department even after written P.H. notices were sent to them.

Findings:

6. I have carefully gone through the facts of the case, impugned order, grounds of appeals, Memorandum of Cross objections filed by the respondent and the submissions made by the respondent. The Department has neither submitted any comments on the grounds raised by the respondent in their Memorandum of Cross objections nor appeared for the hearing. I therefore proceed to decide the case on merit on the basis of records available on file.

7. I find that the issue to be decided in the present appeal is as to whether the impugned orders passed by the lower adjudicating authority sanctioning the refund of service tax charged by the service providers in relation to transportation of imported chemical fertilizer, namely, Murate of Potash and paid by the respondent as service receiver, is correct, legal and proper or not.

8. The department has contended that the respondent has claimed refund of the amount charged as service tax on the services received by them from various service providers under the category of 'supply of tangible goods' and 'other services' as same were utilized by them for onward providing of service i.e. transportation which is claimed as exempted by aforesaid Notification No. 25/2012-ST dated 20.06.2012 and that there is no provision to refund the service tax paid on services which were utilized for providing exempted services. The respondent submitted that there is no specific category of service provided in the specified service list and that the service providers

who have provided service to the respondent also confirmed that they have provided only transportation of specified goods through barges and at the time of raising of invoices they mentioned more general nature service than specific service; that all the bills raised by the service providers are on tonnage of transportation basis and not on time consumption basis; that Section 66F (2) of the Finance Act, 1994 provides that where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

8.1 I find that the respondent has filed refund claims on the ground that they paid service tax to various service providers for services related to transportation of chemical fertilizers, namely, Murate of Potash from ship to shore, although the said services are exempted vide Sr.No. 20 of Notification No. 25/2012-ST dated 20.06.2012 w.e.f. 01.07.2012, which is reproduced as under: -

> *"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely :-*
>
> *1 ....*
> *2.........*
> *3 to 19 ......*
>
> *20. Services by way of transportation by rail or a vessel from one place in India to another of the following goods -*
>
> *(a) ....*
> *(b) ....*
> *(c) ....*
> *(d) ....*
> *(e) ....*
> *(f) ....*
> *(g) ....*
> *(h) ....*
> *(i) ....*
> *(j) chemical fertilizer and oilcakes;*
>
> *(Emphasis supplied)*

8.2 The above Notification provides exemption from payment of service tax on service of transportation of chemical fertilizer by vessel. I find that the respondent entered into agreement for transportation of chemical fertilizers from ship to shore for which rate of Rs. 60/- per metric tonne has been agreed upon for the period 01.11.14 to 31.03.16. The rates for barge hire charges for the said period have also been agreed upon, however the respondent has not provided copy of the schedule rate for barge hire charges. I further find that in order to fulfill the contractual obligations, the respondent hired barges from various barge owners through which transportation of chemical fertilizers from ship to shore has been completed. These barge owners have charged @ Rs. 40/- to Rs. 45/- PMT and service tax thereon to the respondent for providing their

barges, which can be classified as "supply of tangible goods for use" as defined under Section 65(105) (zzzzj) of the Act, which is reproduced as under: -

> *65(105) "taxable service" means any [service provided or to be provided, -*
>
> *(zzzzj) - to any person, by any other person <u>in relation to supply of tangible goods including machinery, equipment and appliances for use</u>, without transferring right of possession and effective control of such machinery, equipment and appliances;*
>
> *(Emphasis supplied)*

8.3 The respondent has neither provided terms of schedule rate for barge charges entered into with the importer M/s. IPL nor provided copy of contract entered into with various Barge owners whose services have been availed by them for providing output service of transportation of chemical fertilizers from ship to shore. I also find that as provided in Section 66F (1) of the Act, wherein principles of interpretation of specified descriptions of services <u>or bundled services</u> have been provided, which state that *"Unless otherwise specified, <u>reference to a service</u> (herein referred to as main service) <u>shall not include reference to a service which is used for providing main service</u>*. Hence, I find that the service providers in the instant case have not provided transportation service to the respondent but provided service of "supply of tangible goods for use". The services provided by the service providers by providing barges on hire can be categorized as input service for the respondent for providing output service of transportation of chemical fertilizers. I find that 'supply of tangible goods for use' service has not been specified in the exemption Notification *ibid*.

8.4 I also find that the respondent has not deposited this service tax into Government account, which they have sought refund. They are not entitled for refund of service tax paid on input service used for providing his exempted output service as there is no such provision in the Finance Act and Rules framed thereunder or under Section 11B of the Central Excise Act, 1944 made applicable to service tax vide Section 83 of the Act. Hence, sanctioning of refund claims to the respondent is not correct.

9. The department has also contended that the respondent has acted as an 'agent' for supply of these services to M/s. IPL and not provided transportation services to M/s. IPL. I find that this contention of the department is not correct as 'pure agent' has been defined under Rule 5(2) of Service Tax (Determination of Value) Rules, 2006 as under: -

> ***Explanation 1.*** *- For the purposes of sub-rule (2), "pure agent" means a person who -*
>
> *(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*
>
> *(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*
>
> *(c) does not use such goods or services so procured; and*
>
> *(d) receives only the actual amount incurred to procure such goods or services.*
>
> *(Emphasis supplied)*

9.1 I find that the respondent in the instant case has entered into composite contractual agreement with M/s. IPL for transportation of chemical fertilizers to many places and have the activity of bringing chemical fertilizers from ship to shore is essential and then only further transportation from shore to any specific place by road or by rail is possible. The respondent has availed services of hiring of barges for bringing the chemical fertilizers from ship to shore and paid Rs. 40/- to Rs. 45/- per metric tonne to the barge owners including service tax thereon but has charged Rs. 60/- per metric tonne from M/s. IPL, the importer to earn profit for themselves. Hence, the respondent has not acted as 'agent' for M/s. IPL and this contention of the department is not tenable.

10. The department has also contended that the respondent is engaged in providing various services and has availed cenvat credit of duty/tax paid on common inputs or input services for payment of service tax. The respondent submitted that they have claimed refund of service tax illegally charged by their supplier of services without authority of law in violation of Article 265 of the Constitution of India and, therefore, cenvat credit of service tax paid by them through the supplier of these services to them has been reversed by them before filing of these refund claims. I find that it is on record that the respondent has initially availed cenvat credit of service tax paid by them to their service providers, however, the respondent has reversed the cenvat credit at the time of filing refund claim, which was otherwise also not admissible to them as per Cenvat Credit Rules, 2004, because these services have been used by the respondent for providing exempted output service of transportation of goods by road or by rail. I also find that it is settled legal position that reversal of cenvat credit tantamounts to non-availment of cenvat credit. The submission of the respondent that the service providers have charged service tax illegally and without authority of law is not correct as the service providers have correctly charged service tax for providing barges on hire for bringing chemical fertilizers from ship to shore. This service has properly been classifiable under Section 65(105)(zzzzj) read with Section 66F (1) of the Act as discussed above. The confirmation of the service providers that they have provided services of transportation of goods is neither sufficient for classification of service nor correct. The verification of the invoices issued by the barge owners clearly reveals that they have charged service tax on barge hiring charges for 'supply of tangible goods service for use' and per tonnage collection is only a convenient method of collection of charges for supply of barges (tangible goods). This method of charging does not alter the chargeability of service tax as the service providers have provided barges (equipment), which were used for bringing goods/chemical fertilizer from ship to shore.

11. The department has also contended that provisions of unjust enrichment have not been examined properly by the lower adjudicating authority as to whether the value of so called exempted output services were inclusive of service tax elements or otherwise. The respondent has submitted that they have borne the burden of tax and

has claimed refund of service tax and also submitted that where service tax has been collected without authority of law, no case of undue enrichment was made out and the service tax paid earlier is required to be refunded. I find that the respondent entered into with agreement with M/s. IPL for transportation of goods at a consolidated rate inclusive of all expenses towards discharge of bulk fertilizers from the vessel into barges and further transportation by road, rail or bulk delivery from shore and godown charges for storage of imported chemical fertilizers. It has also been stipulated in the agreement that wherever service tax is applicable will be paid by M/s. IPL. The respondent's submission that the service providers have collected service tax from them without authority of law has already been held as not correct. The terms of the agreement of the respondent with M/s. IPL clearly provide that the rate for transportation of chemical fertilizers is inclusive of all expenses. It is also on record that the respondent has paid Rs. 40/- to Rs. 45/- per MT towards hiring of barges for transportation of chemical fertilizers but recovered Rs. 60/- per MT from M/s. IPL. Thus, I find that the incidence of service tax has been passed on to M/s. IPL.

12. In view of above factual and legal position, I set aside the impugned orders passed by the lower adjudicating authority and allow the appeals filed by the department.

१२.१ डिपार्टमेंट द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

12.1 The appeal filed by the Department stand disposed of in above terms.

(कुमार संतोष)
आयुक्त (अपील्स)

By Regd. Post AD

To,

M/s. International Cargo Terminals & Infrastructure Pvt. Ltd., 2nd floor, 'Jalpari', Pratap Palace Road, Opp. Guru Datattrey's Temple, Jamnagar – 361 008	मे. इंटरनेशनल कार्गो टेरमीनल्स एवं इन्फ्रास्ट्रक्चर प्रा. लिमिटेड, दूसरी मंज़िल, 'जलपरी' प्रताप पैलेस रोड, गुरु दत्तात्रेय के मंदिर के सामने, जामनगर - ३६१ ००८

Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Deputy Commissioner, GST & Central Excise Division, Jamnagar.
4. Guard File.