



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



सत्यमेव जयते

द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan

रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

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**रजिस्टर्ड डाक ए.डी.द्वारा :-**

क अपील / फाइलसंख्या/  
Appeal / File No.  
V2/188/BVR/2018-19

मूल आदेश सं /  
O.I.O. No.  
R-51/Refund/18-19

दिनांक/  
Date:  
11/10/2018

ख अपीलआदेशसंख्या(Order-In-Appeal No.):

**BHV-EXCUS-000-APP-237-2019**

आदेश का दिनांक/  
Date of Order: 21.10.2019

जारी करने की तारीख /  
Date of issue: 22.10.2019

22.10.2019

**श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /**  
**Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot**

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं 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/ST / GST,  
Rajkot/Jamnagar/Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-**  
**M/s. Madhu Silica Pvt. Ltd., DU-IV, situated at Plot No.147, Vartej, Bhavnagar-364060, .**

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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> 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) नियमवाली, 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 क्रमशः 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 नियमवाली, 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 क्रमशः 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 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 Form 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, बशर्त 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  
- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।  
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 पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक 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 छुट (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 इयूटी 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 समयावधि पर या बाद में पारित किए गए हैं। /  
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।  
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 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 चाहिए। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय 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, notwithstanding 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-1 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 ओर 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](http://www.cbec.gov.in) को देख सकते हैं। /  
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant refer to the Departmental website [www.cbec.gov.in](http://www.cbec.gov.in)



**:: ORDER-IN-APPEAL ::**

M/s Madhu Silica Pvt Ltd, Bhavnagar (*hereinafter referred to as "Appellant"*) filed Appeal No. V2/188/BVR/2018-19 against Order-in-Original No. R-51/Refund/2018-19 dated 11.10.2018 (*hereinafter referred to as 'impugned order'*) passed by the Asst. Commissioner, Central GST & Central Excise, Bhavnagar-1 Division, Bhavnagar Commissionerate (*hereinafter referred to as 'refund sanctioning authority'*).

2. The brief facts of the case are that the Appellant was engaged in the manufacture of Precipitated Silica. During Audit of the records of the Appellant, it was observed that the Appellant had not paid service tax on ocean freight service as recipient of service under reverse charge mechanism. On being pointed out, the Appellant paid service tax of Rs. 7,41,231/- along with interest and penalty on 26.6.2018.

2.1 The Appellant filed refund claim of Rs. 7,41,231/- on the ground that services availed by them was covered under the definition of 'input service' in terms of Rule 2(l) of the Cenvat Credit Rules, 2004 and hence, they were eligible to avail Cenvat credit of service tax paid by them but due to implementation of GST w.e.f. 1<sup>st</sup> July, 2017, they were not in a position to avail Cenvat credit of Service Tax and hence, they filed refund claim under Section 11B of the Central Excise Act, 1944.

2.2 It appeared to the refund sanctioning authority that service tax was paid by the Appellant on being pointed out by Audit and had it not been pointed out by Audit, the Appellant would not have paid service tax and hence, the Appellant was not eligible to avail Cenvat credit of service tax in view of provisions contained in Rule 9(1)(bb) of the Cenvat Credit Rules, 2004 (*hereinafter referred to as "CCR,2004"*). Show Cause Notice dated 10.9.2018 was issued to the Appellant calling them to show cause as to why they refund claim should not be rejected.

2.3 The refund sanctioning authority rejected the refund claim vide the impugned order.

3. Aggrieved, the Appellant has preferred appeal, *inter-alia*, on the following grounds:-

(ii) In order to streamline the manner of taxability on the service of transportation of goods by sea, the Govt. has issued many notifications viz.



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Notif. No. 01/2017-ST dated 12.01.2017, 02/2017-ST dated 12.01.2017, 03/2017-ST dated 12.01.2017, 14/2017-ST dated 13.04.2017 & 10/2017-CE (N.T) dated 13.04.2017 with further amendments; that frequent amendments in these notifications represent confusion of Govt. regarding levy and collection of service tax on service of transportation of goods through sea; that the appellant observed from the impugned order that the adjudicating authority did not properly examined all these confusion of the Govt. and rejected the refund claim with prejudice mind; that under the above circumstances and facts, the appellant is of the view that refund is to granted when no credit of service tax paid after 30.06.2017 is available under new GST tax regime, therefore, the appellant claimed refund under Section 11B of the Central Excise Act.

(iii) The findings of adjudicating authority at Para 9.5 of the impugned order are not acceptable and sustainable in law. Since, the appellant paid service tax on the service used for import of goods, the said imported goods were used in manufacturing of final product, hence, the used service is input service for the appellant; that provisions of Rule 4 (7) of the Cenvat Credit Rules allows credit of service tax paid by the importer of goods on the said service; that in the instant case appellant has paid service tax as importer of goods as person liable for paying service tax and is eligible for credit of the same; that the appellant has claimed the refund of service tax, on the ground that there is no provision under GST Act for availing credit of service tax paid after 30.06.2017; that the refund was rejected on the ground of restriction provided under Rule 9(1)(bb) of the Cenvat Credit Rules, which appears to be not legal and justified; that the restriction is applicable to the output service provider and not on the manufacture (importer); that the appellant being manufacturer of excisable goods paid service tax on said service in terms of Notification No. 13/2017-ST dated 13.04.2017 and credit of service tax is admissible to the appellant under Notification No. 10/2017-CE (N.T) dated 13.04.2017 w.e.f. 23.04.2017.

(iv) The adjudicating authority has not proven that the appellant is a output service provider and issued supplementary invoice, bill or challan; that the alleged allegation of non-payment of service tax was paid "on account of non-levy or non-payment or short levy or short payment by reason of fraud; or collusion; or willful <sup>full</sup> mis-statement; or suppression or contravention of any provisions of the Finance Act of the rules made thereunder with intent to evade payment of service tax" without any corroborative documentary evidences is not sustainable; that the above elements of reason are absent and not unearthed by the adjudicating authority; that the appellant had no such intentions to evade



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payment of service tax; that on the contrary the appellant produced all the relevant documents before audit officers and discharged service tax liability along with interest and penalty through challan without any objection; that it is a revenue neutral case and appellant maintained bonafide intentions for payment of service tax; that the department failed in proving any malafide intention with corroborative documentary evidences, therefore, the impugned order is not sustainable in law.

3.1 In Hearing, Shri R.R. Dave, Consultant appeared on behalf of the Appellant and reiterated the grounds of Appeal and submitted copy of Order-in-Original dated 20.8.2019 passed by the Asst. Commissioner, Ahmedabad-III Division sanctioning refund on similar issue and requested to decide the case accordingly.

4. I have carefully gone through the facts of the case, the impugned order, and written submissions made by the Appellant. The issue to be decided in the present appeal is whether the impugned order rejecting refund claim of Rs. 7,41,231/- is correct, legal and proper or not.

5. On going through the records, I find that the Appellant had paid service tax of Rs. 7,41,231/- on ocean freight, as recipient of service, on 26.6.2018 after being pointed out by the Audit, but due to implementation of GST w.e.f. 1.7.2017, they could not take Cenvat credit of said Service Tax paid by them and hence, they filed refund claim before the refund sanctioning authority. I find that the refund sanctioning authority rejected their refund claim on the ground that service tax on ocean freight was paid by them on being pointed out by the Audit and had it not been pointed by Audit, they would not have paid service tax and hence, they are not eligible to avail Cenvat credit of Service Tax in view of provisions contained in Rule 9(1)(bb) of CCR, 2004. On the other hand, the Appellant has contested that provisions of Rule 9(1)(bb) of CCR, 2004 are applicable to output service provider and not to them being manufacturer; that the department failed in proving any malafide intention with corroborative documentary evidences, therefore, the impugned order is not sustainable in law.

6. I find it is pertinent to examine the provisions of Rule 9(1)(bb) of CCR,2004, which are reproduced as under:

“(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on



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account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax;”

6.1 I find that it is on record that the Appellant paid service tax of Rs. 7,94,176/- on ocean freight on reverse charge mechanism after being pointed out by Audit. The Appellant would not have discharged their service tax liability, had it not been pointed by the Audit. It is also on record that the Appellant also paid penalty under Section 78 of the Finance Act, 1944. Thus, their case is covered under Rule 9(1)(bb) supra and they are not eligible to avail Cenvat credit of service tax paid by them.

7. Regarding plea of the Appellant that the Department has failed to prove any malafide intentions with documentary evidences, I find that during audit of the records of the Appellant, it was revealed that the Appellant had not discharged service tax on ocean freight being recipient of service. On being pointed out by Audit, the Appellant paid service tax along with interest. The Appellant also paid reduced penalty of Rs. 1,19,126/- @15% under Section 78 of the Finance Act, 1944.

“SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —

(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :

Provided further that where service tax and interest is paid within a period of thirty days of —

(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period :

... ..”

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7.1 I find that penalty under Section 78 of the Act is imposed where any service tax has not been paid, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax. Since, the Appellant *suo moto* paid reduced penalty under Section 78 of the Finance Act, 1944, it becomes apparent that the Appellant themselves admitted that there existed ingredients for imposition of penalty under Section 78 of the Finance Act, 1944.

8. Regarding plea of the Appellant that provisions of Rule 9(1)(bb) of CCR, 2004 are applicable to output service provider and not to them being manufacturer, I find that the Appellant was liable to pay service tax as recipient of service and as per Rule 2(r) of CCR, 2004, "provider of taxable service" includes a person liable for paying service tax. Hence, provisions of Rule 9(1)(bb) of CCR, 2004 are applicable to the Appellant.

9. In view of the above, I hold that the Appellant is not eligible to avail Cenvat credit of service tax paid in terms of Rule 9(1)(bb) of CCR, 2004 and since service tax paid by them is not available as Cenvat credit, the refund sanctioning authority correctly rejected their refund claim. I, therefore, uphold the impugned order and reject the appeal.

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

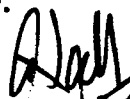
10. The appeal filed by the Appellant is disposed off as above.

सत्यापित,



विपुल शाह

अधीक्षक (अपील)

  
(Gopi Nath) 21/11/19  
Commissioner (Appeals)

By R.P.A.D.

To, M/s Madhu Silica Pvt Ltd, Plot No. 147, GIDC Vartej, Bhavnagar.	सेवा में, मे. मधु सिलिका प्राइवेट लिमिटेड प्लॉट न. 147, जीआईडीसी वरतेज, भावनगर।
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प्रतिलिपि :-

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात



- क्षेत्र,अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
  - 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, भावनगर-1 मण्डल, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
  - 4) गार्ड फ़ाइल।

