

राज्यीय स्तर, ए. एन. डी. भवन एडि. राजदरवाजा, दिल्ली

रत मकाने नगर रोज. - Erud Colony, Erode, Tamil Nadu

फ़ोन नं. : 2234884, 2634821

T.E. Tax No. : 2201/2019-20 - 2019/2019-20 (2019) 2019/2019-20

राजिस्ट्रेशन नंका ए. पी. दुवारा :-

Table with 3 columns: Date, Case No., and Assessment Year. Row 1: 11.12.2018, 22570/4/2019, 2018-19.

अपील आदेश संख्या (Appeals Appellate No.)

KCI-ENCUS-000-APP-214-2018-19

अदेश का तिथि: 11.12.2018, रत मकाने नो तिथि: 14.12.2018

कुमार संतोष, राजपुत्र (अपीलकर्ता), राजदरवाजा, दिल्ली
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

अपीलकर्ता का नाम, पता, शहर, राजपुत्र (अपीलकर्ता), राजदरवाजा, दिल्ली

अपीलकर्ता का पता, शहर, राजपुत्र (अपीलकर्ता), राजदरवाजा, दिल्ली

अपीलकर्ता & अपीलकर्ता का नाम एवं पता (Name & Address of the Appellant & Revenue)
Aarti Power Limited,, 10th Floor, Sanbhay Building,, Judges Bungalow Road, Bodakdev, Ahmedabad (K.G.)

अपीलकर्ता का पता, शहर, राजपुत्र (अपीलकर्ता), राजदरवाजा, दिल्ली

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ORDER IN APPEAL

M/s. Adani Power Ltd., 7<sup>th</sup> Floor, Samanay Building, Judges Bungalow Road, Bosakdev, Ahmedabad (hereinafter referred to as appellant) filed present appeal against Order-In-Original No. 717/ST/Ret/2010 dated 25.11.2010 (hereinafter referred to as "the impugned order") passed by Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. The brief facts of the case are that the appellant filed refund claim of Rs. 3,34,80,486/- on 5.11.2009 in respect of service tax paid towards services received by them for authorized operations in SEZ under Notification No. W2008-51 dated 3.3.2009 as amended vide Notification No. 15/2009-ST dated 20.5.2009. Show Cause Notice No. W13 1-8/ST/Ret/09-10 dated 26.6.2010 was issued to the appellant proposing rejection of refund claim on the grounds mentioned therein. The lower adjudicating authority vide impugned order sanctioned refund claim to the extent of Rs. 3,05,83,185/- but rejected refund claim aggregating to Rs. 21,50,310/- out of which refund of Rs. 1,030/- was rejected for the reason that refund claim was filed beyond prescribed time limit, refund of Rs. 20,71,77/- rejected on the ground that the services were not exclusively consumed in SEZ, refund of Rs. 77,25/- rejected as the invoice did not mention purpose of use and thereby category of service could not be correlated with the specified services approved by the Approval Committee, refund of Rs. 250/- rejected as services of dismantling of air conditioners were availed at their Ahmedabad office. The lower adjudicating authority also rejected refund of Education Cess of Rs. 6,27,861/- and refund of Secondary & Higher Secondary Education Cess of Rs. 3,03,891/- on the ground that there was no provision in Notification No. W2009-57 dated 3.3.2009 to grant exemption to Education Cess and Secondary & Higher Secondary Education Cess.

3. Being aggrieved with the impugned order, the appellant preferred present appeal, inter alia, on the grounds as under:

(1) The appellant complied with the conditions set out in the said Notification and submitted the required documents and hence, the appellant was entitled to get refund of entire amount of service tax as claimed by them without rejection of any amount. There is no dispute that the services were received by the appellant for SEZ operations and that service in dispute has been specified and approved by the approval committee. Once it is admitted that services have been used for SEZ activity and were mentioned in the list of approved authorized operation in SEZ, the appellant is entitled for refund and the same cannot be denied on technical grounds. It is settled legal position that when an assessee had fulfilled substantial eligibility conditions of Notifications, besides, any or fulfillment of procedural part is required to be condoned and substantial rights accruing to the appellant ought not to be denied. Further it was not in dispute that the service tax, claimed by the

appellant, as refund had actually been paid, other conditions as mentioned in the said Notification would be considered as procedural conditions and refund ought not to have been denied on technical/procedure ground.

(ii) The Notification like statute must be construed having regard to purpose and object it seeks to achieve, hence statutory scheme for issuance of such Notification also needs to be considered. The appellant relied on decisions in the case of *M/s. Wa Industries Limited* reported as 2009 (235) F.T. 214 (SC) and *Talwar India and Operations Limited* reported as 2008 (189) E.L. 401 (SC) to say that exemption notification cannot be construed in a way, which prove to be operative in nature.

(iii) The lower adjudicating authority denied refund claim of Rs. 20,71,771/- on the ground that the appellant ought not to have filed refund claim in terms of amended Notification since the entire service has been consumed in EEZ. It was submitted that when the service in question was provided to the appellant, the amended Notification was not in existence. The service provider *M/s. Shandag Tejraj Electric Power Engineering Ltd.* raised interim bill dated 21.5.2008 for services provided by them in April, 2008. The appellant produced letter dated 28.1.2010 of the service provider certifying that Invoice No. AFL STPCG-0-014 dated 21.5.2008 was issued after completion of work. The lower adjudicating authority has not adduced any evidence to substantiate rejection of claim on this account.

(iv) The lower adjudicating authority denied refund of Rs. 71,25/- on the ground that the appellant did not give any explanation in respect of trip shown to have been made from Ahmedabad - Mumbai - Mumbai - Ahmedabad. It is submitted that the appellant hired services of *Karnaveli Aviation Private Limited* for visiting their employees for business trip to Ahmedabad and Mumbai that they have to visit Ahmedabad, Mumbai and other various locations on many occasions for official meetings with Government officials, Bankers & Investors and used for authorized operations. It is undisputed fact that service of transportation of passengers by air services has been used in relation to authorized operations in SEZ, duly approved by the approval committee and that the appellant paid service tax to the service provider; therefore, rejection of refund claim is erroneous and unlawful.

(v) The lower adjudicating authority denied refund of cess on the ground that the said Notification does not contain any clause of exemption to cess. The lower adjudicating authority failed to appreciate that Section 95(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act') has specifically provided that Education Cess levied and collected under Section 97 shall be service tax. That Section 95(2) of the Act states that education cess on taxable service shall be in addition to

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service tax chargeable under Chapter V of the Act. Hence, when refund of service tax is to be allowed, the cess paid on service tax is also to be refunded. The lower adjudicating authority failed to appreciate that the Notification provides exemption from whole of the service tax leviable thereon under Section 66 of the Act. Since cess is levied and collected under Section 66 of the Act, the same is covered under the said Notification. Section 95(3) of the Act envisages that provisions of Chapter V of the Act and Rules framed thereunder, including those relating to refund and exemptions from tax and imposition of cesses shall, as far as may be applied in relation to levy and collection of education cess on taxable service as they apply in relation to levy and collection of tax on such taxable services under Chapter V of the Act and Rules made thereunder. There is no need to issue separate Notification for refund of cess. The appellants relied on decisions in the case of Viper Chemicals Pvt. Ltd. reported as 2009 (236) E.L.T. 44 (Guj.) and Banswara Synthex Ltd. reported as 2007 (216) E.L.T. 16 (Raj.) in support of their contentions.

3.1 The present appeal was kept in Call Book due to appeal filed by the department in a similar case in the Hon'ble Supreme Court against decision of the Hon'ble High Court of Jammu & Kashmir in case of Bharat Box Factory Ltd. reported as 2008 (237) E.L.T. 476 (J&K). The decision of the Hon'ble High Court was approved by the Hon'ble Apex Court and reported as 2017 (355) F.T. 461 (SC). This appeal was, thus, taken out of Call Book for passing order.

4. Personal hearing in the matter was attended by Sri Rahul Patel, Chartered Accountant who reiterated the grounds of appeal and submitted that the services provided to SEZ are exempted and hence refund needs to be allowed to them; that CESTAT Ahmedabad in the case of Inesa Pharma Ltd. reported as 2015 (32) S.I.T. (4) (Trib. - Ahmed.) and CESTAT Mumbai in the case of Sears IT & Management Services (I) Pvt. Ltd. reported as 2018 (3) GSTT 425 (Trib. - Mumbai) have given decisions in favour of appellants and against the department and the department has accepted these orders; that service tax of Rs. 20.71 lakhs need to be refunded; that Education Cess & Secondary & Higher Education Cess are like service tax only and hence no need to be stated separately in the Notification of service tax; that if no service tax is payable, cess is automatically not payable as held by High Courts in Viper Chemicals Pvt. Ltd. reported as 2009 (233) E.L.T. 44 (Guj.) and Banswara Synthex Ltd. reported as 2007 (216) F.T. 16 (Raj.).

#### Findings:

5. I have carefully gone through the facts of the case, the proposed order, the grounds of appeal and the submissions made by the appellant. The issues to be decided in the present appeal are: -

(i) Whether the appellant is eligible for refund of service tax paid on the services received for authorized operations in SEZ in view of Notification No. 9/2009-ST dated 03.03.2009 as amended vide Notification No. 15/2009-ST dated 20.5.2009 or not and

(ii) Whether the appellant is eligible for refund of Education Cess and Secondary & Higher Education Cess paid on services or otherwise.

5. The lower adjudicating authority has rejected refund of Rs. 1,332/- for the reason that the appellant paid service tax towards services received under Invoice No. 331 dated 31.3.2009 and filed refund claim on 5.11.2006 and hence time barred in view of Notification No. 9/2009-ST dated 03.03.2009 as amended. I find that Para 2(f) of the said Notification provides that the claim for refund shall be filed, within six months or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit from the date of actual payment of service tax by such developer or unit to service provider. It is settled legal position that word 'shall' has to be read and construed as mandatory and not discretionary. I also find that Section 26(e) of SEZ Act, 2005 provides unconditional exemption to SEZ unit from payment of service tax on services received for authorized operation. Section 51 of SEZ Act, 2005 provides that provisions of SEZ Act shall have overriding effect over other law/Act in case of any inconsistency as has also been clarified by CBEC in Para 3 of CBEC Circular No. 10018/2016-CX.3 dated 28.04.2016. The SEZ Act and the rules have not provided any conditions for granting exemption from payment of service tax and therefore, I hold that refund claim of Rs. 1,332/- cannot be held time barred.

6.1 The lower adjudicating authority has rejected refund of Rs. 20,71,770/- on the ground that the invoice towards receipt of service was issued after issuance of Notification No. 15/2009-ST dated 20.5.2009 which exempts service tax on services wholly consumed in SEZ whereas the appellant contended that the service provider has provided service in April, 2009 and invoice dated 21.5.2009 was raised after completion of rendering service. The appellant has also produced letter dated 28.1.2010 of the service provider certifying that Invoice No. API-ST/PC-3-014 dated 21.5.2009 was issued after completion of work. I find that receipt of service for authorized operation in SEZ and payment of service tax to the service provider is not under dispute. Further, the service tax on the services received for authorized operation in SEZ were exempted and since the appellant has paid service tax as established from returns, the refund cannot be denied on this ground. Hence, I find that rejection of refund of service tax of Rs. 20,71,770/- is also not correct, legal and proper.

6.2 The lower adjudicating authority has rejected refund of Rs. 77,291/- as the invoice did not mention purpose of visit and thereby category of service could not be correlated with the specified services approved by Approval Committee whereas the appellant contended that they hired service of Karnavati Aviation Private Limited for visiting their employees for business trip to Ahmedabad and Mumbai; that they have to regularly visit Ahmedabad, Mumbai and other locations for official meetings with the Government officials, Bankers & Investors and used for authorized operations and that service of transportation of passengers by air services has been used in relation to authorized operations in SFZ approved by the approval committee. I find that no documents in support of arguments could be produced by the appellant. The appellant is duty bound to demonstrate that the service was used for authorized operations in SFZ. In absence of any such demonstrations with documentary evidences, refund for hired services of Karnavati Aviation Private Limited can't be allowed. I agree with the rejection of refund decided in the impugned order.

6.3 I also find that the appellant has availed services of dismantling of air conditioners for their registered office at Ahmedabad and not used the service for authorized operations in SFZ, they are not entitled for refund of Rs. 253/- paid towards receipt of the service tax fee other than authorized operations.

7 The lower adjudicating authority rejected refund of Education Cess of Rs. 6,07,921/- and refund of Secondary & Higher Secondary Education Cess of Rs. 3,03,961/- on the ground that there was no provision in Notification No. 9/2009-ST dated 3.3.2009 for grant of exemption to Education Cess and Secondary & Higher Secondary Education Cess whereas the appellant contended that Section 89(1) of the Act provided that Education Cess levied and collected under Section 89 shall be service tax that Section 89(2) of the Act states that education cess on taxable service shall be in addition to service tax chargeable under Chapter V of the Act; that when refund of service tax is to be allowed, the cess paid on service tax is also to be refunded. That Section 55(3) of the Act envisages that provisions of Chapter V of the Act and Rules framed thereunder including those relating to refund and exemptions from tax and imposition of penalty shall as far may be applied in relation to levy and collection of education cess on taxable service as they apply in relation to levy and collection of tax on such taxable services under Chapter V of the Act and Rules made thereunder. I find that service tax includes Education Cess and Secondary & Higher Education Cess in terms of provisions of Section 89 of the Finance Act, 2004 and Section 143 of the Finance Act, 2007 and hence, the provisions of refund and exemption of the Act are also applicable to Education Cess and Secondary & Higher Education Cess, that the exemption from service tax under Notification No. 9/2009-ST dated 3.3.2009 as amended is also

applicable to Education Cess and Secondary & Higher Education Cess as discussed below.

7.1 The Education Cess was levied vide under Sections 91 & Section 90 of Chapter VI of the Finance (No.2) Act, 2004 which read as under.

91. Education Cess - (1) Without prejudice to the provisions of sub-section (1) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance unreserved quality basic education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilize such sums of money of the Education Cess levied under sub-section (1) of section 2 and this Chapter for the purposes specified in sub-section (1), as it may consider necessary.

95. Education Cess on taxable services - (1) The Education Cess levied under section 91, in the case of all services which are taxable services, shall be a tax (in this section referred to as the Education Cess on taxable services) at the rate of two per cent, calculated on the tax which is levied and collected under section 66 of the Finance Act, 1994 (32 of 1994).

(2) The Education Cess on taxable services shall be in addition to the tax chargeable on such taxable services under Chapter V of the Finance Act, 1994 (32 of 1994).

(3) The provisions of Chapter V of the Finance Act, 1994 (32 of 1994) and the rules made thereunder, including those relating to refunds and exemptions from tax and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994 or the rules on the case may be.

7.2. The Secondary & Higher Education Cess was levied vide under Sections 136 & Section 140 of Chapter VI of the Finance Act, 2007, which read as under:

136. Secondary and Higher Education Cess:

(1) Without prejudice to the provisions of sub-section (1) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilize such sums of money of the Secondary and Higher Education Cess levied under sub-section (1) of section 2 and this Chapter for the purposes specified in sub-section (1) as it may consider necessary.

140. Secondary and Higher Education Cess on taxable services - (1) The Secondary and Higher Education Cess levied under section 136, in the case of all services which are taxable services, shall be a tax (in this section referred to as the Secondary and Higher Education Cess on taxable services) at the rate of one per cent, calculated on the tax which is levied and collected under section 66 of the Finance Act, 1994 (32 of 1994).



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(2) The Secondary and Higher Education Cess on taxable services shall be in addition to the tax chargeable on such taxable services under Chapter V of the Finance Act, 1994 (32 of 1994) and the Education Cess chargeable under section 95 of the Finance (No. 2) Act, 2004 (22 of 2004).

(3) The provisions of Chapter V of the Finance Act, 1994 (32 of 1994) and the rules made thereunder, including those relating to refunds and exemptions from tax and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994 or the rules made thereunder, as the case may be.

7.2 Thus, the Education Cess and Secondary & Higher Education Cess were in nature of surcharge and were levied under Section 91 of the Finance (No. 2) Act, 2004 and Section 135 of the Finance Act, 2007 respectively as surcharge tax at the rate of 2% and 1% respectively to be calculated on the aggregate value of taxable services and are levied and collected by the Central Government. The provisions of the Act and the rules made thereunder, including those relating to refunds and exemptions from tax and imposition of penalty were made applicable to the levy and collection of the Education Cess and Secondary & Higher Education Cess on taxable services as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Act.

7.4 and that Notification No. 9/2009-ST dated 3.3.2009 had granted total exemption from levy of service tax in respect of services used for authorized operations in SEZ. Education Cess and Secondary and Higher Education Cess were levied on taxable services and when the service tax on taxable services itself was exempted by way of refund, then the Education Cess and Secondary and Higher Education Cess also got exempted thereby. Hence, the question of levy of any surcharge or cess or whatever name is called thereupon would not arise.

7.5 CBEC vide Circular No. 134/3/2011/ST dated 08.04.2011 clarified that since Education Cess and Secondary & Higher Education Cess were levied and collected as percentage of service tax, no Education Cess and Secondary & Higher Education Cess would be payable when and wherever service tax is nil by virtue of exemption. Circular No. 134/3/2011/ST dated 08.04.2011 is reproduced as under.

Subject: Education Cess and Secondary and Higher Education Cess - Reg.

Representations have been received from the field formations, seeking clarification regarding the applicability of service tax exemption to Education Cess payable to both Education Cess leviable under Finance (No. 2) Act, 2004 and Secondary and Higher Education Cess leviable under Finance Act, 2007, under notifications where whole of service tax stands exempted. Apparently the doubt arises in the context of Tribunal's Order in the matter of *M/s. Devasare Alloys Ltd. v. CCE, Customs and Service Tax, RRS-1 (2010-TIC) -1669-CFSTAT-KOL* = 2010 (29) S.T.R. 505 (Tribunal).

2. The issue has been examined. Though Tribunal's Order referred above is in favor of revenue, it is inconsistent with the policy intention of the Government to exempt education cess in addition to service tax where whole of service tax stands exempted. According to section 25(1) of Finance (No. 2) Act, 2004 and section 14(1) of Finance Act, 2007 Education Cess and Secondary and Higher Education Cess are leviable and collected as service tax, and when whole of service tax is exempt, the same applies to education cess as well. Since Education Cess is levied and collected as percentage of service tax, when and wherever service tax is nil by virtue of exemption, Education Cess would also be Nil.

3. This being the principle laid down, it is directed not to initiate proceedings to recover the education cess, where 'whole of service tax' stands exempted under the notification. Extending the same principle, where education cess has been levied in exporters along with service tax, by virtue of exemption notifications, where whole of service tax is exempt, the same need not be recovered.

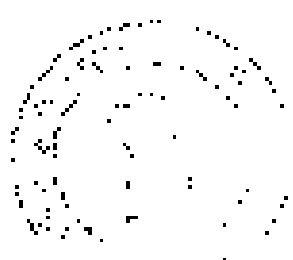
7.6 I find that on the issue of levy of Education Cess when the Central Excise duty was exempted, the Honble Apex Court in the case of SRD Nutrients Pvt Ltd recorded as 2017 (355) F.T. 431 (57) has held as under.

20. One aspect that clearly emerges from the reading of these two circulars is that the Government itself has taken the position that where whole of excise duty or Service Tax is exempted, even the Education Cess as well as Secondary and Higher Education Cess would not be payable. These circulars are binding on the Department.

21. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education Cess is an excise duty. It means that those assesses who are required to pay excise duty have to shell out Education Cess as well. This Education Cess is introduced by Sections 91 to 93 of the Finance (No. 2) Act, 2004. As per Section 91 thereof, Education Cess is the surcharge which the assessee is to pay. Section 93 makes it clear that this Education Cess is payable on 'excisable goods' i.e. in respect of goods specified in the first Schedule to the Central Excise Tariff Act, 1985. Further, this Education Cess is to be levied @ 2% and calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of Central Excise Act, 1944 or under any other law for the time being in force. Sub-section (3) of Section 93 provides that the provisions of the Central Excise Act, 1944 and the rules made thereunder, including those related to refunds and duties etc., shall as far as may be applied in relation to levy and collection of Education Cess on excisable goods. A careful reading of these provisions would amply demonstrate that Education Cess as a surcharge, is levied @ 2% on the duties of excise which are payable under the Act. It can, therefore, be clearly inferred that when there is no excise duty payable, as it is exempted, there would not be any Education Cess as well. Inasmuch as Education Cess @ 2% is to be calculated on the aggregate of duties of excise, there cannot be any surcharge when basic duty itself is Nil.

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24. For the aforesaid reasons, we allow these appeals and hold that the appellants were entitled to refund of Education Cess and Higher Education Cess which was paid along with excise duty upon the excise



duty itself was exempted from law. There shall, however, be no order as to cost."

(Emphasis supplied)

7.7. Hence I hold that the appellant is eligible for refund of Education Cess and Secondary & Higher Education Cess paid on taxable services used for authorized operations in SF7 under Notification No. 9/2009-S dated 30.12.09, as amended.

8. In view of above, I set aside the impugned order except rejection of refund of Rs. 77,291/- and refund of Rs. 258/- and allow the appeal filed by the appellant with consequential relief, if any, and appeal for refund of Rs. 77,291/- on related invoices issued for hiring of trisla to Ahmedabad, Bombay, etc. and refund of Rs. 258/- for dismantling of air conditioners at their office at Ahmedabad is rejected.

9. अपीलकर्ता द्वारा दलील की वजह अपील का निराकरण अर्थात् अंशिक से किया जाता है।

10. The appeal filed by the appellant is disposed off in above terms.

सचिव, अपील विभाग

(कुमार सेठ) (अधीनस्थ)  
अधीनस्थ (अधीनस्थ)

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से. अदानी पावर लिमिटेड,  
7<sup>th</sup> फ्लोर, सन्सार बिल्डिंग,  
जुद्धीन कुलावत रोड,  
बोडवद,  
अहमदाबाद

Copies:

- 1) The Chief Commissioner, CCSF & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information please.
- 2) The Commissioner, CCSF & Central Excise, Kutch Commissionerate, Gandhinagar for necessary action.
- 3) The Assistant Commissioner, CCSF & Central Excise Division-Rtuj, Gandhinagar for further necessary action.
- 4) Guard File

