::प्रधानआयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय उत्पाद शुल्क::
O/O THE PRINCIPAL 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 – 2477952/2441142Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/41/GDM/2018-19	12AC/RR/Ref/CGST MUNDRA/2017-18	08.06.2018

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

KCH-EXCUS-000-APP-059-2019

आदेश का दिनांक / Date of Order:	12.06.2019	जारी करने की तारीख / Date of issue:	13.06.2019

श्री कुमार संतोष, प्रधान आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, 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 **Appellant** & Respondent :-

M/s Adani Wilmar Limited, Village-Dhrub, Mundra, Kutch-370421, .

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से 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- ३८००१६को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 माँग ,ब्याज की माँग 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 रजिस्ट्रार के नाम से किसी भी सार्वजिनक 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 dutydemand/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 माँग ,ब्याज की माँग 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 रजिस्ट्रार के नाम से किसी भी सार्वजिनक 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 Commissionerauthorizing 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 कोपुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर 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 ड्यूटी क्रेडीट 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 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 आदेशो 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 नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers variousnumbers 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 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 को देख सकते हैं । /
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.

:: ORDER IN APPEAL ::

M/s. Adani Wilmar Ltd., Village – Dhrub, Mundra, Kutch – 370421 (hereinafter referred to as 'appellant') filed present appeal against Order-in-Original No. 12/AC/RR/Ref/CGST Mundra/2017-18 dated 8.6.2018 (hereinafter referred to as "impugned order") passed by the Assistant Commissioner, Central GST Division, Mundra (Kutch) (hereinafter referred to as "the adjudicating authority"): -

2. The brief facts of the case are that the appellant on 19.2.2018 filed claim for refund of service tax of Rs. 5,19,28,216/- paid on Ocean freight during May, 2017 and June, 2017 on the ground that as an abundant precaution, they had paid service tax on full value of transportation service without availing of exemption under Sl.No. 10 of Notification No. 26/2012-ST dated 20.6.2012. The lower adjudicating vide impugned order rejected the refund claim filed by the appellant on the ground of CBEC Circular No. 206/4/2017 dated 13.4.2017 stating that benefit of the exemption would not be available in a case where the services are rendered by a foreign shipping lines as much as the said shipping lines are not registered in India and do not follow the provisions of Cenvat Credit Rules, 2004.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal, *inter-alia*, on the following grounds: -

(i) The impugned order is ex-facie and illegal as the same has been passed without putting the appellant to notice as to the proposed grounds for rejection of refund claim filed by the appellant; that the lower adjudicating authority failed to follow the procedure of judicial fairness and passed the impugned order, which is contrary to the principles of equity, fairness and natural justice; that the appellant relied on decision of the Hon'ble Supreme Court in the case of Shukla & Bros. reported as 2010 (254) ELT 6 (SC).

(ii) The appellant is entitled to exemption on 70% of value of services of transportation of goods in a vessel provided by a foreign shipping line under Sl.No. 10 of Notification No. 26/2012-ST dated 20.6.2012; that cenvat credit on inputs, capital goods and input services used for providing the taxable service has not been taken by the service provider under Cenvat Credit Rules, 2004 and therefore, condition for availment of exemption under the said Notification is satisfied; that the lower adjudicating authority has merely relied on CBEC Circular No. 206/4/2017 dated 13.4.2017 and Notification No. 15/2017-ST dated 13.4.2017 without dealing the fulfilment of conditions and eligibility of exemption under Notification No. 26/2012-ST dated 20.6.2012 and hence, the denial of refund in respect of service tax paid on 70% of the value of services is unsubstantiated, untenable and bad in law.

(iii) CBEC Circular No. 206/4/2017 dated 13.4.2017 regarding scope of exemption under Notification No. 26/2012-ST dated 20.6.2012 is contrary to the judgments pronounced by the Hon'ble Supreme Court in the case of SRF Ltd. reported as 2015 (318) ELT 607 (SC) and AIDEK Tourism Services Pvt. Ltd. reported as 2015 (318) ELT 3 (SC); that it is settled law laid down by the Constitutional Bench of the Hon'ble Supreme Court in the case of Ratan Melting reported as 2008 (231) ELT 22 (SC) that circulars or clarifications issued by the Board, contrary to the judgments of the Supreme Court, have no existence in law; that the lower adjudicating authority has not dealt with the appellant's submissions and has simply stated that the judgments referred to by the appellant are not applicable to the instant case, without giving reasons in his decision/order.

(iv) The lower adjudicating authority has reproduced text of Notification No. 15/2017-ST dated 13.4.2017 and held that in view of this Notification, refund is not admissible without actually applying the substance of the Notification or giving any reasons in support of the same; that Notification No. 15/2017-ST has no relevance to the determination of benefit of exemption under Notification No. 26/2012-ST; that Notification No. 15/2017-ST notifies that in respect of services of transport of goods by a vessel from place outside India up to the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the importer as defined under Section 2(26) of the Customs Act, 1962 of such goods; that specifying the person liable to pay service tax is an issue that is altogether distinct and different from the issue of exemption available to such person; that the importer is liable to pay service tax under reverse charge in respect of the said service is not in dispute; that the present case relates only to the applicability of exemption under Notification No. 26/2012-ST to service of transportation of goods by vessel, which is different issue, to which Notification No. 15/2017-ST has no applicability; that there is nothing to show that Notification No. 15/2017-ST has any application or relevance to the decision of the Hon'ble Supreme Court in the case of SRF Ltd.; that if the Central Government had the intention to restrict the benefit of exemption under Notification No. 26/2012-ST only to domestic service providers of transportation of goods by vessel after the decision in SRF Ltd., it would have introduced suitable amendment to the provisions and conditions in Notification No. 26/2012-ST as has been done in the case of Notification No. 34/2015-CE to Notification No. 36/2015-CE all dated 17.7.2015.

(v) The burden of service tax has not been passed on to any other person by them and the amount of refund claimed has been recorded by the appellant in their Books of Accounts as "Receivable" and copy of Certificate dated 29.5.2018 of Shri Dharmesh Parikh & Co., Chartered Accountant is submitted along with appeal memorandum.

(vi) The appellant is engaged in the manufacture of edible oils and was not eligible to take cenvat credit of service tax and the appellant has not availed cenvat credit of service tax paid on full value of transportation service provided by foreign shipping lines.

4. Personal hearing in the matter was attended by Shri S.J. Vyas, Advocate, who reiterated the grounds of appeal and submitted that the cenvat credit for providing ocean freight service has not been taken by them; on query to submit evidence before the adjudicating authority, he replied that they have not submitted; that this was not issue in their perception; that this issue has been decided by the Hon'ble Apex Court in SRF Ltd. reported as 2015 (318) ELT 607 (SC); that appeal may be allowed.

FINDINGS:

5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal and the submissions made by the appellant including during personal hearing. I find that this being the case of refund, provisions of Section 35F of the Central Excise Act, 1944 are not applicable. The issue to be decided in the present case is as to whether rejection of refund claim of service tax paid on full value of service of transportation of goods in a vessel is correct or not.

6. I find that the appellant filed refund claim for differential service tax of Rs. 5,19,28,216/- paid on Ocean freight during May, 2017 and June, 2017 since they had paid service tax on full value of the transportation service of goods in a vessel without availing of exemption under Sl.No. 10 of Notification No. 26/2012-ST dated 20.6.2012 as amended, which reads 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 13/2012-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. 211(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 taxable service of the description specified in column (2) of the Table below, from so much of the service tax leviable thereon under section 66B of the said Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (3) of the said Table, of the amount charged by such service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table, namely :-

TABLE

Sl.No.	Description of taxable service	Percent-age	Conditions
(1)	(2)	(3)	(4)
1	----	----	----
[illegible]	---	---	---

| ---- | --- | ---- | --- |
| 10 | Transport of goods in a vessel | 30 | CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. |

(Emphasis supplied)

6.1 I would also like to reproduce Notification No. 15/2017-ST dated 13.4.2017, which reads as under: -

> In exercise of the powers conferred by sub-section (2) of section 68 of the Finance Act, 1994 (32 of 1994), the Central Government, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 30/2012-Service Tax, dated the 20th June, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* number G.S.R. 472(E), dated the 20th June, 2012, namely :-
>
> 1. In the said notification, for *Explanation III and Explanation IV,* following shall be substituted, namely:-
>
> *"Explanation III.* - The business entity located in the taxable territory who is litigant, applicant or petitioner, as the case may be, shall be treated as the person who receives the legal services for the purpose of this notification.
>
> *Explanation IV.* - For the purposes of this notification, "non-assessee online recipient" has the same meaning as assigned to it in clause (ccba) of sub-rule (1) of rule 2 of Service Tax Rules, 1994.
>
> *Explanation V.* - For the purposes of this notification, in respect of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the importer as defined under clause (26) of section 2 of the Customs Act, 1962 (52 of 1962) of such goods.".
>
> 2. This notification shall come into force on the 23rd day of April, 2017.

(Emphasis supplied)

6.2 Hence, with effect from 23.4.2017, in case of transport of goods in a vessel, the importer of the goods made liable for payment of service tax on 30% value of service of transportation of goods in a vessel subject to condition that cenvat credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. The Notification No. 26/2012-ST dated 20.6.2012 has neither been withdrawn till the date of payment of service tax by the appellant nor amended to the effect that exemption is not available

in a case of service of transportation of goods in a vessel provided by the foreign shipping lines. I find that the foreign shipping lines do not get registered in India and not required to follow the provisions of Cenvat Credit Rules and hence, the question of availment of cenvat credit by the service provider i.e. foreign shipping lines does not arise and in this case, neither they nor appellant has taken cenvat credit on this account and thus, condition stipulated in Notification No. 26/2012-ST dated 20.6.2012 stands fulfilled in this case and therefore, the appellant is entitled for benefit of exemption provided under the said Notification and is liable to pay service tax only on 30% value of taxable service. Hence, the service tax paid on remaining 70% value of taxable service is liable to be refunded to the appellant as the incidence of service tax has not been passed on to any other person as certified by the Chartered Accountant vide Certificate dated 29.5.2018, which has not been disputed by the department.

6.3 In this regard, I rely on judgment of the Hon'ble Apex Court in the case of SRF Ltd. reported as 2015 (318) ELT 607 (SC) wherein the Hon'ble Supreme Court decided eligibility of exemption from payment of CVD under Notification No. 6/2002-CE dated 1.3.2002 which has similar condition that "If no credit under Rule 3 or Rule 11 of the Cenvat Credit Rules, 2002, has been taken in respect of the inputs or capital goods used in the manufacture of these goods". The relevant para of the said judgment is re-produced as under: -

> 6. In the present case, admitted position is that no such Cenvat credit is availed by the appellant. However, the reason for denying the benefit of the aforesaid Notification is that in the case of the appellant, no such credit is admissible under the Cenvat Rules. On this basis, the CEGAT has come to the conclusion that when the credit under the Cenvat Rules is not admissible to the appellant, question of fulfilling the aforesaid condition does not arise. In holding so, it followed the judgment of the Bombay High Court in the case of 'Ashok Traders v. Union of India' [1987 (32) E.L.T. 262], wherein the Bombay High Court had held that "it is impossible to imagine a case where in respect of raw nephtha used in HDPE in the foreign country, Central Excise duty leviable under the Indian Law can be levied or paid." Thus, the CEGAT found that only those conditions could be satisfied which were possible of satisfaction and the condition which was not possible of satisfaction had to be treated as not satisfied.
>
> 7. We are of the opinion that the aforesaid reasoning is no longer good law after the judgment of this Court in *'Thermax Private Limited* v. *Collector of Customs (Bombay), New Customs House'* [1992 (4) SCC 440 = 1992 (61) E.L.T. 352 (S.C.)] which was affirmed by the Constitution Bench in the case of *'Hyderabad Industries Limited* v. *Union of India'* [1999 (5) SCC 15 = 1999 (108) E.L.T. 321 (S.C.)]. In a recent judgment pronounced by this very Bench in the case of *'AIDEK Tourism Services Private Limited* v. *Commissioner of Customs, New Delhi'* [Civil Appeal No. 2616 of 2001 - 2015 (318) E.L.T. 3 (S.C.)], the principle which was laid down in *Thermax Private Limited* and *Hyderabad Industries Limited* was summarized in the following manner-
>
> "15. The ratio of the aforesaid judgment in *Thermax Private Limited* (supra) was relied upon by this Court in *Hyderabad Industries Ltd.* (supra)

while interpreting Section 3(1) of the Tariff Act itself; albeit in somewhat different context. However, the manner in which the issue was dealt with lends support to the case of the assessee herein. In that case, the Court noted that Section 3(1) of the Tariff Act provides for levy of an additional duty. The duty is, in other words, in addition to the Customs duty leviable under Section 12 of the Customs Act read with Section 2 of the Tariff Act. The explanation to Section 3 has two limbs. The first limb clarifies that the duty chargeable under Section 3(1) would be the Excise duty for the time being leviable on a like article if produced or manufactured in India. The condition precedent for levy of additional duty thus contemplated by the explanation deals with the situation where 'a like article is not so produced or manufactured'. The use of the word 'so' implies that the production or manufacture referred to in the second limb is relatable to the use of that expression in the first limb which is of a like article being produced or manufactured in India. The words 'if produced or manufactured in India' do not mean that the like article should be actually produced or manufactured in India. As per the explanation if an imported article is one which has been manufactured or produced, then it must be presumed, for the purpose of Section 3(1), that such an article can likewise be manufactured or produced in India. *For the purpose of attracting additional duty under Section 3 on the import of a manufactured or produced article the actual manufacture or production of a like article in India is not necessary. For quantification of additional duty in such a case, it has to be imagined that the article imported had been manufactured or produced in India and then to see what amount of Excise duty was leviable thereon."*

(Emphasis supplied)

7. I find that CBEC Circular No. 206/4/2017 dated 13.4.2017 states that in a case where service of transportation of goods in a vessel provided by foreign shipping lines, the condition for availing exemption under Sl.No. 10 of Notification No. 26/2012-ST dated 20.6.2012 is not fulfilled by the foreign shipping lines and hence, benefit of conditional exemption will not be available to them and service tax is required to be paid on full value of services. I find that the said CBEC Circular is contrary to the conditional exemption provided under the said Notification which has neither rescinded nor amended to prohibit the exemption of service tax in a case where service of transportation of goods in a vessel provided by foreign shipping lines. I find that benefit of exemption provided under the Notification cannot be restricted through clarification issued by the Board as held by the Hon'ble Supreme Court in cases of Inter Continental (India) reported as 2008 (226) ELT 6 (SC) and Tata Teleservices Ltd. reported as 2006 (194) ELT 11 (SC).

7.1 I find that the Hon'ble Supreme Court in the case of Indian Oil Corporation Ltd. reported as 2004 (165) E.L.T. 257 (S.C.) has held as under: -

26. I am of the view that in a situation like this, the Customs authority should obey the constitutional mandate emanating from Article 141 read with Article 144 rather than adhering to the letter of a statutory provision like Section 151A of the Customs Act. The Customs authority should act subservient to the decision of the highest constitutional Court and not to the circular of the Board which is denuded of its rationale and substratum under the impact of the authoritative pronouncement of the highest Court. Alternatively, Section 151A has to be suitably read down so that the circulars issued would not come into conflict with the decision of this Court

which the Customs authorities are under a Constitutional obligation to follow.

(Emphasis supplied)

7.2 Hence, I am of the considered view that the appellant is not liable to pay service tax on full value of transportation service availed by them and required to pay service tax on taxable value @ 30% of gross value of transportation service. Thus, I hold that the appellant is entitled for refund of service tax paid on gross value @ 70% of service since they have not passed on the incidence of service tax to any other person duly certified by the Chartered Accountant vide Certificate dated 29.5.2018.

8. In view of above, I set aside the impugned order and allow the appeal filed by the appellant.

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

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

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By Speed Post

To,

M/s. Adani Wilmar Ltd., Village – Dhrub, Mundra, Kutch – 370421	मेसर्स अदानी विलमर लिमिटेड, गाँव – ध्रुब, मुँदरा कच्छ – ३७०४२१

प्रति:

(1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु ।

(2) आयुक्त, केन्द्रीय वस्तु व सेवा कर, गांधीधाम को आवश्यक कार्यवाही हेतु।

(3) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर मण्डल, मुँदरा को आवश्यक कार्यवाही हेतु ।

(4) गार्ड फ़ाइल


प्रधान आयुक्त अपील्स
सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट