



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



सत्यमेव जयते

द्वितीय तल, जी एस टी भवन / 2nd 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 / फाइल संख्या / Appeal / File No. V2/541/RAJ/2010	मूल आदेश सं / O.I.O. No. 44/ST/Ref/2010	दिनांक / Date 29.04.2010
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ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-021-2018-19

आदेश का दिनांक / Date of Order:	17.05.2018	जारी करने की तारीख / Date of issue:	23.05.2018
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Passed by **Shri Sunil Kumar Singh, Commissioner, CGST & CX, Gandhinagar**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १०.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री सुनील कुमार सिंह, आयुक्त, केन्द्रीय वस्तु व सेवाकर, गांधीनगर को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Sunil Kumar Singh, Commissioner, CGST & CX, Gandhinagar has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

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 Appellants & Respondent :-**

Oswal Salt & Chemical Industries, plot No. 160, Maitri Bhavan, Plot No 13, Sector-8, Gandhidham,

इस आदेश(अपील) से व्याथेत कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारों / 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- 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

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, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये 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/- रूपए 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 को 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, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये 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/- रूपए 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 नियमावली, 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 प्रतियों 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 रूपए से अधिक न हो।

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

- (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 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 पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, 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 समायाविधि 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।

जहाँ 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 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 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 टिकट 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 ::

Being aggrieved with the Refund Order No. 44/ ST/ Refund/ 2010 dated 29.04.2010 (**hereinafter referred to as the "impugned order"**) passed by the then Assistant Commissioner, Service Tax Division, Rajkot (**hereinafter referred to as "the Adjudicating Authority"**) M/s. Oswal Salt & Chemical Industries, Maitri Bhavan, Plot No: 18, Sector 8, Gandhidham 370 201 (Kutch) (**hereinafter referred to as "the appellants"**) have filed the present appeal.

2.1 Briefly stated the appellants filed an application on 30.06.2009 seeking refund of Rs. 57,931/- being the Service Tax paid on the services used for the export during the quarter **Oct, 2008 to December, 2008**, under Notification No: 41/2007-Service Tax dated 06.10.2007, as amended, with the Adjudicating Authority. The Adjudicating Authority issued Show Cause Notice No. V/18-44/ ST/Ref/ 09-10 dated 22.02.2010 wherein it was proposed to reject the claim of refund on the grounds that they have not fulfilled the conditions prescribed under Notification No: 41/2007-Service Tax dated 06.10. 2007, as amended.

2.2 The Adjudicating Authority vide OIO No. 44/ST/ Ref/ 2010 dated 29-04-2010 rejected the refund claim. While rejecting the said refund claim, Adjudicating Authority has observed that appellants neither filed reply to Show Cause Notice nor sought personal hearing; that the claimant sought refund on handling & clearing charges on the basis of invoices issued by M/s Arvind V Joshi & Co. ; that the claimant sought refund on warf cleaning service on the basis of invoice issued by M/s AVB Contractor; that the claimant sought refund of Service Tax on the basis of invoices issued by M/s SGS India Pvt. Ltd., M/s Geochem Laboratories Pvt. Ltd. and M/s CU Inspection India Pvt. Ltd. wherein the services rendered were shown as weight & quality survey; that these services were not specified as eligible services under Notification No. 41/2007-ST dated 06.10. 2007; that the claimant sought refund of Service Tax on the basis of invoices issued by M/s Pest Control M. Walshe, Kandla but the claimant had not submitted any agreement entered into with the overseas agent for the rendering of the services; that apart from the above, the claimant has not provided declaration for non availment of Cenvat Credit of Service Tax as per provisions of para 1(d) of the Notification No. 41/2007-ST dated 06.10.2007; that the claimant has not provided declaration regarding non availment of drawback of Service Tax paid on the specified services under the Customs, Excise and Service Tax Drawback Rules.

Order

3. Being aggrieved with the impugned order, the appellants have filed the present appeal No. 541/RAJ/2010 on the grounds that ...

(i) the services provided by M/s Arvind V Joshi & Co. are eligible service as specified in the Notification No. 41/2007-ST dated 06.10.2007;

(ii) they have availed cleaning of wharf at port services of M/s AVB Contractor; that the services rendered by the Service Provider should not be judged on the basis of Registration certificate under which the Service Provider have registered themselves but it should be determined on type of service rendered; that such services shall either fall under the Cargo Handling Services or under Port Services; that both these services are categorized as an eligible service under Notification No. 41/2007-ST dated 06.10.2007;

(iii) that they have enclosed copy of Letter of Credit alongwith refund application which stipulates terms & conditions between Importer & Exporter of goods; that as per terms and conditions of Letter of Credit, the appellant has to carry out fumigation and disinfection of the goods from such agency as specified in the Letter of Credit which the appellant has carried out; that the format of Invoice M/s SGS India Pvt. Ltd., M/s Geochem Laboratories Pvt. Ltd. and M/s CU Inspection India Pvt. Ltd. are prefixed which contains all the details as mentioned in their invoice; however, the said agency has provided the services of sampling, analysis and inspection of the goods to the appellant and claim of refund is made by the appellant only on that basis; that the services which are rendered by M/s SGS India Pvt. Ltd., M/s Geochem Laboratories Pvt. Ltd. and M/s CU Inspection India Pvt. Ltd. for testing, inspection, analysis, etc. of the goods are an eligible service under Notification No. 41/2007-ST dated 06.10.2007;

(iv) That the appellant has not filed declaration regarding non availment of Cenvat Credit of Service Tax and duty drawback in absence of any such stipulation in the Notification No. 41/2007-ST dated 06.10.2007;

(v) In view of the above they have prayed that the order passed by the learned Adjudicating Authority should be quashed and annulled.

4. The said appeal was transferred to call book in the month of August, 2010 on the basis of the Tax Appeal No. 353 of 2010 filed by the Department in the Hon'ble High Court of Gujarat against the order of Tribunal, as reported at 2010(17)S.T.R. 134 (Tri. Ahmedabad) in the case of

Cadila Health Care Ltd. v/s Commissioner of Central Excise, Ahmedabad.
Subsequently, the said appeal was retrieved from call book on 28.09.2017

5. Personal hearing in the matter was scheduled on 31.01.2018 which was postponed to 28.02.2018 & 20.03.2018 at the behest of the applicant. The PH was held on 10.04.2018 which was attended by Shri Manish Vora, Chartered Accountant and put forth a written submission; that he reiterated the points mentioned in his submission.

6.1 The appellant vide their letter dated 10.04.2018 has filed submissions wherein they have interalia submitted that...

(i) The first ground on which refund claim is denied is that the service of loading and unloading i.e. handling of cargo provided within the port area by M/s. Arvind V. Joshi & Co., a stevedoring agent, is not an eligible service under the relevant notification. In this regard the Appellant submit that, on going through the copy of invoices submitted by Service Provider, one will find that they have charged their service charges towards handling of goods within the Port area including wharfage charges paid to Kandla Port Trust; that according to section 65(82) of Finance Act, the services provided by Arvind V. Joshi & Co. squarely falls under the parameters of Port Service and notified as an eligible service under Sr. No. 2 of the relevant notification. Without prejudice to the above, the appellant submit that the invoices issued by M/s. Arvind V. Joshi & Co. contains various details viz. name of the vessel, type of commodity exported, quantity exported, etc. which will co-relate with the copy of Shipping Bill and other documents submitted by the appellant with their refund application dated 29.06.2009 and ultimately proves that the service of Arvind V. Joshi & Co. were utilized by the appellant for goods exported by them on which refund claim is being made; that the appellant has enclosed a Certificate issued by Kandla Port Trust authorizing M/s. Arvind V. Joshi & Co., to carry out operation of loading & un-loading of cargo within the port area i.e. stevedore agent; that they have also invited the attention of Circular No. 112/9/2008-ST dated 12.03.2009 issued by Central Board of Excise & Custom to bring home the point that nature of service should be judged on the basis of type of service rendered by the service provider

(ii) As regards the second ground on which refund claim came to be denied is that M/s. A.V.B Contractor, Gandhidham is a Man Power Supply and Recruitment Agency and provided the service of supply of

5/1/18

manpower which is not an eligible service under the relevant notification, the Appellant submitted that the above agency had carried out the operation of cleaning of wharf at Port in relation to goods exported by the appellant for which they have charged their service charges on the basis of quantity of goods handled by them and not on the basis of No. of manpower/labours supplied; that the service which is rendered by M/s. AVB Contractor squarely falls under the parameter of "Port Services" as the same was rendered within the Port area and not under the head "Man Power Supply & Recruitment Agency"; that Port Service is specified as an eligible service under Sr. No. 2 of the relevant notification; that they have invited the attention towards Circular No. 112/9/2008-ST dated 12.03.2009 issued by Central Board of Excise & Custom vide which various clarifications has been issued by the Board in respect of filing of claim for refund of service tax paid under relevant Notification; that they have reproduced Para No.VII of the said circular which is applicable to the case under consideration;

- (iii) The third ground on which refund claim came to be denied is that the service for which refund is being claimed is not an eligible service as per the relevant notification and the appellant failed to submit written agreement or Rules & Regulation requiring testing & analysis of goods; that they have invited the attention towards Sr. No. 3 of the relevant notification notifying the type of service for which refund is being claimed under the relevant notification; that as far as submission of copy of agreement are concern, the appellant submit that vide their refund application dated 29.06.2009 they have furnished copies of Letter of Credit (hereinafter referred to as L/C) and in some cases copy of contract which they have received from their buyers; that the L/C is governed by UCP 600 and issued by Bankers of the buyers containing various terms and conditions based on which buyer wants to purchase the goods from the sellers; that the L/C is a written agreement between buyers and sellers stipulating the terms and conditions based on which buyers wants to purchase goods from the seller; that the appellant have also prepared a summarized statement in tabular form showing Name of the Inspection Agency, Invoice No. & Date, Description of the service received from them (i.e Testing/analysis etc.), whether requirement of such services were stipulated by the relevant L/C and/or contract or not and reference to relevant page No. of L/C and/or Contract and other documents pertaining to invoice issued by Inspection Agency to negate the contention raised by the Learned Adjudicating Officer that

the appellant has not submitted written agreement with regards to testing and inspection service received by them.

- (iv) The last ground on which refund claim is denied is that the appellant has not submitted any declaration with regards to non-availment of CENVAT credit and non-availment of Drawback of service tax paid on the specified service under the Custom, Excise & Service Tax Drawback Rules. In this regard the appellant submit that neither they have availed CENVAT credit of service tax nor claimed Drawback of service tax in respect of goods exported by them. They have enclosed an undertaking to the above effect which was not furnished before the Learned Adjudicating Officer.

On the basis of submission made herein above which is duly supported by the documentary evidence available on record, the appellant prayed that Order in Origin passed by Learned Adjudicating Officer may kindly be quash, set-a-side and the appeal of the appellant may kindly be allowed or in alternate may be restored to verify the documents submitted herewith.

6.2 The appellant vide their letter dated 01/04.05.2018 has filed additional submissions wherein they have interalia submitted that...

Port Service :-The appellant has reiterated that any service provided within the Port area irrespective of type/nature of service provided, would squarely falls under the head "Port Services" and eligible for refund under Sr. No. 2 of the Notification No. 41/2007-ST dated 06.10.2007. In support of their contention, they have relied upon various judicial pronouncements.

Technical Testing & Analysis Service :- As far as granting of refund on Technical Testing & Analysis Service are concern, they have submitted that activity of Supervision, Weighment, Sampling, Stuffing, Analysis & Inspection are part and parcel of Technical Testing & Analysis Services carried out by Testing Agency and notified as an eligible service for claiming of refund under the relevant notification. Further the submission of Purchase Order and Testing Certificate, confirming the necessary testing & analysis carried out by the exporter alongwith the refund claim would deemed as compliance of the conditions as noted. In support of their contention, they have relied upon various judicial pronouncements.

To & Fro Transportation i.e. Goods Transport Agency Service :- The appellant has submitted that they withdraw their earlier statement to restrict refund claim under GTA Service to 50% and now they have requested allow 100% of the refund amount. They have relied upon following judicial precedent in their support.

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Goods Transport Agency :- We would also like to place on record that where there is export of cargo in bulk (i.e. more than 6000 Mts of cargo) and covered by one or more shipping bill, the same could not be transported by a single lorry and required to be aggregated at Port premises before shipping document could be prepared. In such circumstances compliance of conditions as prescribed in the relevant notification under the heading "Goods Transport Agency Service" should be ascertain broadly by co-relating evidence of transport and service tax paid on such transportation charges and quantity exported. In such situation it is not possible to mention in each and every lorry receipt details as prescribed under the head "Goods Transport Agency" in the relevant notification. In this regard we rely upon many judicial pronouncements on the relevant issue.

Procedural Violation :- The appellant has referred decision rendered by CESTAT, Principal Bench, New Delhi in the case of Jain Grani Marmo (P) Ltd. Vs. Commissioner of Central Excise, Jaipur, 2016 (45) S.T.R. 430 (Tri. Del.) wherein it is held that "if some of the conditions of the notification have not been complied with, such lapse should be considered as procedural lapse, for which the substantive right of the appellant to claim the benefit of refund as an exporter should not be denied/disallowed".

7. I have carefully gone through the appeal memorandum. I find that since the appeal is against rejection of refund claim, there is no need for compliance to requirement of Section 35F(i) of Central Excise Act, 1944. I also find that vide letter dated 05/09.08.2010 Adjudicating Authority was asked to submit parawise comments on the points raised by the appellants, but till date the same has not been received.

8. I find that the limited issue required to be decided in this case is whether the impugned order rejecting the refund claim is just and proper or otherwise.

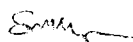
9. I find that appellant was served with a show cause notice on 22.02.2010 as to why the refund claim of Rs. 57,931/- filed by them for the quarter Oct,2008 to December,2008, should not be rejected under notification No. 41/2007-ST dated 06.10.2007 as amended. The appellant did not submit written reply in the matter.

10.1 I find that appellant in their Appeal Memorandum have not raised the issue of violation of the principle of natural justice. From the impugned OIO, I find that the prior to rejection of the refund claim, the Adjudicating

Authority has not heard the appellant in person. Adjudicating Authority has opined & rejected the refund claim stating that the services for which the refund is claimed by the claimant are not specified as eligible services under Noti. No. 41/2007-ST dated 06.10.2007. Another ground for rejection of the refund by the Adjudicating Authority is that the appellant has not submitted written agreement or Rules & Regulation requiring testing & analysis of goods and have also failed to submit any declaration with regards to non-availment of CENVAT credit and non-availment of Drawback of service tax paid on the specified service under the Custom, Excise & Service Tax Drawback Rules. As regards the observation of the Adjudicating Authority that the appellant had not provided copy of the contracts, I find from the written submission of the appellant that they have claimed to have submitted copy Letter of Credit containing the terms and conditions and the said documents submitted by the appellant at the time of filing refund claim have not been taken into consideration during adjudication of the refund claim. Adjudicating Authority has not elaborated at depth as to which services are specified as eligible services under Noti. No. 41/2007-ST dated 06.10.2007 and also not justified how the services for which the refund is claimed by the claimant are not specified as eligible services under Noti. No. 41/ 2007-ST dated 06.10.2007. Further, the appellant have now submitted the written submissions, as discussed at para 6.1 & 6.2 supra alongwith the evidences/documents, which are now needed to be verified and the decision regarding admissibility/non- admissibility of the refund claim, after verification of the above submissions/documents is needed to be taken with proper justification/reasons. Thus, I find that the impugned OIO is cryptic and non speaking and is also passed in violation of the principle of natural justice. In large number of decisions, various higher appellate authorities have held that grant of refund is a quasi-judicial proceedings and application for refund filed by any person cannot be rejected without issue of a show cause notice to explain, to the said person.

10.2 The rules of natural justice do not supplant the law of the land but only supplement it. It is now firmly established that in the absence of express provisions in any statute dispensing with the observance of the natural justice, such principles will have to be observed in all judicial, quasi-judicial and administrative proceedings which involve civil consequences to the parties. Natural justice recognizes three principles:

- (i) *Nemo debet esse judex in propria causa* – which means that nobody shall be a judge in his own or in a cause in which he is interested;
- (ii) *Audi alterem partem* – which means to hear the other side;
- (iii) Speaking orders or reasoned decisions.



10.3 Section 33A of the Central Excise Act, 1944 provides opportunity of being heard to a party by the adjudicating authority from time to time with grant of adjournment to the party not more than three times. Further, CBEC vide its Circular No. 1053/ 2/ 2017-CX dated 10.03.2017, has further on the question of personal hearing has clarified as follows:

14.3 Personal Hearing: *After having given a fair opportunity to the noticee for replying to the show cause notice, the adjudicating authority may proceed to fix a date and time for personal hearing in the case and request the assessee to appear before him for a personal hearing by himself or through an authorized representative. At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of being heard. Separate communications should be made to the noticee for each opportunity of personal hearing. In fact separate letter for each hearing / extension should be issued at sufficient interval. The adjudicating authority may, if sufficient cause is shown, at any state of proceeding adjourn the hearing for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a notice (emphasis supplied).*

11. Therefore, to meet the ends of justice, I set-aside the impugned order of the Adjudicating Authority on the grounds that it has been passed without observing the principles of natural justice and is non-speaking, in light of the decision in the case of **Singh Alloys (P) Ltd. - 2012 (284) ELT 97 (Tri. Delhi)**, and remand the matter back to Adjudicating Authority, with a direction to decide the matter afresh on merits by following principles of natural justice and also justify/ issue a speaking order with respect to the said refund claim in terms of Notification No. 41/2007-ST dated 06.10.2007. Adjudicating Authority must mention in the order details of hearing given with a reasonable time.

12. In holding this, I also rely upon the case law of **Honda Seil Power Products Ltd.- 2013 (287) ELT 353 (Tri. Del.)** wherein a similar view has been taken as regard inherent power of the appellate authority to remit back the matters under the provisions of Section 35A(3) of the Central Excise Act, 1944. Further, **Hon'ble Gujarat High Court, in Tax Appeal No. 276 of 2014**, in the case of **Associated Hotels Ltd.** has held that even after amendment in Section 35A ibid after 10-05-2011, Commissioner of Central Excise would retain the powers of remand.

13. Accordingly, without expressing any opinion on admissibility of the refund or otherwise, the appeal of the Appellant is disposed by way of remand with a direction to the Adjudicating Authority to decide the refund claim of the Appellant on merits after following principles of natural justice.

Signature

The appellant is also directed to submit their submissions raised in the present grounds of appeal before the adjudicating authority, so as to enable adjudicating authority to decide all aspects involved in the matter on merits

14. The appeal is accordingly disposed off in above terms.

F. No. V.2/541/RAJ/2010
Place: Ahmedabad.

Dated: 17.05.2018

Sunil Kumar Singh 12.05.18
(SUNIL KUMAR SINGH)
COMMISSIONER (APPEALS)/
COMMISSIONER, CGST & CEX,
GANDHINAGAR

By Speed Post

To,
M/s. Oswal Salt & Chemical Industries,
Maitri Bhavan, Plot No: 18, Sector 8,
Gandhidham 370 201 (Kutch).

સુનિલ કુમાર સિંઘ,
Sunil Kumar Singh
આર. એન. મીઠા
અધિકારક (અપીલ)

Copy to:

- 1) The Chief Commissioner, Central GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner (Appeals), Central GST & Central Excise, Rajkot.
- 3) The Commissioner, Central GST & Central Excise, Kutch (Gandhidham).
- 4) The Assistant Commissioner, Central GST & Central Excise, Division-_____.
- 5) The Assistant Commissioner (Systems), Central GST & Central Excise, Rajkot
- 6) The Superintendent, Central GST & Central Excise, AR-_____.
- 7) PA to Commissioner of Central GST & Central Excise, Gandhinagar.
- 8) Guard File.

