



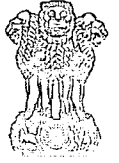
::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

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

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142

Email: cexappealsrajkot@gmail.com



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/305/RAJ/2010

मूल आदेश सं /
O.I.O. No.
11/ST/Refund/2010

दिनांक /
Date
13.02.2010

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

KCH-EXCUS-000-APP-023-2018-19

आदेश का दिनांक /
Date of Order: 17.05.2018

जारी करने की तारीख /
Date of issue: 23.05.2018

23.05.2018

Passed by **Shri Sunil Kumar Singh, Commissioner, CGST & CX, Gandhinagar**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ 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 :-

M/s. Friends Mercantile Pvt. Ltd., Maitri Bhavan, Plot No 13, Sector-8, -Gandhidham,

इस आदेश(अपील) से व्याथेत कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

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

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

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

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

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 3८००१६ को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

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

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

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

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied 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 प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /

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

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

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

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन 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.

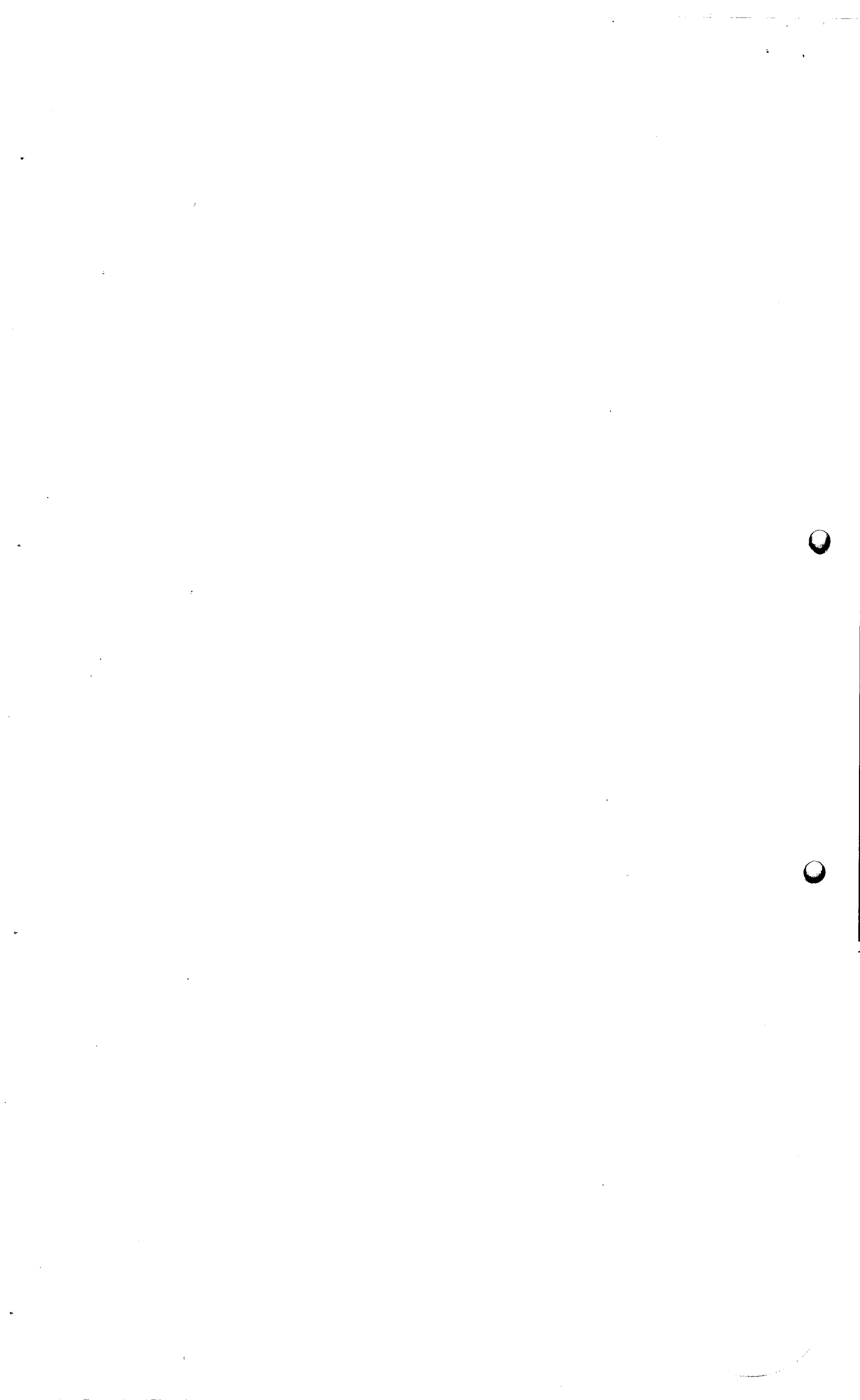
(C) **भारत सरकार को पुनरीक्षण आवेदन :**

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 ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा 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 हैं, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पंजी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-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. Friends Mercantile Private Ltd., Maitri Bhavan, Plot No. 18, Sector-8, Gandhidham-370201 (hereinafter referred to as 'the appellant') has filed this appeal against Refund Order No. 11/ST/Refund/2010 dated 18.02.2010 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as the 'adjudicating authority').

2.1 The issue involved in the matter, in brief, is that the appellant filed an application on 28.11.2008 seeking refund of Rs. 2,09,460/- being the service tax paid on exported goods for the July, 2008 to September, 2008 under Notification No. 41/2007-ST dated 06.10.2007 as amended. The adjudicating authority issued show cause notice dated 30.03.2009 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-ST dated 06.10.2007, as amended.

2.2 The appellant neither filed reply to show cause notice nor sought personal hearing in the matter. The appellant requested for one month time to file written reply, however, no reply has been filed by the appellant. The adjudicating authority vide impugned order rejected the refund claim of the appellant. The brief of reasons for rejection is as under:

- (i) The shipping bills filed with the refund application are filed under duty drawback scheme. Para 1(e) of Notification No. 41/2007-ST dated 06.10.2007 stipulates that the said goods have been exported without availing drawback of service tax paid on the specified services under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. Therefore it was held that the claimant has not fulfilled this condition and therefore his claim is not admissible.
- (ii) As regards refund claim in respect of Technical Testing and Analysis Service, the claimant has sought refund on this service defined under section 65(105)(zzh) on the basis of invoices issued by M/s. Geochem Laboratories, M/s. SGS India Pvt. Ltd. and M/s. Cotecna Inspection India Pvt. Ltd. The adjudicating authority has held that:
 - (a) No written agreement entered into with the buyer or rules or regulations stipulating testing and analysis of the said goods was submitted by the claimant and thereby they have not fulfilled the conditions of Notification No. 41/2007-ST dated 06.10.2008.
 - (b) Further it was held that service rendered as mentioned in the invoices submitted indicated services rendered for supervision, weighment, sampling, container stuffing and weight and quality survey which are not specified as eligible for refund under Notification No. 41/2007-ST dated 06.10.2007.
- (iii) As regards refund claim in respect of invoices issued by M/s. Cargo Seatrans, Clearing & Forwarding Agents and invoices issued by M/s. Shubam Shipping Services, Stevedoring & Clearing Forwarding Agents, the adjudicating authority has held that the category of clearing &

Forwarding Agent service is included as one of the eligible services vide Notification No. 33/2008-ST dated 07.12.2008 hence the benefit of same cannot be extended to the claimant as the services were received by them prior to 07.12.2008.

3. Being aggrieved with the impugned order, the appellant have filed the present appeal on the grounds of appeal dated 24.05.2010 and additional submission dated 03.08.2010 that:

- (i) That they have claimed draw back not of service tax (as per the requirement of the relevant notification) but of the excise duty component levied on the goods which is exported by them. They further relied upon Para No. 6 of Notification No. 103/2008-Customs (NT) dated 29.08.2008 and contended that the drawback availed is of the custom component only and not either of excise duty or of service tax. They further contended that the condition for non-availment of drawback is omitted vide Notification No. 33/2008-ST dated 07.12.2008 and also clarified vide Circular No. 112/06/2009-ST dated 12.03.2009.
- (ii) That they have enclosed copy of Letter of credit and in some cases also copy of contract along with refund application which stipulates terms and conditions between importer & exporter of goods and the appellant was obliged to carry out testing and analysis of the goods from such agency as specified in the letter of credit. The services of testing, inspection, analysis etc. of the goods are an eligible service as specified in the Notification No. 41/2007-ST dated 06.10.2007. As regards proof of payment they referred to Issue No. II and clarification issued in this regard in Circular No. 106/9/2008-ST dated 11.12.2008 and contended that there is no requirement to produce proof of any payment by the exporter for claiming the refund even though they have submitted the ledger account of M/s. SGS India Pvt. Ltd., M/s. Geochem Laboratories Pvt. Ltd. and M/s. Cotecna Inspection India Pvt. Ltd. and also undertaking to the effect that they have already made payment of service tax to the service provider from whom specified services has been received for which refund is claimed.
- (iii) That the invoices enclosed with the refund claim clearly shows that M/s. Cargo Seatrans and M/s. Shubham Shipping Services have charged Agency Charges from them and falls under the category of Customs House Agent which is an eligible service for claiming of refund vide Notification No. 17/2008-ST dated 01.04.2008. They further referred to clarification issued at Para VII of Circular No. 112/9/2008-ST dated 12.03.2009 and contended that exact nature of services which is rendered by the service provider should not be seen from the head under which the service provider has taken registration but from the nature of services rendered by them or activities undertaken by them.
- (iv) That M/s. AVB Contractor has provided the service of wharf cleaning at port in respect of goods exported by them and M/s. AVB Contractor has charged on the basis of quantity of material handle i.e. per Mts. of cargo handled and not on the basis of No. of manpower / laborers supplied by them and Port Service and Cargo Handling Services are categorized as an eligible service for refund claim under Notification No. 41/2007-ST dated

06.10.2007. They further contended that exact nature of services which is rendered by the service provider should not be seen from the head under which the service provider has taken registration but from the nature of services rendered by them or activities undertaken by them.

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 before the Hon'ble High Court of Gujarat against the order of Tribunal, as reported at 2010 (17) STR 134 (Tri.-Ahmedabad) in the case of Cadila Health Care Limited Vs Commissioner of Central Excise, Ahmedabad-II. Subsequently the said appeal was retrieved from call book on 28.09.2017.

5. Personal hearing in the matter was held on 29.07.2010 and Shri Arvind V. Joshi, Director and CA Manish Vora attended and reiterated the appeal and will submit additional submission within 7 days. Further hearing after retrieval of appeal from call book was fixed on 31.01.2018, 28.02.2018 and 20.03.2018 and the appellant sought adjournment on all occasions. Further hearing was held on 10.04.2018 and CA Manish Vora appeared and requested for one weeks adjournment for collection of documents required for submission. Further hearing was fixed on 18.04.2018 and 01.05.2018 and the appellant sought adjournment on all occasions. Further hearing was held on 04.05.2018 and CA Manish Vora appeared and put forth two written submission including case laws. Further he interalia reiterated the contents of his submission in toto.

6. The appellant vide their letter dated 04.05.2018 has filed additional submissions wherein they submitted that:

- (i) Port Service: Any service provided within the Port area irrespective of type / nature of service provided, would squarely fall under the head "Port Services" and eligible for refund under Sr. No. 2 of the Notification No. 41/2007-ST dated 06.10.2007 and relied upon various judicial precedents in support of their contention.
- (ii) Technical Testing & Analysis Service: As far as granting of refund on Technical Testing & Analysis service are concern, they submit 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 along with the refund claim would deemed as compliance of the conditions as noted in the relevant notification and relied upon various judicial precedents in support of their contention.
- (iii) To & Fro Transportation i.e. Goods Transport Agency Service: They withdraw their earlier statement to restrict refund claim under GTA service to 50% and now they have requested to allow 100% of the refund amount and relied upon various judicial precedents in support of their contention.
- (iv) Goods Transport Agency: They place on record that 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 and relied upon various judicial precedents in support of their contention.

- (v) Procedural violation: They referred to decision rendered by CESTAT Principal Bench, New Delhi in the case of Jain Grani Marmo (P) Ltd. Vs Commissioner of Central Excise, Jaipur reported in 2016 (45) STR 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". Further there are also plethora of judgments wherein it is held that no substantive benefit should be denied on the ground of procedural lapse.

7. I have gone through the facts of the case, the appellants ground of appeal and submission made during the course of personal hearing. 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 the Central Excise Act, 1944. I also find that vide letter dated 31.05.2010, the concerned authority was asked to submit para wise comments on the points raised by the appellant, but till date the same has not been received.

8. I find that only point 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 issued show cause notice on 30.03.2009 as to why the refund claim of Rs. 2,09,460/- filed by them should not be rejected under Notification No. 41/2007-ST dated 06.10.2007 as amended for non fulfillment of conditions of said notification. The appellant did not submit written reply to the show cause notice. The appellant was requested to submit their written reply vide letter dated 30.07.2009 in reference to the appellant vide letter dated 08.08.2009 requested for one month time to submit reply, however no reply was filed. On going through the impugned order, it is observed that the adjudicating authority has passed the order without giving proper natural justice to the appellant. In the appeal memorandum, appellant have not raised any argument for violation of principle of natural justice, but it is fact that the adjudicating authority has not given another chance of personal hearing to the appellant and issued the impugned order without hearing the appellant personally or without taking into record the submission of the appellant. 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 iudex 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 alteram partem* – which means to hear the other side;
- (iii) Speaking orders or reasoned decisions.

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 noticee (emphasis supplied).*

10. The refund claim of service tax paid on Technical Inspection and Certification Service, Clearing & Forwarding Service and Manpower Recruitment and Supply Agency Service was filed which were used in connection of export. The adjudicating authority has rejected the refund claim of Rs. 2,09,460/- mainly because of non-fulfillment of conditions of Notification No. 41/2007-ST dated 06.10.2007.

11. As regards refund claim in respect of above services, it was held by adjudicating authority that the shipping bills filed with the refund application are under duty drawback scheme and para 1(e) of Notification No. 41/2007-ST dated 06.10.2007 stipulates that the goods have been exported without availing drawback of service tax paid on the specified services under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and thereby they have not fulfilled the conditions of Notification No. 41/2007-ST dated 06.10.2007; that no written agreement entered into with the buyer or rules or regulation stipulating testing and analysis of the goods was submitted in respect of refund claim of Technical Testing and Analysis Service and thereby they have not fulfilled the conditions of Notification No. 41/2007-ST dated 06.10.2007; that the services mentioned in the invoices submitted indicated services rendered for supervision, weighment, sampling, container stuffing and weight and quality survey are not specified as eligible for refund under Notification No. 41/2007-ST dated 06.10.2007 and that the category of clearing and forwarding agent service is included as one of the eligible service vide Notification No. 33/2008-ST dated 07.12.2008 hence the benefit of same cannot be extended as the services were received prior to 07.12.2008.

12. On going through the submission of the appellant, it is observed that the appellant has not claimed drawback of service tax; that they have provided copy of letter of credit and in some cases also copy of contract along with refund application stipulating terms and conditions to carry out testing and analysis of the goods from such agency; that the services of testing, inspection, analysis etc. of the goods are an eligible service as specified in the Notification

No. 41/2007-ST dated 06.10.2007; that they have submitted the ledger account for proof of payment of service tax for claiming the refund; that M/s. Cargo Seatrans and M/s. Shubham Shipping Services have charged Agency Charges from them and falls under the category of Customs House Agent which is an eligible service for claiming of refund vide Notification No. 17/2008-ST dated 01.04.2008 and M/s. AVB Contractor has provided the service of wharf cleaning at port in respect of goods on the basis of quantity of material handle i.e. per Mts. of cargo handled and not on the basis of No. of manpower / laborers supplied by them and Port Service and Cargo Handling Services are categorized as an eligible service for refund claim under Notification No. 41/2007-ST dated 06.10.2007. It is observed that the Adjudicating Authority has not properly scrutinized the details provided by the appellant at the time of filing the refund claim and simply rejected the refund claim mentioning that they have not fulfilled the conditions of Notification No. 41/2007-ST dated 06.10.2007 and services rendered were not specified as eligible for refund under Notification No. 41/2007-ST dated 06.10.2007. It is further observed that the Adjudicating Authority has not elaborated as to which services are specified as eligible services and which conditions have not been fulfilled under Notification No. 41/2007-ST dated 06.10.2007.

13. In view of above, I find that the documents submitted by the appellants are required to be verified and the decision taken needed to be justified with proper reasons / discussions. Thus, I find that impugned order is cryptic and non-speaking and also 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 giving proper reasoning / discussion and natural justice to the said person.

14. Therefore, to meet the ends of justice, I set aside the impugned order 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. reported at 2012 (284) ELT 97 (Tri.-Delhi), and remand the matter back to the adjudicating authority, with a direction to decide the matter afresh on merits by following principles of natural justice and justify / issue a speaking order with respect to the said refund claim in terms of Notification No. 41/2007-ST dated 06.10.2007.

15. In holding this, I also rely upon the case law of Honda Seil Power Products Ltd. reported in 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 High Court of Gujarat 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.

16. 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 Adjudicating Authority to decide the refund claim of the appellant on merits after following principles of natural justice. The appellant is also directed to submit their submissions raised in the present grounds of

Emir

appeal before the adjudicating authority, so as to enable adjudicating authority to decide all aspects involved in the matter on merits.

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

સુનિલ કુમાર સિંઘ,
આર. જી. મૌખા
અધિકારક (અર્થાલ્પ)

Sunil Kumar Singh
17.05.18
(Sunil Kumar Singh)
Commissioner (Appeals)/
Commissioner,
CGST & Central Excise,
Gandhinagar

By Regd. Post AD

F. No. V2/305/RAJ/2010

Date: 17.05.2018

To,
M/s. Friends Mercantile Private Ltd.,
Maitri Bhavan, Plot No. 18,
Sector-8, Gandhidham-370201

Copy to:

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

