



::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. V2/534/RAJ/2010	मूल आदेश सं / O.I.O. No. 38/ST/Ref/2010	दिनांक / Date 28.04.2010
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ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-024-2018-19

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 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-3, -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 अपीलें 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, 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 मामले 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 an 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 संमायाविधि पर या बाद में पारित किए गए हैं। /

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule. 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी 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 Appellate 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 ::

Being aggrieved with the Refund Order No. 38/ST/Refund/2010 dated 28.04.2010 (**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. Friends Mercantile Pvt Ltd., Maitri Bhavan, Plot No: 18, Sector 8, Gandhidham 370 201 (Kutch) (**hereinafter referred to as "the appellant"**) have filed the present appeal.

2.1 The issue involved in the matter, in brief, is that the appellant filed an application on 29.06.2009 seeking refund of Rs. 7,64,037/- being the Service Tax paid on the services used for the export during the quarter **October , 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 dated 24.02.2010 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 appellant neither filed reply to Show Cause Notice nor appeared for personal hearing before Adjudicating Authority. The Adjudicating Authority vide his impugned order rejected the refund claim of the appellant. The brief of reasons for rejection is as under:-

(a) As regards refund of service tax claimed on the basis of invoices issued by M/s Shubham Shipping Service Pvt. Ltd and M/s Cargo Seatrans for Agency Charges and invoices issued by M/s Arvind Joshi and Co. for Handling and clearing charges, it was held that this service is not specified as eligible service under Notification No. 41/2007-St. dated 06.10.2007.

(b) In respect of debit notes issued by M/s Seatrans Logistics, M/s Shereman Inc, it was held that Debit notes is not a specified documents under rule 4 A of Service Tax Rules.

(c) The appleeant sought refund of service tax under category of labour on the basis of invoices issued by M/s A.V.B. Contractor. It was held that Manpower Recruitment and supply service is not a specified service under Notification no. 41/2007-St dated 6.10.2007.

(d) As regards testing and analysis service provided by M/s SGC, M/s Geochem Lab., M/s Cale Brett and M/s Cotencna Inspection to the appellant, it was held that the appellant has not provided written agreement and hence it was held that appellant has not fulfilled the conditions of notification no. 41/2007-ST dated 06.10.2008. Similarly, the appellant failed to submit written agreement for service rendered by M/s Pest Mortem under cleaning service.

(e) The service of S.S. charges and Ground rent rendered M/s Omega Shipping Agencies Pvt Ltd. are not specified as eligible service under notification no. 41/2007-St. dated 6.10.2007 and also debit notes is not a specified documents as per Rule 4A of Service tax Rules 1994.

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(f) Most of shipments were made by appellant in the month of May-Sept.2008, and claim filed on 29.6.2009, hence claim for the said period is time barred.

(g) The appellant has not provided declaration regarding non avilment of Cenvat Credit and duty drawback as required under notification No. 41/2007-St. dated 6.10.2007.

3. Being aggrieved with the impugned order, the appellant have filed the present appeal no. 534/RAJ/2010 on the grounds that ...

(i) Agency charges are covered under Custom House Agent Service. Loading of cargo in vessel (within port) and clearance of documents, both are covered under "Port Service". Both service are eligible for refund as per the notification no. 41/2007-ST dated 6.10.2007.

(ii) M/s Seatrans Logistics and M/s Sherman Inc. have provided GTA service, therefore service tax liability under reverse charge has been discharged by the appellant.

(iii) Cleaning of Wharf at port provided by M/s AVB Contractor should fall under Cargo Handling service or under Port Service. Both services are eligible as per notification n. 41/200-St dated 6.10.2007.

(iv) Appellant had submitted copy of LC/Contract alongwith Ruffund application which stipulated terms and conditions. As per terms and conditions appellant has to carry out testing and analysis/disinfection and fumigation of the goods from such agencies which appellant had carried out.

(v) As per notification no. 32/2008-St. dated 18.11.2008, claim period has been extended from 60 days to 6 months from the end of the relevant quarter for filling refund claim.

(vi) As regards filling of declaration regarding non avilment of Cenvat as well as non avilment of drawback of service tax, appellant has stated that there is no stipulation in the relevant notification to give such declaration.

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 held on 10.04.2018 which was attended by Shri Manish Vora, Chartered Accountant during hearing he has requested one week time for submission. Subsequently, personal hearing has been held on 4.5.2018. Shri Manish Vora, CA has been remain present on behalf of the said assessee. He has filed written submission during personal hearing..

6. The appellant vide their letter dated 01.05.2018 has filed additional submissions wherein they submitted as under.

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(i) As regards refund of service tax claimed on the basis of Invoices issued by M/s. Shubham Shipping Services & M/s. Cargo Seatrans, appellants have stated that both the parties have charged Agency Charges from the Appellant. The nomenclature agency fees is used by Custom House Agent for charging their service charges. Custom House Agent Service is categorized as an eligible service for claiming of refund vide Notification No. 17/2008-ST dated 01.04.2008. As far as service rendered by M/s. Arvind V. Joshi & Co. are concerned, the Appellant has submitted that, they have received handling of goods services within the Port area including wharfage charges paid to Kandla Port Trust. Both services fall under "Port Service". Also appellants also have referred Circular No. 112/9/2008-ST dated 12.03.2009 issued by Central Board of Excise & Customs to bring home the point that nature of service should be judged on the basis of type of service rendered by the service provider but not on the basis of service head under which registration is obtained by the service provider.

(ii) As regards debit notes issued by M/s. Seatrans Logistics and M/s. Sherman Inc, the appellants have stated that both the above parties have provided the service of transport of goods by road and they have discharged service tax liability under the reverse charge mechanism. Further, they have submitted that various high courts have held that debit note is considered to be a valid document if it contains all the details as specified in Rule 4A of Service Tax Rules, 1994.

(iii) As regards service rendered by M/s. A.V.B Contractor, Gandhidham is not Man Power Supply and Recruitment Agency but the said service squarely falls under the head Port services as specified U/s. 65(82) of the Finance Act, 1994 as the service was provided within the Port area and not under the head "Man Power Supply & Recruitment Agency" as alleged by the Learned Adjudicating Officer. Appellants have also referred Circular No. 112/9/2008-ST dated 12.03.2009 issued by the Board. As regards taxable services that are not covered under the registration, as per circular, refund should be granted in such cases, if otherwise in order. The procedural violations by the service provider need to be dealt separately, independent of the process of refund.

(iv) As regards non submission of written agreement or Rules & Regulation requiring testing & analysis of goods, the Appellant submit that vide their refund application dated 29.06.2009 they have furnished a copy of Letter of Credit and in some cases copy of contract. Based on the conditions specified in the L/C and/or Contract, the appellants have carried out testing and analysis of the goods through nominated inspection/testing agencies as specified in the L/C and/or contract.

(v) As far as debit notes are concerned, the appellants have submitted that same is held to be a valid document by the decisions pronounced by various High Courts and CESTAT if it contains all details specified in Rule 4A of Service Tax Rules, 1994. As far as question of denying refund of S.S.R. charges and ground rent on ground that said service is not an eligible service, the appellants have submitted that these services fall under Port Service.

(vi) The sixth ground on which refund claim came to be denied is that most of the Shipping Invoices in respect of which refund claim is being made pertains to April-2008 to December-2008 and in terms of relevant notification the claim should have been filed within 60 days from the end of the relevant quarter during which the said goods have been exported whereas in the case under consideration the said claim was filed only on 30.06.2009. In this regard the Appellant has referred Circular No. 112/06/2009-ST dated 12.03.2009. Refund claims of service tax in specified taxable services used for exports of goods made in the quarter Mar-Jun 08 could be filed till 31st Dec 08.

Further, the appellant would like to invite the attention of towards following decisions wherein a view is taken that, if a refund claim is filed within a period of one year from the end of the relevant month in which goods are exported, as specified in Notification No. 17/2009-ST dated 07.07.2009, the claim will be treated as filed within the stipulated time :-

- i) JVMD Apparels Vs Commissioner of C. Ex. & S.T., Faridabad-2017(4)G.S.T.L 237(Tri.-Chan);
- ii) Versatile Enterprises Pvt. Ltd. Vs Commissioner of C. Ex., Ludhiana 2017 (3) G.S.T.L. 441 (Tri. -Chan.);
- iii) K.N. Resources Pvt. Ltd. Vs Commissioner of Central Excise, Raipur 2017 (47) S.T.R. 303 (Tri. Del.) duly affirmed in 2017(6) G.S.T.L.J 417 by Chhattisgarh High Court.
- iv) Gran Overseas Ltd. Vs Commissioner of Central Excise, Delhi-I 2017 (52) S.T.R. 286 (Tri.-Del.)

(vii) The appellant has submitted that neither they have availed CENVAT credit of service tax nor claimed Drawback of service tax in respect of goods exported by them. An undertaking to the above effect which was not furnished before the Learned Adjudicating Officer is enclosed.

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 05.08.2010 Adjudicating Authority was asked to submit parawise 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 served show cause notice on 24.02.2010 as to why the refund claim of Rs. 7,64,037/- filed by them 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 nor sought any personal hearing. On going through the impugned order, I find that the the Adjudicating Authority has passed the order without giving proper natural justice to the appellant. In their Appeal Memorandum, Appellant has not raised any argument for violation of the principle of natural justice. But it is fact that the

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Adjudicating Authority has not given sufficient 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 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:

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;

Audi alterem partem – which means to hear the other side;

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 notice (emphasis supplied)".

10. I find that the refund claim was filed for Agency charges, Handling & Clearing charges, testing and analysis, S.S.Charges, and ground rent charges . The Adjudicating Authority has rejected the refund claim of Rs. 7,64,037/- mainly because of non fulfillment of conditions of Notification No. 41/2007-ST dated 06.10.2008, and violation of Rule 4A of Service tax Rules.

11. As regards refund claim in respect of above services, it was held by Adjudicating Authority that service regarding Agency Charges and Handling & clearing charges are is not specified as eligible service under Notification No. 41/2007-St. dated 06.10.2007; that debit notes is not a specified documents under rule 4 A of Service Tax Rules; that Manpower Recruitment and supply service is not a specified service under Notification no. 41/2007-St dated 6.10.2007; that as regards testing and analysis service no written agreement was provided and thus appellant has not fulfilled the conditions of notification no. 41/2007-ST dated 06.10.2008; that the service of S.S.

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charges and Ground rent are not specified as eligible service under notification no. 41/2007-St. dated 6.10.2007; that most of shipments were made by appellant in the month of May-Sept.2008; that the appellant has not provided declaration regarding non avilment of Cenvat Credit and duty drawback as required under notification No. 41/2007-St. dated 6.10.2007. However, on going through the submission of the appellant I find that the appellant has provided copy Letter of Credit, copy contract containing the terms and conditions in some cases, summarized statements along with all details while filling the refund claim. I find that the Adjudicating Authority has not properly scrutinized the details provided by the appellant at the time of filling the claim and simply reject the refund claim mentioning that they have not fulfilled the conditions of Notification no. 41/2007-St dated 06.10.2008 and service rendered were not specified as eligible for refund under notification no. 41/2007-ST dated 06.10.2007. JAC has opined & rejected the refund claim stating that the appellant has not fulfilled the conditions of Notification no. 41/2007-ST and services for which the refund is claimed by the appellant are not specified as eligible services under Noti. No. 41/2007-ST dated 06.10.2007. However, he has not elaborated as to which services are specified as eligible services and which conditions have not fulfilled under Noti. No. 41/2007-ST dated 06.10.2007. Also, I find that the Adjudicating Authority has not elaborated how there is violation of Rule 4A of Service tax rule in the impugned order.

12. In view of the above, I find that the documents submitted by the appellant are required be verified and the decision taken needed to be justified with proper reasons/ discussions. Thus, I find that the impugned OIO is cryptic and non speaking and is 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 natural justice to the said person.

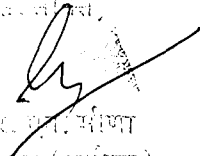
13. Therefore, to meet the ends of justice, I set-aside the impugned order of the Adjudicating Authority on the grounds that it has been passed without observing the principles of natural justice and is non-speaking, in light of the decision in the case of Singh Alloys (P) Ltd. - 2012 (284) ELT 97 (Tri. 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.

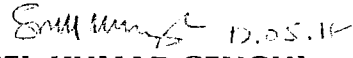
14. In holding this, I also rely upon the case law of Honda Seil Power Products Ltd.- 2013 (287) ELT 353 (Tri. Del.) wherein a similar view has been taken as regard inherent power of the appellate authority to remit back the matters under the provisions of Section 35A(3) of the Central Excise Act, 1944. 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.

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15. 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. 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

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


आ.प्र.मं.प्रा.
अ.स.स. (अ.प्र.मं.प्रा.)

 D.O.S. 17
(SUNIL KUMAR SINGH)
COMMISSIONER (APPEALS)/
COMMISSIONER, CGST & CEX,
GANDHINAGAR

F. No. V.2/534/RAJ/2010

Place:-Ahmedabad

Date:- 17 .05.2018

By speed post/HD

To,
M/s. Friends Mercantile Pvt. Ltd.
Maitri Bhavan,
Plot No: 18, Sector 8,
Gandhidham 370 201 (Kutch)

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner (Appeal), CGST and Central Excise Rajkot.
- 3) The Commissioner, GST & Central Excise, Kutch.
- 4) The Assistant Commissioner, GST & CEX, Gandhidham Urban.
- 5) The Assistant Commissioner (Systems), CGST, Rajkot.
- 6) The Superintendent, GCAST and Central Excise, AR Gandhidham,
- 7) PA to Commissioner CGST and Central Excise Gandhinagar.
- 8) ✓ Guard File.

