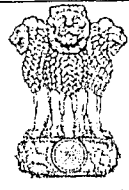




::आयुक्त (अपील) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot - 360 001



सत्यमेव जयते

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

| | | | |
|---|---|-----------------------------|------------------|
| क | अपील / फाइल संख्या / Appeal / File No. | मूल आदेश सं / O.I.O. No. | दिनांक / Date |
| | V2/171/2017 | ST/330/2017-18 | 23.06.2017 |

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

KCH-EXCUS-000-APP-136-2018-19

| | | | |
|------------------------------------|-------------------|--|-------------------|
| आदेश का दिनांक / Date of Order: | 24.09.2018 | जारी करने की तारीख / Date of issue: | 25.09.2018 |
|------------------------------------|-------------------|--|-------------------|

कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

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 IFFCO Kisan Bazar Logistics Limited,
Talwar Bhavan, Admn. Building, Old Kandla, Kutch, Gujarat**

इस आदेश(अपील) से व्यथित 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 बनाए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 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) नियमवाली, 2001, के नियम 6 के अंतर्गत 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 नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की 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 Assintant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the 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, बशर्त 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
- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं 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, केन्द्रीय 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) गुनिश्चित 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 (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा सामय्याविधि 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 सख्या EA-8 में, जा 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 दंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय 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 appeal is filed to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scripious work it excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 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 और 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. IFFCO Kisan Bazar & Logistics Ltd., Talwar Bhavan, Admn, Building, Old Kandla, Kutch (*hereinafter referred to as "Appellant"*) filed present appeal against Order-In-Original No. ST/330/2017-18 dated 23.06.2017 (*hereinafter referred to as "the impugned order"*) passed by the Assistant Commissioner, Service Tax Division, Gandhidham (*hereinafter referred to as "the lower adjudicating authority"*).

2. The facts of the case are that the Appellant filed refund application of Service Tax of Rs. 60,98,464/- paid by them for 'Construction of Barge Jetty and Warehouse' at Kandla Port under special provisions for exemption of Service Tax for Construction of original works pertaining to Port under Section 103 of the Finance Act, 1994 (*hereafter referred as 'the Act'*), as amended w.e.f. 1.4.2015 vide Finance Act, 2016. This new Section 103 of the Act was inserted vide Finance Act, 2016 after getting assent of the President on 14.05.2016 reads as under :-

"2. Special provision for exemption in certain cases relating to construction of airport or port under Section 103 of Finance Act, 1994 as amended.—

I. Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of services provided by way of construction, erection, commissioning or installation of original works pertaining to an airport or port, under a contract which had been entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date, subject to the condition that Ministry of Civil Aviation or, as the case may be, the Ministry of Shipping in the Government of India certifies that the contract had been entered into before the 1st day of March, 2015.

II. Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (!) been in force at all material times.

III. Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President".

2.1 The Appellant signed contract in form of Concession Agreement dated 17.02.2011 with Kandla Port Trust to provide services related to Construction, Erection, Commissioning, Installation of original works for setting up of Barge Jetty having design capacity not less than 5

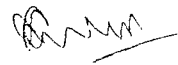
Tonnes per sq. mtrs. and for developing of Back up area to handle 2 MMTPA of cargo and paid Service Tax on construction of these works which got exempted in 2016 with retrospective effect from 1.4.2015 to 29.2.2016 (both dates inclusive) and Service Tax paid by the Appellant was required to be refunded to the appellant, as per the aforesaid provisions. However, the refund claim of Rs. 60,98,464/- filed by the Appellant was rejected by the lower adjudicating authority on the grounds as under :-

(i) Rs. 25,029/- on the ground that services provided for soil testing not covered by Section 103 of the Act and the invoices are beyond time limit;

(ii) Rs. 1,42,355/- on the ground that the services provider paid 100 % Service Tax instead of 50% by them and 50 % by the Appellant and the invoices are beyond time limit;

(iii) Rs. 8,63,904/- on the ground that for work done through M/s. Paresh Constructions and Foundation Pvt. Ltd., Mumbai, refund should have been claimed at Mumbai and not before the lower adjudicating authority;

(iv) Remaining amount of Rs. 50,67,176/- on the ground that these services had been provided by the Appellant after expiry of the Agreement period and issuance of the Completion Certificate dated 11.11.2013 by Kandla port authorities and also on the ground that Construction of the Warehouses / Storage Sheds was not part and parcel of the said Concession Agreement. It was held that the Appellant was not eligible for this refund because they did not fulfill the conditions of Section 103 of the Act to avail service tax exemption and also because the actual work offered under contract was for setting up of Barge jetty, which had already been completed by 11.11.2013.



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

- (i) the lower adjudicating authority erred in not giving any consideration to the submissions made by them vide their letter dated 31.05.2017, which clarified that the contract between the Kandla Port Trust and the Appellant was not only for construction of Barge jetty in Kandla Port (old Port Area)

- but also to develop back up area and therefore, the impugned order violates the principles of natural justice;
- (ii) the conditions of the retrospective exemption that the contract for construction of port must have been entered prior to 01.03.2015 and must be certified by the Ministry of Shipping had been duly satisfied and hence, the refund was admissible to them;
 - (iii) The Hon'ble Supreme Court in the case of Bhag Singh reported as 2004(164)E.L.T. 0137 (S.C.), has, *inter alia*, held that failure to give proper reasons for rejection of claim amounts to denial of justice.

4. Shri Vikas Mehta, Consultant, appeared during personal hearing and reiterated the grounds of Appeal and made written submissions to submit that Construction of Warehouses had been included in Para (ii) and Para (iv) of Appendix 4 of the Concession Agreement dated 17.2.2011; that Para (iii) of Appendix - 4 very specifically says to have capacity to handle 2 MMTPA of cargo, which was possible only when related warehousing facilities are also constructed within the Backup Area of the Port; that construction of 3 warehouses/storage shed was, therefore, part of the Concession Agreement dated 17.2.2011; that Contract / Work Order to M/s. Balaji Insulations was issued on 7.2.2015 and Contracts to M/s. Sadguru Construction Co. were issued on 16.1.2014 and 23.2.2015; that the Concession Agreement dated 17.2.2011 included construction of warehouses / storage sheds and the same is also very evident from the fact that no further agreement was made by the Kandla Port Trust for construction of warehousing / storage sheds; that no additional payment due to warehouses was made by them to Kandla Port Trust, other than what was required to be paid by them due to the Concession Agreement dated 17.02.2011.

4.1 The Appellant vide written submissions dated 1.8.2018 further submitted as under :-

"3. M/s. IKBL (the Appellant) have all along maintained that Kandla Port Trust had provided land in Kandla Port not only for construction of jetty but also for development of back up area of 36,000 sq.m. as per details given in Appendix 4 of the said concession agreement. The developmental work apart from jetty specifically required M/s. IKBL to set up facilities capable of handling 2 MMTPA

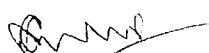
cargo and included ancillary infrastructure and other works for operating and maintaining the terminal for safe and efficient handling cargo.

3.1 To further strengthen this contention, following original documents are submitted for kind consideration by your Honour :-

(i) Affidavit dated 24.07.2018 by Shri Shri P. V. Narayana, Chief Executive Officer of M/s. IKBL affirming that there is no separate agreement between M/s. IKBL and M/s. Kandla Port Trust for construction of warehouses, etc. in the back up area.

(ii) Certificate dated 23.07.2018 of Chartered Accountant Sanjay Ruchandani & Associates certifying that M/s. IKBL have not made any payment to M/s. Kandla Port Trust towards construction of warehouses, etc. in the back area, over and above the charges that were originally fixed vide the concession agreement dated 17.02.2011 between them.

3.2 It may be appreciated from the above affidavit and certificate that the agreement dated 17.02.2011 between M/s. IKBL and M/s. KPT envisaged construction of jetty as well as warehouses in the back up area within Kandla port. This aspect has escaped attention of Ld. Assistant Commissioner, which is otherwise, evident from Appendix 4 to the concession agreement. Thus, denial of refund is not tenable and hence, appeal filed by M/s. IKBL may kindly be allowed.

4. It is further submitted that Ld. Assistant Commissioner has erred in holding that refund of Service Tax amounting to Rs. 8,63,904/- could not be granted to M/s. IKBL on the ground that jurisdiction of service provider, i.e. M/s. Paresh Constructions and Foundations Pvt. Ltd. Mumbai was at Mumbai and hence, M/s. IKBL should have filed the refund claim at Mumbai (i.e. before the jurisdictional authorities of said M/s. Paresh). In this regard, it is submitted that there is no such requirement under Section 103 of the Finance Act, 1994. Therefore, M/s. IKBL having undisputedly borne the service tax paid by them (i.e. M/s. IKBL) for refund of the said service tax. Except for this, it is evident from the impugned order that there is no short coming in the claim." 

4.2 Despite personal hearing notices sent to the Commissionerate, no reply / response was received from the Division / Commissionerate and no one appeared for personal hearing from the Department till date. Hence, I proceed to decide the appeal on the basis of the available facts and evidences in the case.

FINDINGS:-

5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal and submissions made by the Appellant. The issue to be decided in the present appeal is as to whether the impugned order rejecting the refund claim of Service Tax borne by the Appellant on construction of warehouses / storage sheds in Kandla Port area,

subsequently exempted, in terms of Section 103 of the Act is correct or not.

6. The refund of Service Tax of Rs. 25,029/- has been rejected by the lower adjudicating authority on the grounds that (i) M/s. Geo Engineering Services provided services for soil testing, which is not covered under Section 103 of the Act and (ii) Invoices are beyond the prescribed time limit. On going through Section 103 of the Act, as reproduced at Para (2) above in this order, I observe that service tax has been exempted in respect of the services provided for construction of port. I find construction consists of wide array of services and soil testing is a very important element for construction purpose. I, therefore, do not see any justified reason to deny refund of Service Tax of Rs. 25,029/- on the ground that soil testing is not covered under Section 103 of the Act. Regarding the ground that the invoices are beyond the time limit prescribed in the said Notification, I find that Section 103 of the Act stipulates provisioning of the services during the period from 1.4.2015 to 29.2.2016. The Appellant has not submitted requisite documents or invoices to discharge the onus cast upon them that the services provided by M/s. Geo Engineering Services during the said period. The Appellant has also not prove that the invoices were raised in advance and services were provided during 1.4.2015 to 29.2.2016. It is expressly mentioned in Section 103 of the Act that the services provided during the period from 1.4.2015 to 29.2.2016 is entitled to get refund. I, therefore, uphold the denial of refund of Rs. 25,029/- on this ground.

7. The refund of Service Tax of Rs. 1,42,355/- has been rejected by the lower adjudicating authority on the grounds that (i) M/s. J.S. Engineering & Contractors have paid 100 % of Service Tax instead of 50% by them and 50 % by the Appellant and (ii) Invoices are beyond the prescribed time limit. Regarding the ground that the service provider paid 100 % Service Tax instead of 50 %, the fact remains that the appellant had to bear 100 % of Service Tax incidence and there is no denial that the appellant has borne full burden of Service Tax of Rs. 1,42,385/- and the department has also not disputed this fact. Once service tax has been

exempted by the Government with retrospective effect, the lower adjudicating authority cannot start finding technical loopholes to deny the rightful claim of refund to a person, who has borne the incidence of Service Tax. There is no dispute that the appellant has borne the burden of Service Tax of Rs. 1,42,355/- in relation to construction of Port refund of which is covered under Section 103 of the Act. It has been stated at Para No. 7 of the impugned order that NOC has been provided to the effect that M/s. J. S. Engineering and Contractors have not claimed and shall not claim refund of amount. I, therefore, do not see any reason to deny refund of Rs. 1,43,355/- on this ground. Regarding the ground that the relevant invoices are beyond the time limit prescribed in the said Notification, I find that Section 103 of the Act stipulates provisioning of the services during the period from 1.4.2015 to 29.2.2016. The Appellant has not proved that the invoices were raised in advance or prior to the provision of the services. Section 103 of the Act mentions that the services provided during the period from 1.4.2015 to 29.2.2016 only shall be refunded. The Appellant has not submitted requisite documents to prove that the services provided by M/s. J.S. Engineering & Contractors were falling under the said period. I, therefore, uphold the denial of refund of Rs.1,43,355/- on this ground.

8. The refund of Rs. 8,63,904/- in respect of the services provided by M/s. Paresh Construction and Foundation Pvt. Ltd., Mumbai has been rejected by the lower adjudicating authority on the ground that the contractor is registered with the service tax authority having jurisdiction at Mumbai and therefore, refund claim was required to be filed at their jurisdictional authority. The Appellant has submitted that there is no such requirement under Section 103 of the Act and the Appellant having undisputedly borne this service tax and hence, they are eligible as they had, on 21.03.2017, submitted NOC letter dated 20.2.2017 of M/s. Paresh Construction and Foundations Pvt. Ltd. to the lower adjudicating authority vide their letter dated 20/3/2017, which was not considered in the impugned order. It is already settled that refund can be granted to the person, who ultimately borne the tax/duty. In this regard, I rely on a final order passed by the Hon'ble CESTAT in the case of Chambal Fertilisers and Chemical Ltd. reported as 2017 (52) STR 329 (Tri-Del) wherein it has been held as under :-

"4. Heard both sides and perused the records.

5. The applicability of Section 11B ibid for claiming refund of Central Excise duty/Service Tax is not restricted only to manufacturer/service provider. The said statutory provision mandate that any person can claim refund subject to the conditions that the tax/duty was collected from or paid by him; and the incidence of such tax/duty had not been passed on by him to any other person. Thus, in absence on any stipulation contained in the statutory provisions, the service recipient is well entitled to claim refund of service tax paid by him to the service provider. With regard to the issue, as to whether, the service recipient can claim refund of service tax, the Hon'ble Allahabad High Court, in the case of Indian Farmers Fertilizers Coop Limited (supra), have ruled in affirmative. The relevant paragraph is extracted below :

"15. The Tribunal was clearly, in our respectful view, correct and justified in following this principle. The assessee is the recipient of the taxable service provided by RGTIL and had borne the incidence of service tax. Hence, the assessee is entitled to claim a refund of excess service tax paid consequent upon the downward revision of the transmission charges payable by the assessee to RGTIL in terms of the determination made by the Regulatory Board."

6. There is no provision exist in Section 11B ibid, limiting the filing of refund claim either in Commissionerate having jurisdiction over service provider or that having jurisdiction over service recipient. In such a case, the appellant is entitled to file refund application before any of these authorities. In this regard, the Tribunal in the case of Jindal Steel & Power Limited (supra) has held as under :-

6. The fact that the recipient of the service is also entitled to file a claim for refund is no longer res integra. The issue stand concluded by the Constitution Bench decision in Mafatlal Industries Limited v. Union of India - 1997 (89) E.L.T. 247 (S.C.). This decision was followed in Indian Farmer Fertilizer Co-op. Ltd. v. CCE, Meerut-II - 2014 (35) S.T.R. 422 (Tri.-Del.). If the appellant which is a recipient of a service which is admittedly not taxable files a claim for refund within the prescribed period of limitation, it is axiomatic that it is entitled to do so before the Commissionerate under whose jurisdiction it pursues its taxable activities, business or is a registrant; or before the Commissionerate having authority over the provider of the service. That would be a matter of a legitimate choice for a claimant of refund. In this case, the appellant had initially filed a claim before the Delhi Commissionerate which rejected the same on the ground that it had no jurisdiction since the appellant was pursuing business outside its jurisdiction. The Bilaspur Commissionerate also rejected the refund claim on the ground that the provider of the service is not within its jurisdiction. The rejection by both Commissionerates is in my view unsustainable.

7. Therefore, the appellant in the capacity of recipient of service, can file refund application before the authorities having jurisdiction over the service recipient or before the jurisdictional authorities of the service provider under Section 11B ibid. The provisions of Section 11B ibid are explicit to provide that such recipient-claimant is only required to prove that the tax amount was collected from him. In the instant case, it is evident from the invoices that GAIL had charged service tax from the appellant at the provisional price, which was at the higher side and upon finalization of the price, had issued the credit notes for the differential price. It is also evident from the records that GAIL had deposited the service tax, collected from the appellant into the Government exchequer and had not refunded the service tax on account of price revision to the appellant and requested the Department to process the refund claims filed by the service recipients. In this context, the letter dated 26-11-2010 addressed by GAIL to the Range Superintendent, Guna, M.P. is useful, and the relevant portions therein are extracted below :-

"6. We enclose herewith at Annexure-B, a summary listing of the credit notes issued by GAIL to customers. We wish to draw to your kind attention to the fact that these credit notes have been issued only for the difference in the base value of service i.e. the difference between the initial tariff collected by GAIL and provisional initial pipeline transportation tariff approved by PNGRB.

7.

8.

9.

10. In view of the foregoing, the appellant's eligibility for refund of service tax is prima facie sustainable on legal grounds. Since the appellant is located in the jurisdiction of service tax authorities of Kota, before whom the refund application was filed on 17-1-2011, the required verification of documents may be carried out by the jurisdictional Assistant Commissioner of Service Tax, who is directed to examine the claim and dispose the same in view of the findings above. "

8.1 In view of above, I find that rejection of refund of Rs. 8,63,904/- only on the ground of wrong jurisdiction is not sustainable at all especially when NOC of M/s. Paresh Constructions and Foundations Pvt. Ltd., Mumbai along with copies of challans evidencing Service Tax payment were submitted to the lower adjudicating authority on 21.3.2017.

9. The remaining amount of Rs. 50,67,176/- has been rejected by the lower adjudicating authority on the ground that the services, for which refund was claimed, had been provided by the Appellant after expiry of the Agreement period and issuance of the Completion Certificate dated 11.11.2013 by Kandla port authorities and also on the ground that Construction of the Warehouses / Storage Shed was not part and parcel of the said Agreement. It was also stated by the lower adjudicating authority that the Appellant was not eligible for the refund of this amount because they did not fulfill the conditions of Section 103 of the Act to avail service tax exemption and because the actual work offered under contract was for setting up of Barge jetty only, which was completed by 11.11.2013. The impugned order rejected the refund claim, *inter-alia*, recording at Para 13 of the order as under :-

"13. The Deputy Commissioner (Audit), Kutch Commissionerate cleared this file vide their F. No. IV/10-35/ST/Pre/IAD/IFFCO/Kutch/2017-18 dated 22.06.2017 by making the observation that the concession agreement made with the KPT dated 17.02.2011 is only meant for setting up the Barge Jetty for captive use basis at Kandla Port and all obligations surviving, the cancellation, expiration or termination of said agreement shall only survive for a period of three years for the date of entered into the said agreement. As per the terms and condition of the agreement work so allotted in contract has been completed in the time frame and completion certificate for this effect issued on 11/11/2013. Further, they informed that the work carried out through various

work orders for which refund claim is not a part and parcel of the said concession agreement dated 17/02/2011. As the actual work offered into contract has meant for setting up of Barge jetty for handling raw material and finished product of fertilizer."

9.1 The Appellant vehemently contested this part of the impugned order stating that the lower adjudicating authority had not given any consideration to their submissions dated 31.05.2017 which had contended that the Completion Certificate issued on 11.11.2013 had certified that jetty was ready for operations and that the unloading operations from the jetty could now be carried out; that without construction of warehouses / storage sheds, the goods unloaded could not have been safely and efficiently handled without being taken to storage sheds; that the goods were required to be compulsorily shifted out immediately on unloading from the jetty; that the work carried out subsequent to issue of the Completion Certificate dated 11.11.2013 were essential parts of the upgradation of the jetty; that as required in terms of provisions of Section 103 of the Act, the Concession Agreement had been entered into between the Kandla Port Trust and the Appellant on Built, Operate and Transfer (BOT) basis prior to 01.03.2015; that Service Tax refund had been claimed by the appellant against the main Agreement dated 17.02.2011; that the dates of the subsequent contracts are not relevant for the applicability of provisions of Section 103 of the Act; that as per Section 103 of the Act for construction work pertaining to Kandla Port, there was no service tax liability on the construction services provided by the appellant to Kandla Port under contract / Concession Agreement dated 17.02.2011; that the condition in Section 103 of the Act was that the Contract had to be entered into before 01.03.2015; that the contracts for warehouses / storage sheds were part and parcel of the activities necessary for executing the work as envisaged under the main contract / Concession Agreement dated 17.02.2011; that there is no dispute that the Concession Agreement had been entered into by the appellant on 17.02.2011, much prior to 01.03.2015.

9.2 I find that the Warehouses / Storage Sheds have been constructed in the Backup area of Kandla port as per Appendix 1 read with Appendix - 4 of the Concession Agreement dated 17.02.2011, which are as under :-

head and viceversa as well as loading / unloading to / from the vessels shall be fully mechanized using conveyors and latest state-of-arts handling equipments having handling rates commensurate to handle 2 MMTPA of cargo.

iv. **Others**

The personnel and other related facilities should be capable of handling 2 MMTPA cargo. Some of the facilities to be developed and their parameters are outlined below:

- The Jetty should be constructed with RCC piled foundation to take care of all designed loads including conveyors loads;
- The Deck slab should be 120m X 20m and designed to take live load of 5 tonnes per Sq meter;
- The top of deck slab and back up area should be +9.14;
- The Jetty should be designed for Seismic Zone V;
- All necessary fendering and Mooring system should be provided;
- RCC Custom fencing should be provided around the Project facility;
- Fire Fighting arrangement;
- Communication systems;
- Electrifications & Illumination;
- Environment measures and Ancillary infrastructure;
- Other miscellaneous works for operating and maintaining the terminal for safe & efficient handling of cargo;
- Dredging of the Barge Jetty at - 4.0m.”

[Emphasis supplied]

9.4 I find that Article 2.2 and Article 2.4 of the Concession Agreement dated 12.02.2011 read as under :-

“2.2 Concession Period

The Concession hereby granted is for a period of 30 years commencing from Date of Award of Concession during which the Concessionaire is authorized and obliged to implement the Project and to provide Project Facilities and Services in accordance with the provisions hereof.

Provided that: -

- a. in the event of the Concession being extended by the Concessioneing Authority beyond the said period of 30 years in accordance with the provisions of this Agreement, the Concession Period shall include the period by which the Concession is so extended, and
- b. in the event of an early termination/determination of the Concession/ this Agreement by either Party in accordance with the provisions hereof, the Concession Period shall mean and be limited to the period commencing from the Date of Award of Concession and ending with the date of termination/determination of the Concession/this Agreement.

2.3

2.4 Port's Assets

a) In consideration of the Concessionaire agreeing to perform and discharge its obligations as set forth in this Agreement, the Concessioneing Authority hereby grants to the Concessionaire, the exclusive right to enter upon, occupy and use the Project Site and Port's Assets for the purpose of implementing the Project and provision of Project Facilities and Services pursuant thereto in accordance with this Agreement.

b) The Concessionaire shall at its costs, charges and expenses make such

development and improvements in the Project Site and Port's Assets as may be necessary or appropriate for implementing the Project and providing Project Facilities and Services, in accordance with the Agreement, Applicable Laws and Applicable Permits. ”

[Emphasis supplied]

9.5 I further find that the following clauses are also there in the said Concession Agreement dated 17.02.2011 :-

“21.2 Survival of Obligations

Any cause of action which may have occurred in favour of either Party or any right which is vested in either Party under any of the provisions of this Agreement during the Concession Period as the case may be as a result of any act, omission, deed, matter or thing done or omitted to be done by either Party before the expiry of the Concession Period by efflux of time or otherwise in accordance with the provisions of this Agreement shall survive the expiry of the Concession Period/ termination of this Agreement.

21.3 Articles to survive Termination

The provisions of Articles 16 to 21 shall, to the fullest extent necessary to give effect thereto, survive the Concession Period/the termination of this Agreement and the obligations of Parties to be performed/discharged following the termination/early determination of this Agreement shall accordingly be performed/discharged by the Parties. ”

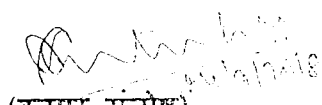
9.6 The clauses of Appendix 4 read with Article 2.2, 2.4 and 21.2 and 21.4 the Concession Agreement dated 17.02.2011, make very clear that the Appellant has carried out construction of Warehouses / Storage Sheds at Barge jetty in the Back up area of size 36000 sq. m. for the upgradation / development of Kandla Port as per Concession Agreement dated 17.02.2011 only and the concession has been granted to the Appellant by Kandla Port Trust for a period of 30 years commencing from the Date of Award of Concession (as per clause 2.2) and during this period of 30 years, the Concessionaire i.e. the appellant is authorized and obliged to implement the project of upgradation of Kandla Port and to provide all necessary facilities and services in accordance with the provisions thereof. Accordingly, the construction of warehouses / storage sheds was a natural ancillary infrastructure activity for the efficient handling of cargo at Kandla port and it is not disputed that the construction of warehouses / storage sheds in the Back up Area of Kandla Port has been ordered by Kandla Port authorities and duly certified by the Ministry of Shipping, Govt. of India vide Certificate No. PD-11015/S2007-KPT date 20.10.2010 for setting up of Barge Jetty at Old Kandla Port to handle 2 MMTPA cargo. Therefore, the Completion Certificate dated 11.11.2013 was only related to readiness of the barge jetty for operations and has no adverse impact

on the construction of Warehouses / Storage Sheds, which have be considered as integral work pertaining to the Kandla Port. It is also on record that the Contract dated 16.10.2014 with M/s. Sadguru Construction Co. for construction of storage shed at Barge jetty and Contract dated 23.2.2015 with M/s. Sadguru Construction Co. for construction of 2 storage sheds at Barge jetty / Back up area, contract/work order dated 7.2.2015 with M/s. Balaji Insulations for construction of 3 warehouses with steel structure, roofing and side cladding work at Barge jetty and contract / work order dated 21.8.2014 with M/s. Paresh Constructions and Foundations Pvt. Ltd. for construction of pre-cast filling work for covered storage shed at Barge jetty / Back up area - all are prior to 1.3.2015 (i.e. cut off date of the notification) and have to be read with the Concession Agreement dated 17.2.2011 for the simple reason that for any port and jetty to run efficiently, sufficient facilities of warehouses/storage sheds are essential and construction of such facilities by the Appellant has to be treated as integral part of the project of Kandla Port for upgradation of its Barge jetty to handle 2 MMTPA of cargo vide Concession Agreement dated 17.2.2011 which was/is effective for 30 years, if not terminated. The impugned order has failed to consider the facts and the Concession Agreement dated 17.2.2011 and therefore, I have no option but to hold that the rejection of entire refund claim of Service Tax which has been borne by the appellant for the construction of warehouses / storage sheds vide the impugned order is not correct, legal and proper.

10. In view of above, I uphold denial of refund of Rs. 25,029/- and Rs. 1,42,355/- as discussed above and set aside remaining portion of the impugned order and allow refund of remaining amount with consequential relief, if any.

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

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


(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.
To,

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| M/s.IFFCO Kisan Bazar & Logistics Ltd., Talwar Bhavan, Admn., Building, Old Kandla, Kutch. | मे. ईफको किसान बाजार & लॉजिस्टिक्स लिमिटेड, तलवार भवन, प्रसासनिक बिल्डिंग ओल्ड कांडला, कच्छ. |
|---|--|

Copy to:

- 1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information please.
- 2) The Commissioner, CGST & Central Excise, Gandhidham, Kutch for necessary action.
- 3) The Assistant Commissioner, CGST & Central Excise, Gandhidham, Kutch for further necessary action in the matter.
- 4) Guard File.