

क फाइल संख्या :File No :V2(WCS)22/AHD-III/2017-18 /10110

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-0145-17-18**

दिनांक Date :**27.10.2017** जारी करने की तारीख Date of Issue:27-11-17

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश :
GNR-STX-DEM-DC-17/2017 दिनांक : **31.03.2017** से सृजित

Arising out of Order-in-Original: **GNR-STX-DEM-DC-17/2017**, Date: **31.03.2017** Issued by: Assistant Commissioner, Service Tax, Div:Gandhinagar, Ahmedabad-III.

घ **अपीलकर्ता** एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Kalpataru Power Transmission Ltd.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur 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.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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

- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
- (C) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- षोबी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registrar of a branch of any

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number 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 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 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 43 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

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

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

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten 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.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on

ORDER-IN-APPEAL

This appeal is filed by M/s. Kalpataru Tower Transmission Ltd., 101, Part-III, GIDC Estate, Sector-28, Gandhinagar (for short "appellant") against OIO No.GNR-STX-DEM-DC-17/2017 dated 31.03.2017 passed by the Assistant Commissioner, Service Tax Division, Gandhingar [for short - 'adjudicating authority'].

2. This appeal is primarily against CENVAT credit which stands disallowed on outdoor catering services. The facts of the case is that based on an audit objection, show cause notice dated 10.10.2016 was issued to the appellant, *inter alia*, proposing to disallow CENVAT Credit amounting to Rs.2,31,553/- availed on outdoor catering service for the period of 2011-12 to 2014-15. The notice demanded interest and further proposed penalty on the appellant. Vide the impugned order, *supra*, the said show cause notice was decided by the adjudicating authority by dis-allowing the CENVAT credit in respect of the aforementioned service and ordered payment of interest. He also imposed penalty on the appellant for Rs.2,31,553/-. It is against this order that the present appeal is filed.

3. The grounds raised in the appeal are that:-

- The appellant is engaged in erection and commissioning of electricity power line in remote area; that as per Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and Cess Act, 1996, welfare measures such as canteen facility, first aid facility, accommodation etc are required to be provided for workers near the work place; that the catering services were provided to the workers at the site where no other food facility available nearby area; that the exclusive part in definition of input service does not restricts such service provided to workers but restricts personal use on consumption of any employees.
- The nature of work and the provisions of the Act specifically mandate that the catering service must be provided to the workers and such service received by them is as per law and credit on such services is not deniable. Hence, demand with interest and penalty not sustainable.
- They relied on Hon'ble Gujarat High Court decision in case of M/s Ferromatik Milacron India Ltd and Bombay High Court decision in case of M/s Ultratech Cement.
- The demand hits by limitation.

4. Personal hearing in the matter was held on 11.09.2017. Shri S.J.Vyas, Advocate appeared on behalf of the appellant and reiterated the grounds of appeal. He explained definition of Input Service and submitted additional submissions. Mrs. Mary George, Superintendent of Gandhinagar Division, appeared on behalf of Revenue.

5. I have gone through the facts of the case, the grounds mentioned in the appeal and the oral averments, raised during the course of personal hearing. The main issue to be decided is whether as alleged by the

department, the appellant has wrongly availed CENVAT credit on outdoor catering services or otherwise.

6. The adjudicating authority has denied the credit in view of clause (C) of exclusive part of definition of "input service"; that the said service is received for consumption of workers who may be other than employees however, the said service was not for industrial purpose. I find that the adjudicating authority has extensively quoted the definition of input service as defined under Rule 2(I) of Cenvat Credit Rules, 2004, and hence I do not reproduce the same. The appellant contended that the said definition of outdoor catering not attracts in their case as the service was used for their business activities and consumption of workers who are not the employees.

7. In the instant case, the appellant was providing food facility to the workers who were engaged in work of erection and commission of machine at a place other his factory. When a caterer provides services in connection with catering at a place other than his own but including a place provided by way of tenancy or by a person receiving such service, then such service is very well within the ambit of "outdoor catering service". I find that the disputed input service viz. outdoor catering service is excluded from the definition of input service. The exclusion clause was effective w.e.f. 1-4-2011 and Clause (C) of the said exclusion specifically excludes the services provided in relation to outdoor catering, when such services are used primarily for personal use or consumption of any employee. In the instant case, the said services are used for the workers deployed by the appellant. In the circumstances, the said service is very well covered in the exclusion part. The appellant has relied on the decision of Hon'ble High Court of Gujarat in case of M/s M/s Ferromatik Milacron India Ltd [2013 (31)STR 424-Guj] and Bombay High Court decision in case of M/s Ultratech Cement [2010 (260) ELT 369] which is not applicable to the instant as the period involved in the said decisions are prior to the said amendment. Therefore, the adjudicating authority has rightly not accepted the decision.

8. In cases where, the definition of input services, have been amended to exclude such services, such exclusion on 01.04.2011 was conscious decision on part of the legislature having knowledge of earlier judicial decisions on such subject, yet it chose to exclude these items from the definition of input service and wisdom of the legislature cannot be questioned in the guise of interpretation or hardship. Moreover, the interpretation cannot add words to the definition, where definition is unambiguous and crystal clear. The Hon'ble High Court of Bombay in the case of Nicholas Piramal (India) Limited [2009

(244) ELT 321 (Bom)], has on the question of interpretation of Rules, made the following observation:

- *We may only mention that hardship cannot result in giving a go-by to the language of the rule and making the rule superfluous. In such a case it is for the assessee to represent to the rule making authority pointing out the defects if any. Courts cannot in the guise of interpretation take upon themselves the task of taking over legislative function of the rule making authorities. In our constitutional scheme that is reserved to the legislature or the delegate.*
- *Hardship or breaking down of the rule even if it happens in some cases by itself does not make the rule bad unless the rule itself cannot be made operative. At the highest it would be a matter requiring reconsideration by the delegate.*
- *It is never possible for the Legislature to conceive every possible difficulty. As noted a provision or a rule can occasion hardship to a few, that cannot result in the rule being considered as absurd or manifestly unjust.*
- *In our opinion, the rule must ordinarily be read in its literal sense unless it gives rise to an ambiguity or absurd results.*

I find that the Hon'ble Tribunal had pronounced eligibility of CENVAT credit on various items, before 2011. Despite the Legislature being aware of these judgments/decisions, yet it chose to restrict the credit by changing the definition in 2011, by excluding certain services and inputs. Hon'ble Supreme Court has very categorically stated "Courts cannot add words to a statute or read words into it which are not there". (Parmeshwaran Subramani [2009 (242) ELT 162 (SC)]. Moreover, in the guise of interpretation, no intention can be added, when intention of legislature is very clear. In view of the foregoing, I agree with the view taken by the adjudicating authority that the CENVAT credit was wrongly availed by the appellant as far as the issue is concerned.

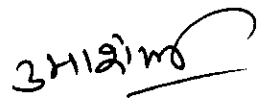
9. Further, I find that in case of M/s AET Labarootory Pvt Ltd [2016-42-STR-720 Tri, Ban], the Hon'ble Tribunal has held that:

"The exclusion clause was effective w.e.f. 1-4-2011 and Clause (C) of the said exclusion specifically excludes the services provided in relation to outdoor catering and health insurance or life insurance, etc. Admittedly such services, prior to 1-4-2011, have been held to be covered by the definition of input services. In fact, the need for exclusion would arise only when the services are otherwise covered by the definition. Legislation, in its wisdom, has excluded certain services from the availment of Cenvat credit w.e.f. 1-4-2011, when such services are otherwise covered by the main definition clause of input service. To interpret the said exclusion clause, in such a manner, so as to hold that such services have direct or indirect nexus with the assessee's business and thus would be covered by the definition, would amount to defeat the legislative intent. It is well settled that the legislative intent cannot be defeated by adopting an interpretation which is clearly against such intent. As such, I find no justifiable reason to allow the credit in respect of the two disputed services and I uphold the confirmation of denial of Cenvat credit and demand of interest thereon."

10. In view of above discussion, I am of the considered view that the appellant is not eligible for taking Cenvat credit on service tax paid on Outdoor catering service during relevant period. In the circumstance, the same is required to be recovered with interest.

11. As regards the penalty, looking into the facts of the case, I do not find any merit to interfere the contention placed by the adjudicating authority in the impugned order. Hence, the same is also sustainable.

12. The appeal filed by the appellant stands disposed of in above terms.
अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।



(उमा शंकर)

आयुक्त (अपील्स - I)

Date: /10/2017.

Attested



(Mohanan V.V)
Superintendent (Appeal-I)
CGST, Ahmedabad.

By RPAD

M/s. Kalpataru Tower Transmission Ltd.,
101, Part-III, GIDC Estate, Sector-28, Gandhinagar

Copy to:-

1. The Chief Commissioner, CGST Zone, Ahmedabad.
2. The Commissioner, CGST, Gandhinagar.
3. The Addl./Joint Commissioner, (Systems), CGST, Gandhinagar
4. The Dy. / Asstt. Commissioner, CGST, Gandhinagar
5. Guard file.
6. P.A