
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, वस्तु एवं सेवा कर भवन, सप्तवीमंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015		GST Building, 7 th Floor, Near Polytechnic, Ambavadi, Ahmedabad-380015
टेलीफोन : 079-26305065		टेलीफैक्स : 079 - 26305136	

क फाइल संख्या : File No : V2/48/RA/GNR/2018-19 / 11412 to 11416

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-19-19-20

दिनांक Date : 09-07-2019 जारी करने की तारीख Date of Issue:

11/07/2019

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals) Ahmedabad

Cyfile

ग अपर आयुक्त, केंद्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : 13/REF/EX/2018-19
दिनांक : 05-10-2018 से सृजित

Arising out of Order-in-Original: 13/REF/EX/2018-19, Date: 05-10-2018 Issued by:
Assistant Commissioner, CGST, Div:Kadi, Gandhinagar Commissionerate, Ahmedabad.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Metal Tech Industries,

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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) केंद्रीय 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 प्रक्रिया 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- पठनी/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 दूसरा मंजिल, बहुमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

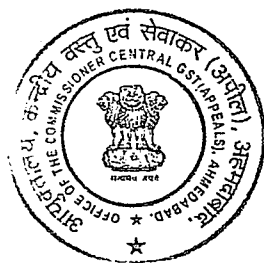
To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-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 रुपये 5 लाख या उससे कम है वहाँ रुपये 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपये 5 लाख या 50 लाख तक हो तो रुपये 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपये 50 लाख या उससे ज्यादा है वहाँ रुपये 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 Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 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 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 63 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 रुपए से अधिक न हो

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

- (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 अर्ज़ी 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 payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.



ORDER IN APPEAL

The below mentioned departmental appeal have been filed by Assistant Commissioner, CGST & Central Excise, Division-Kadi, Gandhinagar, [for short –'adjudicating authority'] under Section 35E of Central Excise Act, 1944, 2017, the details of which are as follows:

Name of the respondent	OIO No. & date	Review Order No. passed by the Pr. Commissioner, CGST & C.Ex., Ahmedabad North Comm'rate [in terms of Section 107(2) of the CGST Act, 2017]	Appeal No.
M/s. Metal Tech Industries, S.No.671/3,laxmipura-Kherpur Road,Rajpur,Tal-Kadi,Dist-Mehsana,Gujarat	13/Ref/Ex/2018-19 dated 05.10.2018.	37/2018-19 dtd 31.01.2019 issued from F.No.IV/16- 233/OIO/Ref/18-19	V2/48/RA/ GNR/2018- 19

2. The facts of the cases, in brief, are that in pursuant to the instruction of range superintendent that exemption under Noti. No.12/2012-CE dated 17.03.2012,(Sr.No.332A) has been availed and Cenvat credit in term of rule 6(3) of Cenvat Credit Rules, 2004 has not been reversed, the respondents reversed duty ₹12,76,469/-and paid interst ₹24,852/-on 31.08.2016. However, subsequently the respondent filed a refund claim for said amount of duty and interest on 30.06.2017 stating that Rule 6(6) (viii) of Cenvat Credit Rules specifically exempts the supplies to units for setting up of solar power generation projects and hence they were not required to pay duty and interest therein which was sanctioned under the impugned order.

3. The impugned orders was reviewed by the Principal Commissioner,CGST & Central Excise, Gandhinagar and issued review orders number 37/2018-19 dated 31.01.2019 for filing appeal under section 35E of the Central excise Act, 1944 mainly on grounds that the principle of unjust enrichment has not been examined properly by the adjudicating authority and claimed the relief that the matter may be remanded back for considering all aspects and ascertaining the admissibility of the refund claim; they also cited judgement of Hon'ble supreme Court in case of M/s. Mafatlal Industries Ltd v/s Union of India as repored in 1997 (89) ELT 247, Hon'ble CESTAT in case of M/s Rajasthan Spg Wvg Mills Ltd v/s CCE -2006

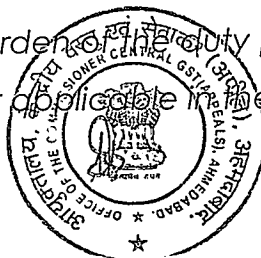


(194) ELT 254(tri Del), m/s. HPCL Corporation v/s CCE-2015 (317) ELT 379(Tri Mum) and Sahakari Khand Udhog Mandal Ltd v/s CCE-2005 (181)ELT 328(SC) in this regard.

4. Personal hearing was granted on 03.05.2019 and 06.05.2019. However, the respondents had requested to decide the case based on their written submission dated 21.05.2019. Vide the said written submission, the respondent referred the impugned OIO(para 24) wherein it is observed that all clearances has been made after filling of annexure-I and that benefit of non reversal of input credit availed on clearance of exempted product have been fulfilled. On the issue of unjust enrichment, they stated that duty was not paid at the time of clearance as they claimed exemption and subsequently on insistence of the department, reversal was made, therefore, burden of duty has been born by them and hence unjust enrichment is not applicable.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and the written submissions made by the respondents. As the respondents have shown unwillingness to avail the opportunity of personal hearing, I proceed with the appeal for ex-parte decision.

6. I observe that the clearance of goods made by the respondent claiming exemption under Sr.No.332A of Noti. No.12/2012-CE dated 17.03.2012 is not disputed by the department and the same has been accepted under the OIO at para 23 observing that *'there is no dispute regarding the availability of the benefit of nil rate of duty to the claimant on their clearance'*. Another issue pertaining to said clearance whether made before filling of required annexure-I with the jurisdictional division office or not was also decided in favor of the appellant and the same do not form part of the appeal, I need not require to offer my finding on the same. The impugned order is appealed only for addressing the issue of unjust enrichment. The adjudicating authority at para 25 of the impugned order has held that *"As regards the applicability of unjust enrichment, it is clear that the claimant has not paid duty at the time of clearance as they have claimed the exemption from duty and subsequently they have made reversal of the input credit on the insistence of the department. Therefore, they have themselves born the burden of the duty paid to the department, hence the unjust enrichment is not applicable in the instant case."*



7. However, It is argued by the appellant that the adjudicating authority was required to verify whether the duty component has been loaded by the claimant in the value or not, which has not been tested. It is further argued that the adjudicating authority ought to have appreciated the fact that non-payment of duty is not the only parameter to examine the aspect of unjust enrichment. Merely any such non-payment of duty will not be conclusive in nature. It has to be considered alongwith other facts like non-recovery of such taxes from consumers by claimant and reflection of said amount in books of account as "duty receivable/recoverable" and not booked as expenses, etc. The department has relied on decision of Hon'ble supreme Court in case of M/s. Mafatlal Industries Ltd v/s Union of India as reported in 1997 (89) ELT 247, Hon'ble CESTAT in case of M/s Rajasthan Spg Wvg Mills Ltd v/s CCE -2006 (194) ELT 254(tri Del), M/s. HPCL Corporation v/s CCE-2015 (317) ELT 379(Tri Mum) and Sahakari Khand Udhog Mandal Ltd v/s CCE-2005 (181)ELT 328(SC) in this regard. I found force in the appeal as no findings on the such points exists in the impugned order.

8. The cross objection filed by the respondent also simply repeats the observations of the adjudicating authority wherein it is states that duty was not paid at the time of clearance as they claimed exemption and subsequently on insistence of the department, reversal was made, therefore, burden of duty has been born by them and hence unjust enrichment is not applicable. Since the impugned order has not tested the refund claim thoroughly and in totality as per the spirit of Section 11B, said plea of the respondent cannot be accepted. I observe that crossing of bar of unjust enrichment is a prerequisite condition mandated under Section 11B of the Central Excise Act,1944 for any refund claim non qualifying of which can makes the refund claim immature for further processing. I observe that so far as the issue of unjust enrichment is concerned, the refund claim in question before its sanction has not tested thoroughly with all ingredients as stipulated under Section 11B of the Central Excise Act,1944 as well as not followed the verdicts of Hon'ble supreme Court in case of M/s. Mafatlal Industries Ltd v/s Union of India as reported in 1997 (89) ELT 247, Hon'ble CESTAT in case of M/s Rajasthan Spg Wvg Mills Ltd v/s CCE -2006 (194) ELT 254(tri Del), M/s. HPCL Corporation v/s CCE-2015 (317) ELT 379(Tri Mum) and Sahakari Khand Udhog Mandal Ltd v/s CCE-2005 (181)ELT 328(SC).



9. I therefore, remit the case back to the adjudicating authority to test/verify from record i.e. balance sheet/invoice etc whether the duty component has been loaded by the claimant in the value or not and to appreciated the fact that non-payment of duty is not the only parameter to examine the aspect of unjust enrichment, but it has to be considered alongwith other facts like non-recovery of such taxes from consumers by claimant and reflection of said amount in books of account as "duty receivable/recoverable" and not booked as expenses, etc. applying the ratio of decision cited supra and to order a fresh ensuring principle of natural justice.

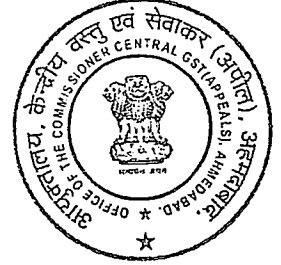
10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

(उमा शंकर)

केंद्रीय कर, प्रधान आयुक्त (अपील्स)
Date:



Attested

(D.A. Parikh)
Superintendent, Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
M/s.Metal Tech Industries,
S.No.671/3,laxmipura-Kherpur Road,
Rajpur,Tal-Kadi,Dist-Mehsana,Gujarat

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad.
2. The Principal Commissioner of Central Tax, Gandhinagar.
3. The Additional Commissioner, Central Tax (System), Gandhinagar.
4. The Asstt.Commissioner, Central Tax, Division-Kadi, Gandhinagar.
5. Guard File.
6. P.A.

