केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

वस्तु एवं सेवा कर भवन,
सातवीं मंजिल,पॉलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

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क फाइल संख्या :File No : **V2/43/RA/GNR/2018-19** /12455 TO 12460

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-29-19-20**

दिनॉक Date :**19-09-2019** जारी करने की तारीख Date of Issue: 23/09/2019

G. file

आयुक्त (अपील) द्वारा पारित

Passed by Commissioner (Appeals) Ahmedabad

ग **अपर** आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश **: 56/Ref/AC/18-19-CEX**
दिनॉक : **29-11-2018** से सृजित

Arising out of Order-in-Original: **56/Ref/AC/18-19-CEX,** Date: **29-11-2018** Issued by: Assistant Commissioner,CGST, Div:Palanpur, Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Ambica Prestress 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूवोक्त 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 मामलें 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 डयूटी केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

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, बहूमाली 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 इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर 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 ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत 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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 रू.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 beer a court fee stamp of Rs.6.50 paisa 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 in 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, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 अर्ज़ी एवं अपील को लागू नहीं होगे।

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

This order arises out of an appeal filed by the Assistant Commissioner, Central GST, Palanpur Division, Gandhinagar Commissionerate (in short 'appellant') in terms of Review Order No.32/2018-19 dtd.09.01.2019 passed u/s 35E of the Central Excise Act, 1944 passed by the Review Authority against Order-in-Original No.56/Ref/AC/18-19-C.Ex. dated 29.11.2018 (in short 'impugned order') passed by the Assistant Commissioner, Central GST & C.Ex., Palanpur Division, Gandhinagar Commissionerate (in short 'adjudicating authority') in the case of M/s. Ambica Presstress Industries, Block No.1419/1427, National Highway-14, Shihori, District Banaskantha (N.G.)-385 550 (in short 'respondent').

2. The facts of the case, in brief, are that the respondent had filed a refund claim application dated 27.09.2005 of the duty inadvertently paid by them though they were eligible for exemption up to the clearance value of ₹100.00 lacs in the year 2005-06. As there was no correspondence from the department in respect of their refund claim application, the respondent wrote a letter, dated 17.06.2008, to the jurisdictional Assistant Commissioner of Central Excise. The Assistant Commissioner, vide letter dated 14.07.2008, asked the respondent to submit the proof of filing refund claim application. In response to the aforesaid letter, the respondent submitted, vide letter dated 20.08.2008, a copy of their refund claim application dated 27.09.2005 along with copies of relevant documents but they did not submit the proof of filing refund claim application. Then after the jurisdictional Assistant Commissioner, vide letter dated 23.06.2009, informed the respondent that there was no endorsement of receipt made by the office on the body of the refund application submitted by them and therefore, it was considered that the respondent had not submitted the refund claim application on 27.09.2005. The respondent clarified the jurisdictional Assistant Commissioner that they had submitted the said refund claim by post through U.P.C. (Under Postal Certificate) and no acknowledgement of the post from the receiver was obtained by the postal authorities. In the above circumstance, the then jurisdictional adjudicating authority, vide letter dated 27.07.2009, disposed off the refund claim application of the appellants on the ground of time bar.

2.1. Being aggrieved with the said letter, the respondent preferred an appeal before the then Commissioner (Appeals-III) who, vide Order-In-Appeal number 358/2009(Ahd-III)KCG/CE/Commr.(A) dated 28.10.2009, remanded the case back to the lower authority with directions to make efforts to find out the truth regarding the filing of refund application by the respondent vide their letter dated 27.09.2005 through U.P.C. and then to pass a speaking order in this regard after following the principles of natural justice. As per the directions of the Commissioner (Appeals-III), the adjudicating authority passed the Order-in-Original No.91/Refund/DC/09-10 dated 15.02.2010 wherein he rejected the refund claim application of the respondent on the ground of time bar. Aggrieved with the impugned order, the respondent, once again, preferred an appeal before the Commissioner (Appeals-III) who, vide Order-In-Appeal number 90/2010(Ahd-III)KCG/CE/Commr.(A) dated 13.05.2010, decided the case *ex parte* and rejected the appeal on the ground that the appellants had failed to present any

acknowledgement/proof to establish the fact that they had submitted the refund application on 27.09.2005.

2.2 The respondent filed an appeal against the above Order-In-Appeal dated 13.05.2010 before the Hon'ble CESTAT, West Zonal Bench, Ahmedabad. The Hon'ble CESTAT, vide Order No. A/10083/2017 dated 16.01.2017, remanded back the case to the Commissioner (Appeals) with direction to conclude the appeal on the merits.

2.3 The Commissioner, Central Tax (Appeals), Ahmedabad vide his Order-in-Appeal No.AHM-EXCUS-003-APP-0183-17-18 dated 24.01.2018 decided the appeal of the respondent filed against Order-in-Original No.91/Refund/DC/09-10 dated 15.02.2010 passed by the Deputy Commissioner, Central Excise, Division Mehsana, Ahmedabad-III, on merits as directed by the CESTAT vide their Order dated 16.01.2017. The Commissioner (Appeals), in his above said Order, observed that the appellants were not liable to pay central excise duty as they did not cross the limit of Rs.4 Crore and hence, their payment of duty may be treated as a procedural lapse on their part and that if a tax has been collected which is not leviable at all, the time limit given in the tax laws does not apply and that the general time limit under the Limitation Act 1963 applies under which the limit is three years from the time of coming to know of it. With the above observation, the Commissioner (Appeals) set aside the OIO dated 15.02.2010 passed by the Deputy Commissioner, Central Excise, Division Mehsana, Ahmedabad-III and allowed the appeal filed by the respondent with consequential relief.

2.4 The department preferred an appeal before CESTAT, WZB, Ahmedabad against the said OIA dated 24.01.2018. However, in view of the Board's Instruction F.No.390/Misc./116/2017-JC dated 11.07.2018 raising monetary limit for filing appeal before CESTAT to Rs.20 lakhs, the department filed an application for withdrawing the appeal and accordingly the CESTAT has dismissed the departmental appeal vide Final Order No.A/11829/2018 dated 20.08.2018 without going into the merit of the appeal.

2.5 Consequent upon the CESTAT's above decision dismissing departmental appeal, the OIA No. AHM-EXCUS-003-APP-0183-17-18 dated 24.01.2018 issued by the Commisisoner, Central Tax (Appeals), Ahmedabad became the final order in the matter and accordingly in view of the decision in the OIA, the adjudicating authority had sanctioned the refund claim of Rs.16,32,000/- vide the impugned Order dated 29.11.2018 as a consequential relief of the appeal allowed by the Commissioner (Appeals).

3. The department on being aggrieved with the impugned Order, filed the present appeal on the ground that the adjudicating authority has not examined the aspect of unjust enrichment while sanctioning the refund and therefore the impugned Order passed by him is not legal and proper and deserves to be set aside and that OIO may be remanded back for considering all these aspects and ascertaining the admissibility of the refund claim.

4. A hearing in the matter was held on 19.08.2019. Shri Shankar Mundra, Consultant appeared on behalf of the respondent and sought two weeks time for submission of cross objection which was allowed. However, no cross objection has been filed from the side of respondent till date. No one has appeared for the hearing from the appellant's side.

5. I have carefully gone through the facts of the case, appeal memorandum, and evidences available on records and I find that the impugned Order under challenge in the present case came to be issued in consequence to Commissioner (Appeals) earlier Order dated 24.01.2018 becoming final as the appeal against the same was dismissed by the CESTAT. The refund has been sanctioned by the adjudicating authority as consequential relief of allowing of appeal of the respondents by the Commissioner (Appeals) by his Order dated 24.01.2018.

6. The appeal against the impugned Order has been preferred by the department only on the ground that the aspect of unjust enrichment as mandated under Section 11 B of the Central Excise Act has not been examined by the adjudicating authority while sanctioning the refund. With regard to the aspect of unjust enrichment, it is to observe that the said aspect comes into play only when the amount of duty paid, for which refund is claimed, has been collected from the buyer or the incidence of duty has been passed on to any other person.

7. In this regard, I would like to refer to para 7 of the OIA dated 24.01.2018 of the Commissioner (Appeals) which reads as under:

> *"7. At the onset, I find that the appellants were executing their tax liability under Notification number 9/2003 for the year 2005-06. Under Notification number 9/2003, the appellants were paying Central Excise duty from the very first consignment. Then suddenly they realized that they were supposed to pay duty under Notification number 8/2003 after availing required SSI exemption. The appellants have regularly paid the Central Excise duty and neither had they collected the said duty amount from their clients, nor did they avail the credit of duty inputs under Rule 3 or 11 of the CENVAT Credit Rules, 2002. The adjudicating authority, in the impugned order, did not counter the above facts. The appellants had not crossed the limit of ₹ 4 crores in the previous financial year as well as in the current financial year. This is enough to establish the fact that the payment of Central Excise duty by the appellants was purely a procedural lapse and hence, they cannot be denied their right to avail the notification which they legally deserve. In the second page of the impugned order, it has been specifically mentioned that despite they came to know that the exemption was legally available to them; the appellants had not discontinued payment of duty. This shows that their intention was bona fide and not to evade payment of Central Excise duty. They had followed all the procedures of Notification 8/2003 correctly except the payment of Central Excise duty from the very first consignment and also they failed to intimate the department about the notification they would avail. However, the above lapse should not be the reason to deny*

the refund on time bar as the said lapse is nothing but absolute procedural one. Thus, looking to the intention of the appellants and the prevailing situation, I find that, the appellants were not liable to pay Central Excise duty as they did not cross the limit of ₹ 4 crore and hence, their payment of duty may be treated as a procedural lapse on their part. The law should be always applied to help the trade and not to punish them on flimsy procedural grounds. I have seen many instances where tax has been paid on goods or on services which are not at all leviable to tax. Often the tax payers pay such amounts due to insufficient knowledge on their part or on the part of Revenue who coax them to pay to be on the safe side. Later, when it is realised that the tax is not payable, refund claims are made which are rejected by Revenue on the ground of time bar. The statutory time bar given in the Service Tax, Excise and Customs Acts is invoked. I am of the belief that the normal statutory time limit does not apply if the goods or services are not taxable. The court of law has always treated this subject with a very rational approach to ensure that the genuine tax payers are not penalized on procedural issues. There are plentiful of case laws to quote where the higher courts have negated the stringent approach of the department where the refund of unauthorized tax has been rejected with flimsy grounds.

In Cawasi & Co. case [1978 E L T (J 154)] the Hon'ble Supreme Court observed that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known, be it 100 years after the date of payment. This judgment has been quoted and depended upon by the following judgment of the Hon'ble Andhra Pradesh High Court.

In the case of U Foam Pvt. Ltd. vs the Collector of Central Excise -1988 (36) E L T 551(A P), the issue was that Revenue rejected the refund quoting the time limit under Rule 11 of the Central Excise Rules, 1944, and Section 11B of the Central Excises and Salt Act, 1944. The high court held that "the period of limitation to be applied is three years from the date when the assessee discovered the mistake in the payment of duty, or from the date when it came to the knowledge of the assessee that it is entitled to the refund".

In the case of Hexacom (I) Ltd. vs CCE, Jaipur - 2003 (156) E L T 357 (Tri -Del), the tribunal held that if any amounts are collected erroneously as representing Service Tax, which is not in force, there is no bar to the return of such amounts. The time limit under Section 11B of Central Excise Act, 1944 does not apply. The tribunal observed the following;

"We have perused the records and heard both sides. It is not in dispute that no service tax was leviable during the period in question. Therefore, whatever payment was made did not relate to Service Tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of

Service Tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to service tax. Therefore, if any amounts are collected erroneously as representing service tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct".

In the case of CCE, Raipur vs. Indian Ispat Works Ltd -2006 (3) S T R 161 (Tri -Del), the Tribunal held that, "The department has allowed the claim of the respondents for the period 16-11-97 to 1-6-98, but rejected the refund claim for the previous period and subsequent period as time barred. The rejection of the claim of refund is wrong as it can be seen from the records, that the amount paid by the respondents is not a tax, but an amount collected by the department without any authority of law". In the case of CCE, Bangalore vs Motorola India – 2006 (206) E L T 90 (Kar), the high court has held that in the case of claim of refund, limitation under Section 11B of Excise Act is not applicable since the amount paid by mistake in excess of duty and such amount cannot be termed as duty. Therefore, the conclusion is clear that if a tax has been collected which is not leviable at all, the time limit given in the tax laws does not apply. The general time limit under the Limitation Act 1963, applies under which the limit is three years from the time of coming to know of it. As, legally, there was no tax liability on their part, the Central Excise duty already paid by them has to be treated as deposit and not tax. When the amount paid by the appellants is to be treated as deposit, the principle of limitation and all other restricting criterion would not be applicable to the case."

8. As can be seen, the Commissioner (Appeals) in his above findings has categorically brought on record that the respondent had regularly paid the Central Excise duty and neither had they collected the said duty amount from their clients, nor did they avail the credit of duty inputs under Rule 3 or 11 of the CENVAT Credit Rules, 2002. He has also observed that the adjudicating authority did not counter the above facts. Thus, it can be seen that the fact whether the respondent had collected the central excise duty paid from their clients had already been examined by the then Commissioner (Appeals) in his OIA dated 24.01.2018 wherein it is categorically held that the respondents had not collected the duty paid from their clients. Therefore, I find that the aspect of unjust enrichment in the case has already stand examined by the Commissioner (Appeals) by his above findings. Further, from the facts revealed from para 5 of the impugned Order, I find that in the appeal filed against the OIA dated 24.01.2018, the department has not challenged/disputed the fact of non-collection of duty from the clients by the respondent despite the clear finding of the Commissioner (Appeals) in this regard as discussed above though the department has challenged the second part of the finding of Commissioner (Appeals) relating to availment of credit under Cenvat Credit Rules. In view of the facts discussed, I am of the view that the aspect of unjust enrichment in the case now raised by the

department in the appeal under consideration had already stand examined by the Commissioner (Appeals) in OIA dated 24.01.2018 by his findings discussed above and when it is so, the adjudicating authority has no jurisdiction to re-examine the said aspect especially when the said OIA has attained finality. Therefore, I do not find merit in the department's contention that the aspect of unjust enrichment ought to have been examined by the adjudicating authority while sanctioning refund in the present case.

9. In view thereof, I do not find any legal infirmity in the impugned Order passed by the adjudicating authority and accordingly, I uphold the same and reject the appeal filed by the department being devoid of merits.

10. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals filed by the appellant stand disposed off in above terms.

19/9/19

(Gopi Nath)
Commissioner (Appeals)

Attested:

25/09/2019

(Anilkumar P.)
Superintendent(Appeals),
CGST, Ahmedabad.

BY SPEED POST TO :

(1) The Assistant Commissioner of CGST,
Palanpur Division,
Gandhinagar Commissionerate.

(2) M/s. Ambica Presstress Industries,
Block No.1419/1427,
National Highway-14, Shihori,
District Banaskantha (N.G.)-385 550

Copy to:

1. The Chief Commissioner, CGST, Ahmedabad Zone .
2. The Commissioner, CGST, Gandhinagar.
3. The Addl. Commissioner, CGST, Gandhinagar.
4. The Assistant Commissioner(System),CGST, Gandhinagar.
(for uploading the OIA on website.)
5. Guard File.
6. P.A. File.