केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

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

GST Building ,7th Floor,,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

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क फाइल संख्या :File No : **V2/1/GNR/2019-20** /12822-26

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-036-19-20**

दिनाँक Date : **15-10-2019** जारी करने की तारीख Date of Issue: 23-10-2019 G.Jile

आयुक्त (अपील) द्वारा पारित

Passed by Commissioner (Appeals) Ahmedabad

ग आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **43/Ref/STAX/NK/2018-19** दिनाँक : **5/2/2019** से सृजित

Arising out of Order-in-Original: **OIO/43/Ref/STAX/NK/2018-19,** Date: **5/2/2019** Issued by: Assistant Commissioner, CGST,Div: Gandhinagar,Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Gujarat State Petroleum Corporation Ltd,
GSPC Bhavan, Gandhinagar

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 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 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– ण0बी/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.

आयुक्त (अपील), केन्द्रीय कर एवं सेवाकर, अहमदाबाद
OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS), AHMEDABAD

ORDER-IN-APPEAL

This order arises on account of an appeal filed by M/s Gujarat State Petroleum Corporation Ltd., GSPC Bhavan, 15, 2nd Floor, Sector-11, Nr. Udhyog Bhavan, Gandhinagar –382010, Gujarat (in short '*appellant*') against the Order-in-Original No.OIO/43/Ref/STAX/NK/2018-19 dated 05.02.2019 (in short '*impugned Order*') issued by the Assistant Commissioner, CGST Division-Gandhinagar, Gandhinagar Commissionerate (in short '*the adjudicating authority*').

2. Briefly, the facts of the case are that the appellant had filed a refund claim of Rs.2,52,56,807/- on 04.09.2018 before the Assistant Commissioner, Central Excise, Division-Gandhinagar on the ground that they have wrongly paid service tax on the services of transportation of goods by a vessel from a place outside up to the customs station of clearance in India in respect of LNG cargo imported by them in May, 2017. As per the provisions of service tax law prevailing during the period, the person liable to pay service tax in cases of services of transportation of goods by sea provided by a foreign shipping line to a foreign charterer with respect to goods destined for India was importer of the goods and the point of taxation of such services provided by a foreign shipping line to foreign charterer with respect to goods destined for India, was specified as the date of bill of lading of goods in the vessel at the port of export. The liability to pay service tax on such services was put on the importer of goods with effect from 23.04.2017 vide Notification No. 15/2017-ST and 16/2017-ST both dated 13.04.2017 and prior to that the liability to pay tax in such cases was on the person in India who complies with sections 29,30 or 38 read with section 148 of the Customs Act, 1962 with respect to such goods (i.e. Shipping Company/Agent), vide Notification No.2/2017 –ST and 3/2017-ST both dated 12.01.2017. In the case of the appellant, it so happened that the LNG cargo imported came to be delivered on May 9-10, 2017 whereas the Bill of Lading of the said cargo was of date 17.04.2017 i.e. prior to 23.04.2017. However, at the time of import, in absence of clarity on Bill of Lading, the appellant have paid Service Tax of Rs.2,52,56,807/-, on vessel services (viz. services of transportation of goods by sea) for goods imported, on 28.06.2017 as an importer. However, for the same service in respect of the same cargo, M/s GAC Shipping India Pvt. Ltd. had made service tax payment on behalf of M/s BG South Asia LNG Ltd. on the ground that the Bill of Lading was dated 17.04.2017. Thus, service tax payable for the services of transportation of goods by sea in respect of same cargo happened to be paid twice, by the appellant as well as by the foreign shipping company. Since the date of Bill of Lading in the present case being 17.04.2017, the person liable for payment of service tax in respect of the vessel services provided for the import of the subject cargo was the foreign shipping company. As the appellant was not liable to pay service tax in the present case, the service tax paid by them was a mistake and hence they filed the subject refund application seeking refund of the amount paid by them as service tax and interest which was not payable by them. The adjudicating authority vide his impugned Order though observed that on the

facts of the case the appellant was not liable to pay service tax in the matter, rejected the refund application of the appellant on the ground of being hit by limitation in terms of explanation (B)(f) to Section 11(B)(1) of Central Excise Act, 1944 as the refund application in the instant case was filed by the appellant on 04.09.2018 after a period of one year from the date of payment of tax viz. 28.06.2017.

3. Feeling aggrieved with the above Order, the appellant has filed the present appeal. The appeal has been preferred mainly on the grounds that in their case the amount paid was not payable and paid by mistake and the provisions of Section 11B(1) of Central Excise Act, 1944 is not applicable in the instant case as the Service Tax was paid by the appellant by mistake. They further placed reliance on the following case laws in support of their contention:

a) Everon Project Consultant Ltd. Vs. C.C.Ex. & S.T., Panchkula [2017(7) GSTL 465 (Tri-Chan.)]
b) Parijat Construction Vs. CCE, Nasik [2018(359) ELT 113 (Bom.)]
c) G.B. Engineers Vs. Union of India [2016(43) STR 345 (Jhar.)]
d) 3E Infotech Vs. CESTAT, Chennnai [2018 (18) GSTL 410 (Mad.)]
e) Joshi Technologies International, INC-India Projects Vs. Union of India [2016 (339) ELT 21 (Guj.)]
f) Commissioner of C.Ex.(Appeals), Bangalore Vs. KVR Construction [2012 (26) STR 195 (Kar.)]
g) Kalpataru Power Transmission Ltd. Vs. CCE & ST, Ahmedabad [2016 (45) STR 454 (Tri.-Ahmd.)]
h) Commissioner of Sales Tax, U.P. Vs. Auriaya Chamber of Commerce, Allahabad [1986 (25) ELT 867 (S.C.)]
i) CCE, Bangalore Vs. Motorola India [2006 (206) ELT 90 (Kar.)]
j) Hexacom (I) Ltd. Vs. CCE, Jaipur [2003 (156) ELT 357]
k) Commissioner (Appeals), Central Tax, Ahmedabad's Order-in-Appeal No.AHM-EXCUS-003-APP-0183-17-18 dated 24.01.2018 in the case of M/s Ambika Presstress Industries

4. A hearing in the matter was held on 21.08.2019. Shri Anil Chauhan, Chartered Accountant appeared and reiterated the submissions of appeal memo and also submitted additional submissions dated 21.08.2019 for consideration.

5. I have carefully gone through the facts of the case, appeal memorandum, submissions made at the time of personal hearing and evidences available on records. I find that the limited issue to be decided in the appeal in hand is as to whether in the facts and circumstances of the case limitation prescribed under Section 11B(1) of the Central Excise Act, 1944 would be applicable to the appellant's claim of refund of service tax paid by mistake.

6. After going through the facts of the case, I find that the issue of eligibility of the refund in the present case except for the limitation aspect is not in dispute. The adjudicating authority has clearly held that based on facts and considering the fact the date of Bill of Lading is 17.04.2017, the appellant was not liable to pay the service tax. Further, the appellant has genuinely explained the circumstances under which the service tax was happened to be paid by them due to lack of clarity on Bill of Lading and when no tax was liable to be paid by the appellant, the amount which he paid as service tax is to held as amount paid by mistake and the appellant is rightly eligible for refund of the amount so wrongly paid as they were not liable to pay any tax in the case. This is more so, when the service tax payable on the services in question had already stand paid by the foreign Shipping Company in the case and there can not be levy of tax two times on the same service.

7. Coming to the core issue of limitation in the case, I find that it has been consistenly held by various High Courts in the country that when the tax/duty not payable is paid by mistake, refund of such amount paid by mistake would not be governed by the provisions of Section 11 B of the Central Excise Act, 1944.

7.1 The Hon'ble High Court of Karnataka in their decision in the case of Commissioner of C.Ex.(Appeals), Bangalore Vs. KVR Construction [2012 (26) STR 195 (Kar.)] has held that:

> ***18.*** *From the reading of the above Section, it refers to claim for refund of duty of excise only, it does not refer to any other amounts collected without authority of law. In the case on hand, admittedly, the amount sought for as refund was the amount paid under mistaken notion which even according to the department was not liable to be paid.*
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> ***19.*** *According to the appellant, the very fact that said amounts are paid as service tax under Finance Act, 1994 and also filing of an application in Form-R of the Central Excise Act would indicate that the applicant was intending to claim refund of the duty with reference to Section 11B, therefore, now it is not open to him to go back and say that it was not refund of duty. No doubt in the present case, Form-R was used by the applicant to claim refund. It is the very case of the petitioner that they were exempted from payment of such service tax by virtue of circular dated 17-9-2004 and this is not denied by the Department and it is not even denying the nature of construction/services rendered by the petitioner was exempted from to payment of Service Tax. What one has to see is whether the amount paid by petitioner under mistaken notion was payable by the petitioner. Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to levy and collect such service tax. In case, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularise such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17-9-2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words,*

mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion.

20. *In the case of Hind Agro Industries Ltd. v. Commissioner of Customs reported in 2008 (221) E.L.T. 336 (Del.), it was the case where cess amount was paid under protest by the appellants. In that case after referring to Mafatlal Industries case (supra), the lordships of Delhi High Court have held that in Mafatlal Industries case, Hon'ble Supreme Court was dealing with the case of refund of duty payable within the meaning of either the Central Excises and Salt Act, 1944 or the Customs Act, 1962 as the case may be, wherein they have held that all claims for refund ought to be filed only in accordance with the Customs Act. Therefore, it did not include the payment made under some other enactment, which for some reason had erroneously been made to the Customs authorities. Even otherwise by referring to paragraph 137 of Mafatlal Industries case, one has to see whether the amount claimed is unconstitutional and outside the provisions of Section 11B of the Act.*

21. *In the case of Nataraj and Venkat Associates (supra), this was pertaining to service tax wherein petitioner company was dealing in architectural services and paid service tax for the construction of the building carried on at Sri Lanka and contended it would not have attracted levy of service tax. In other words, there was an application for refund of said tax and the question that arose therein was what is the relevant date for the commencement of the period of limitation for the purpose of Section 11B and was held that it would be the date of payment of duty. It was held in the paid case that amounts paid cannot be taken to be duty of excise, therefore bar of limitation under Section 11B cannot be applied because such limitation would come in the way of any person claiming refund of any duty of excise and interest.*

22. *In the case of Commissioner of Central Excise, Bangalore v. Motorola India Pvt. Ltd. (supra) the Division Bench of this Court considered similar issue. It was a case where excess amount was paid over duty under Central Excise Act on the direction of the Department. There was an application for refund of amount and the same came to be rejected by the Assistant Commissioner on the ground of lapse of time. It was confirmed by both the Appellate Authority and also the Tribunal. Aggrieved by the order of the Tribunal, revenue came up before the High Court. Their lordships of the Division Bench held that order of the Tribunal to allow the claim on the basis that amount paid by mistake cannot be termed as duty in the said case was justified and therefore applying the law laid down in the decision of Apex Court in the case of India Cements Ltd. v. Collector of Central Excise - 1989 (41) E.L.T. 358, dismissed the appeal.*

23. *Now we are faced with a similar situation where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, Section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 1,23,96,948/- paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Therefore, once it is not payable in law there was no authority for the department to retain such amount. By any stretch of imagination, it will not amount to duty of excise to attract Section 11B. Therefore, it is outside the purview of Section 11B of the Act.*

7.2 Similar kind of view was expressed by the Hon'ble High Court of Madras in their decision in the case of 3E Infotech Vs. CESTAT, Chennnai [2018 (18) GSTL 410 (Mad.)] as under:

> ***8.*** *The present appeal lies from the order of the Appellate Tribunal. We have heard the Learned Counsel for the Assessee and the State. The issue, which arises for consideration in this case, whether the provisions of Section 11B of the Central Excise Act would be applicable to claim of refund made by an Assessee when the tax has been paid under mistake of law. In this case, indisputably, there was no liability on the petitioner to pay service tax. The Supreme Court of India, in the case of Union of India v. ITC Ltd. reported in (1993) Supp. IV SCC 326=1993 (67) E.L.T. 3 (S.C.) while dealing with the question of refund of excess excise paid held :-*
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> > *8. In Shri Vallabh Glass Works Ltd. v. Union of India, this Court, while examining the question as to what is the point of time from which the limitation should be deemed to commence observed that relief in respect of payments made beyond the period of three years may not be granted from the date of filing of the petition, taking into consideration the date when the mistake came to be known to the party concerned. Just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law cannot be permitted to retain the amount, merely because the tax payer was not aware at that time that the recovery being made was without any authority of law. In such cases, there is an obligation on the part of the authority to refund the excess tax recovered to the party, subject of course to the statutory provisions dealing with the refund.*
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> > *9. We are, therefore, of the opinion that the High Court, while disposing of the writ petition under Article 226 of the Constitution of India, was perfectly justified in holding that the bar of limitation which had been put against the respondent by the Collector of Central Excise (Appeals) to deny them the refund for the period September 1, 1970 to May 28,1971, and June 1, 1971 to February 19, 1972 was not proper as admittedly the respondent had approached the Assistant Collector Excise soon after coming to know of the judgment in Voltas case and the assessee was not guilty of any laches to claim refund.*
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> ***9.*** *In the above cited case, the Supreme Court stated that the Assessee's claim to refund would not be disallowed solely because it seemed barred by limitation. Since the Assessee in that case made the claim for refund shortly after learning about their entitlement for the same, it would not be just to hold that such claim is hit by laches.*
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> ***10.*** *The High Court of Gujarat in Oil and Natural Gas Corporation Ltd., v. Union of India, reported in 2017 (354) E.L.T. 577 (Guj.) relied on another judgment of the Gujarat High Court in Joshi Technologies International, INC-India Projects v. Union of India = 2016 (339) E.L.T. 21 (Guj.) and quoted the relevant paragraph, which reads as under :-*
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> > *"Merely because the provisions of the Central Excise Act, 1944 and the rules framed thereunder for collection and refund viz., the machinery provisions have been incorporated in the OID Act for collection and refund of the cess levied thereunder, it cannot be inferred that the Oil Cess imposed under the provisions of the OID Act assumes the character of central excise duty. The finding recorded by the adjudicating authority that the Oil Cess is in the nature of excise duty, is erroneous and contrary to the law laid down by this court in Commissioner v. Sahakari Khand Udyog Mandli Ltd. (supra).*
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> > *In the Circular dated 7th January, 2014, reference to sugar cess and tea cess levied under the Sugar Cess Act, 1982, and the Tea Act, 1953,*

respectively, is merely illustrative in nature and what is meant by the circular is that the cesses which are collected by the Department of Revenue, but levied under an Act which is administered by different Department are not chargeable to Education Cess and Secondary and Higher Secondary Cess chargeable under the provisions of the Finance Acts, 2004 and 2007, respectively.

Education Cess and Secondary and Higher Secondary Education Cess being cesses levied at a percentage of the aggregate of all duties of excise, the basic requirement for levy thereof is the existence of excise duty. In the present case Oil Cess is not a duty of excise and hence, the basic requirement of levy of such cesses is not satisfied. Furthermore, for the purpose of levy of Education Cess and Secondary and Higher Secondary Education Cess, two other conditions precedent, are required to be satisfied, viz., (i) that the duty of excise should be levied by the Central Government in the Ministry of Finance (Department of Revenue); and (ii) the duty of excise should be collected by the Central Government in the Ministry of Finance (Department of Revenue). In the present case, since the machinery provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated in the OID Act, the second condition precedent is satisfied, viz. that the cess is collected by the Central Government in the Ministry of Finance (Department of Revenue); however, the first condition with regard to levy of such duty of excise by the Central Government in the Ministry of Finance (Department of Revenue) is not satisfied inasmuch as the Oil Cess under the OID Act is levied by the Ministry of Petroleum and Natural Gas. In the aforesaid premises, the requirements of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007 are not satisfied in the present case, and consequently, the said provisions have no applicability to the facts of the present case. The petitioner, therefore, cannot be said to have been liable to pay Education Cess and Secondary and Higher Secondary Education Cess under the above provisions.

In the facts of the present case, the refund is claimed on the ground that the amount was paid under a mistake of law and such claim being outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. The petitioner was, therefore, justified in filing the present petition before this court against the order passed by the adjudicating authority rejecting its claim for refund of the amount paid under a mistake.

Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of Section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under section 11B of the Central Excise Act, 1944.

Since the provisions of Section 11B of the Act are not applicable to the claim of refund made by the petitioner, the limitation prescribed under the said provision would also not be applicable and the general provisions under the Limitation Act, 1963 would be applicable. Section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run

until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, since the very retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law, in the light of the decision of this court in Swastik Sanitarywares Ltd. v. Union of India (supra), the question of applying the limitation prescribed under Section 11B of the CE Act would not arise.

Even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same.

If the adjudicating authority was not satisfied with the Chartered Accountant's certificate and the other material produced by the petitioner, he could have called upon the petitioner to produce further documentary evidence in support of its claim that it had not passed on the incidence of duty to the purchaser. However, without affording a reasonable opportunity to the petitioner to produce documentary evidence in support of its claim that there was no unjust enrichment, the adjudicating authority was not justified in holding that there was unjust enrichment. Therefore, the finding that the petitioner's claim is hit by unjust enrichment cannot be legally sustained.

11. *A similar view has been taken by the Bombay High Court in the case of Parijat Construction v. Commissioner Excise, Nashik, reported in 2018 (359) E.L.T. 113 (Bom.), where the Bombay High Court has held as under :-*

4. We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer res integra. The two decisions of the Division Bench of this Court in Hindustan Cocoa (supra) and Commissioner of Central Excise, Nagpur v. M/s. SGR Infratech Ltd. (supra) are squarely applicable to the facts of the present case.

5. Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of Collector of C.E., Chandigarh v. Doaba Co-Operative Sugar Mills (supra) relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case were admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable. We accordingly allow the present appeals and quash and set aside the impugned order, insofar as it is against the appellant in both appeals. We fully allow

refund of Rs. 8,99,9621/- preferred by the appellant. We direct that the respondent shall refund the amount of Rs. 8,99,962/- to the appellant within a period of three months. There shall be no order as to costs.

12. *Further, the claim of the respondent in refusing to return the amount would go against the mandate of Article 265 of the Constitution of India, which provides that no tax shall be levied or collected except by authority of law.*

13. *On an analysis of the precedents cited above, we are of the opinion, that when service tax is paid by mistake a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired. Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that the claim of the Assessee for a sum of Rs. 4,39,683/- cannot be barred by limitation, and ought to be refunded.*

14. *There is no doubt in our minds, that if the Revenue is allowed to keep the excess service tax paid, it would not be proper, and against the tenets of Article 265 of the Constitution of India.*

7.3 As can be seen, the above judgment of Hon'ble High Court of Madras in the case of 3E Infotech Vs. CESTAT, Chennnai refers to similar views expressed by Gujarat High Court in the case of Joshi Technologies International, INC-India Projects Vs. Union of India = 2016 (339) E.L.T. 21 (Guj.) and Bombay High Court in the case of Parijat Construction Vs. Commissioner Excise, Nashik, reported in 2018 (359) E.L.T. 113 (Bom.).

7.4 In the case of CCE, Bangalore Vs Motorola India – 2006 (206) E L T 90 (Kar), the Hon'ble 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.

7.5 Further, the Hon'ble High Court of Jharkhand in their ruling in the case of G.B. Engineers Vs. Union of India [2016(43) STR 345 (Jhar.)] has held that *Section 11B of the Central Excise Act to be read with Section 83 of the Finance Act, 1994 are not applicable to the facts of the present case because, the amount paid by the petitioner is never under the Central Excise Tax nor under the service tax when there is no liability to make the payment of the amount and under the mistake of facts or under mistake of law or under both if any amount is deposited by the assessee, the same cannot be retained by the Union of India under the one or other pretext when a service provider is not liable to make payment of the service tax and if any payment is made, it cannot be covered under Section 11B of the Central Excise Act to be read with Section 83 of the Finance Act, 1994.*

8. Therefore, following the ratio of the above referred judgments of various high courts, I hold that limitation prescribed under Section 11B(1) of the Central Excise Act, 1944 would not be applicable to the appellant's claim of refund of service tax wrongly paid by them in

the instant case as they were not liable to pay the said tax under the law and that being so, the service tax wrongly paid by them can not be considered as a tax leviable under the provisions of the Finance Act 1994 so as to attract the provisions of Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

9. In view of the above discussions, the impugned order is set aside and the appeal of the appellant is allowed with consequential relief.

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.

(Gopi Nath)
Commissioner (Appeals)

Date: 15.10.2019.

Attested:

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

BY SPEED POST TO:

M/s Gujarat State Petroleum Corporation Ltd.,
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Copy to:-

1. The Chief Commissioner, Central Tax , Ahmedabad Zone..
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner, Central GST & C.Ex., Palanpur Division, Gandhinagar.
4. The Assistant Commissioner, CGST (System), HQ, Gandhinagar.
5. Guard file.
6. P.A. File