



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

वस्तु एवं सेवा

कर भवन,

सातवीं मंजिल, पोलिटेक्निक के पास,

आम्बावाडी, अहमदाबाद-380015

GST Building, 7<sup>th</sup> Floor,  
Near Polytechnic,  
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380015



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- क फाइल संख्या : File No : **V2/7/RA/GNR/2019-20/12877 To 12881**
- ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-38-19-20**  
दिनांक Date : **28.10.2019** जारी करने की तारीख Date of Issue: **01/11/2019** *Gr file*  
आयुक्त (अपील) द्वारा पारित  
Passed by Commissioner (Appeals) Ahmedabad
- ग आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **22/AC/CGST/2018-19** दिनांक : **08-03-2019** से सृजित

Arising out of Order-in-Original: **22/AC/CGST/2018-19**, Date: **08-03-2019** 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. Savino Micron India Pvt. 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।

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, 4<sup>th</sup> 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- ०बी/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, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> 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 पढ़ी 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 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 अनुसूची-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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35F के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 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 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 appeal has been filed by the Assistant Commissioner of CGST, Kadi Division, Gandhinagar Commissionerate [hereinafter referred to as 'the department'] against the Order-in-Original No.22/AC/CGST/18-19 dated 08.03.2019 [hereinafter referred to as 'impugned order'] passed by the Assistant Commissioner of CGST, Kadi Division [hereafter referred to as 'adjudicating authority'], as per Review Order No.05/2019-20 dated 21.06.2019 of the Commissioner of CGST, Gandhinagar, in respect of M/s Savino Micron (India) Private Ltd, Survey No.269, Anandpura, Nandasan Dangarva Road, Mehsana [hereinafter referred to as 'respondent']

2. The facts of the case are that the respondent had filed a refund claim of Rs.16,76,675/- which was paid under protest towards duty before issuance of various show cause notices with respect of classification dispute for the period from March 2012 to February 2017. All the show cause notices were decided by the jurisdictional Commissioner of CGST, vide order No.AHM-EXCUS-003-COM-06 to 09-18-19 dated 05.07.2018, by vacating the demands raised. Based on the said order, the adjudicating authority, vide impugned order, has sanctioned the said refund claim to the respondent under the provisions of Section 35F of Central Excise Act, 1944.

3. Aggrieved with the impugned order, the department has filed the instant appeal on the grounds that:

- The adjudicating authority has wrongly sanctioned the refund claim under Section 35F of CEA; that Section 35F of CEA provides for mandatory pre-deposits in the event of assessee preferring an appeal before the appellate authority, as a percentage of duty demanded or penalty imposed before filing appeal and the said section does not cover the duty paid under protest during investigation or audit.
- If the duty paid by the respondent is not covered under Section 35 F of CEA, then in that case as per the mandates of Section 11B of CEA, amount claimed as refund, has to pass the test of unjust enrichment as provided in that section; that the adjudicating authority has not examined the said aspect while sanctioning the refund.
- The department has relied on various case laws in support of their above contentions.

4. The respondent has filed cross-objection in the department's appeal on 05.08.2019. They, inter-alia, submitted that:

- The appeal filed by the department is not maintainable, as the department has not filed the appeal within the time limitation permitted under Section 35 of CEA; that as per said section, the limitation permitted is 60 days which may be condoned by further 30 days by Commissioner (Appeals) on showing sufficient cause. However, in the instant case, the appeal has been filed after total of 118 days from the date of impugned order without being any condonation of delay.





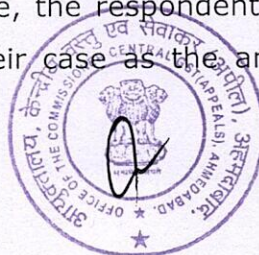
- Provisions of Section 35 E (2) of CEA allows department to review OIO within three months from the date of OIO and file the appeal within one month of such Review order. In the instant case, the Review of impugned order was done beyond three months; hence in any case department appeal not maintainable.
- They relied on case laws in support of their argument.
- They had been claiming their product as non-dutiable in their respective invoices at the time of clearance and the Commissioner has also confirmed the same later on vide his order dated 05.07.2018.
- They have not charged the amount deposited as expenditure in their profit & loss accounts and incidence of this amount is not passed on or recovered it from any other persons. On the contrary, the amount so deposited shown as 'receivable' in their books of account.
- They relied upon case laws in their favour.

5. Hearing in the matter was held and Shri P.P.Jadeja, Authorized Representative appeared on behalf of respondent. He reiterated the submissions of cross-objection and requested to allow the appeal.

6. I have carefully gone through the facts of the case in the appeal filed by the department and submissions made by the respondent in cross-objection dated 05.08.2019 and at the time of personal hearing. The limited issue to be decided in the matter is whether the claim is hit by bar of limitation and whether the doctrine of unjust enrichment is applicable in respect of refund claim sanctioned by the adjudicating authority.

7. At the outset, I find from the fact of the case that the respondent has paid an amount of Rs.16,76,675/- under protest during the course of inquiry by the department with respect to the classification dispute of their product Calcium Powder. The respondent cleared the said product without payment of duty. The inquiry made by the department converted into show cause notices, demanding duty of Rs.45,03,827/- for the period initially from March 2012 to December 2013 and further issued various protective demands upto the period of February 2017. By an adjudication order dated 05.07.2018, all the demands raised in various show cause notice in respect of above mentioned periods were vacated/dropped by the jurisdictional Commissioner of CGST. The respondent, thereafter filed a refund claim of Rs.16,76,675/- which was deposited during inquiry stage and the adjudicating authority has sanctioned the said amount under the provisions of Section 35 F of CEA.

8. I find that the department has filed the instant appeal only on the grounds that the refund sanctioned by the adjudicating under the provisions of Section 35 F of CEA is wrong but attracts provisions of Section 11 B of CEA; hence bar of unjust enrichment is applicable which the adjudicating authority has not considered while sanctioned the refund claim. On other side, the respondent contended that bar of unjust enrichment is not applicable in their case as the amount is a pre-deposit





made during inquiry proceedings relating to classification dispute. They also contended that the appeal filed by the department is hit by limitation as provided under Section 35 E of CEA.

9. First, I take the limitation of filing of appeal by the department, as claimed by the respondent. Section 35E(2) of CEA empowers the Principal Commissioner/Commissioner to examine the order passed by the lower authority and direct his subordinate officer to file an appeal before Commissioner (Appeals). The section reads as under:

*The Principal Commissioner of Central Excise or Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the [Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Central Excise or Commissioner of Central Excise in his order.*

*(3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be made within a period of three months from the **date of communication of the decision or order of the adjudicating authority.***

*(4) Where in pursuance of an order under sub-section (1) or sub-section (2) the adjudicating authority or the authorized officer makes an application to the Appellate Tribunal or the [Commissioner (Appeals)] **within a period of [one month]** from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the [Commissioner (Appeals)], as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of section 35B shall, so far as may be, apply to such application.*

The proviso to clause (3) above came into existence with effect from 10.05.2008. As per the said proviso, the authority is empowered to review the order passed by his lower officer within three months from the date of communication of decision or order. In the instant case, the adjudicating authority has passed the order on 08.03.2019 and received by the department on 03.05.2019. The department has reviewed the order on 21.06.2019 and filed the appeal on 11.07.2019. In the circumstances, there is no delay in review of order by the department and filing of appeal thereof. I find that the contention of the respondent in this regard by relying various case laws is not correct as all the decisions relied on by them are pertaining to the periods prior to 10.05.2008 i.e amendment of clause (3) of Section 35 E of CEA.

10. Now, I take the issue of unjust enrichment. As stated above, the department's contention is that the adjudicating authority has wrongly sanctioned the refund claim in question under Section 35F of CEA but it attracts provisions of Section 11 B of CEA. I find that it is a clarified matter by the Board, vide Circular



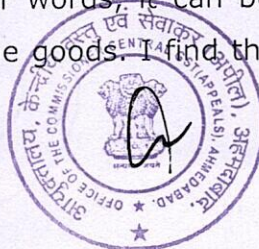


No. 984/8/2014-CX dated 16-9-2014, that the amount paid during investigation/audit takes the colour of deposit under Section 35F of CEA only when an appeal is filed. Therefore, looking into the fact of the case of the respondent, the contention of the department is acceptable and correct that the adjudicating authority has wrongly sanctioned the refund claim under Section 35 F of CEA. In the circumstances, now the question arises as to whether the refund of pre-deposit amount in question made during investigation/inquiry in question is covered under Section 11B of CEA or any other provisions of Central Excise Rule and bar unjust enrichment is application to such case or otherwise.

11. The bar of unjust enrichment is prescribed in 1st proviso to Section 11B (2) of CEA. As per the said provision the refund of duty of excise and interest, if any, paid on such duty paid by the manufacturer, be paid to the applicant, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person. I find that both the department and the respondent have relied on the decision of Hon'ble Supreme Court in case of M/s Allied Photographics India Ltd [2004 (166) ELT -SC]. It is the contention of the department that the duty paid under protest falls under Section 11B of CEA, hence doctrine of unjust enrichment applicable in the instant case as held by the Hon'ble Supreme Court. According to the respondent, their case is of "making refund" after finalization of assessment, hence bar of unjust enrichment is not applicable as held by the Hon'ble Supreme Court in the said decision. The question before the Hon'ble Court was whether a claim of refund, after final assessment would be governed by Section 11 B of CEA or not. The Hon'ble Court held that even in such case, provisions of Section 11 B is applicable and burden would be on the assessee to establish that there was no unjust enrichment. The gist of the said decision is as under:

***Refund - Unjust enrichment - Protest - Refund of duty paid under protest after final assessments attracts bar of unjust enrichment whereas bar of unjust enrichment not applicable to refund consequent upon finalization of provisional assessment*** under Rule 9B of erstwhile Central Excise Rules, 1944 (now Rule 7 of Central Excise Rules, 2002) - Distinction between duty paid under protest and duty paid provisionally under Rule 9B ibid - Section 11B of Central Excise Act, 1944 deals with claim for refund whereas Rule 9B ibid deals with making of refund, in which case assessee not required to comply Section 11B ibid. - Section 11B and Rule 9B operate in different spheres and, consequently, in Para 104 of Mafatlal's case it has been held that in cases where duty is paid under Rule 9B and refund arises on adjustment under Rule 9B(5), then such refund will not be governed by Section 11B. In the said para, it has been clarified that if an independent refund claim is made after adjustment on final assessment under Rule 9B(5), agitating the same issue, then such claim would attract Section 11B. Hence, there is no merit in the contention of the respondent M/s. APIL that although in this case duty was paid under protest, there was no difference between such payment and duty paid under provisional assessment under Rule 9B. [paras 7, 12, 14]

12. In the instant case, it is an undisputed fact that the respondent had deposited the amount in terms of inquiry against duty liability on classification dispute of their final product. In other words, it can be said that the respondent made the deposit after clearance of the goods. I find that the inquiry made by the





department, resulted into various issuance show cause notices by demanding duty liability of their finished goods which was cleared by the appellant without payment of duty. Later on, the entire demands of duty liability assessed in the show cause notices, pertained to the inquiry periods and also pertained to the later periods were dropped by the jurisdictional Commissioner by holding that the product in question is not attracting central excise duty. In the circumstances, the refund of amount claimed by the respondent arises only on the basis of Commissioner's order which held the products in question cleared by the respondent as attracting nil rate of duty. In other words, the refund in question can be considered as a refund consequent upon finalization of assessment. In such situation, bar of unjust enrichment is not applicable to the instant case, in view of above decision.

13. Further, I find that various Courts have taken consistent view that any amount, deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit and, therefore, principles of unjust enrichment would not be attracted. I find that in case of M/s EBIZ.Com Pvt Ltd [ 2017 (49) S.T.R. 389 (All.)], the Hon'ble high Court of Allahabad has held that the amount paid by an assessee during investigation or before adjudication of a case to be a pre-deposit and principles of unjust enrichment is not inapplicable in such cases. The relevant portion of the decision is as under:

**21.** *In the present case, the amount in question, refund whereof is claimed, was not paid. It is not such amount of duty which was deposited by assessee. To check evasion of 'Excise duty' or 'Service Tax', raid was conducted on 12-1-2007, when during raid, sum of Rs. 25,55,000/- was got deposited. Amount of interest thereon was subsequently realized from petitioner on 29-3-2007 i.e. before issue of notice on 3-7-2007. Such deposit was involuntary by petitioner since no one shall deposit a huge money without creation of liability in law. Such an amount has been held to be a pre-deposit and principles of unjust enrichment has been held inapplicable in such cases.*

**22.** *In Commissioner of Central Excise, Coimbatore v. Pricol Ltd. - 2015 (39) S.T.R. 190 (Mad.) = 2015 (320) E.L.T. 703 (Mad.) of Division Bench of Madras High Court had an occasion to look into a similar dispute. Therein also payment was made during investigation by Assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by Assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose. An argument was raised that unless Assessee proves that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held, it is not a case of refund of duty but return of pre-deposit made by Assessee at the time of investigation under protest. Similarly in the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in original proceedings itself. Court has said as under :-*

*"There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."*

The said decision was also followed by he Hon'ble High Court of Allahabad in the case of CCCE V/s Eveready Industries India Ltd [2017 (357) E.L.T. 11 (All.)] and further held that:





**5.** Madras High Court in *Commissioner of Central Excise v. Pricol Ltd. (supra)* relied on a Bombay High Court judgment in *Suvidhe Ltd. v. Union of India - 1996 (82) E.L.T. 177 (Bom.)*; Gujarat High Court judgments in *Commissioner of Customs v. Mahalaxmi Exports - 2010 (258) E.L.T. 217*; *Parle International Ltd. v. Union of India - 2001 (127) E.L.T. 329 (Guj.)* and this Court's judgment in *Summerking Electricals (P) Ltd. v. CEGAT - 1998 (102) E.L.T. 522 (All.)*.

**6.** Against the judgment of Bombay High Court in *Suvidhe Ltd. (supra)*, Revenue preferred an appeal before Supreme Court but High Court's view was maintained. The said judgment is reported in *Union of India v. Suvidhe Ltd. - 1997 (94) E.L.T. A159 (S.C.)*.

**7.** Referring to above authorities a Division Bench of this Court presided over by one of us (Hon'ble Sudhir Agarwal) has taken the same view in Writ Petition (Writ Tax) No. 578 of 2016 (*M/s. Ebiz.com Pvt. Ltd. v. Commissioner of Central Excise, Customs and Service Tax and Others*) decided on 12-9-2016 [2017 (49) S.T.R. 389 (All.)].

**8.** Moreover, in passing the impugned order, relying on *UOI v. A.K. Spintex - 2009 (234) E.L.T. 41*, Tribunal has observed as under :

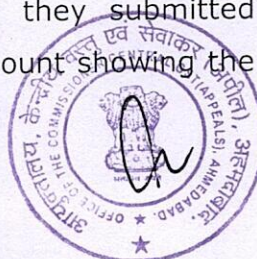
"..the presumption under Section 12B is a rebuttable presumption and once the assessee produces evidence in support of his claim of having not passed on the incidence of duty whose refund is claimed to the customers, the burden of proof would shift to the Department to prove that the claim of the assessee is false. In this case the Department has not produced any evidence to prove that the certificate of the Chartered Accountant M/s. Damle Dhanndhanania & Co., is false. Therefore, we are of the considered view that rejection of refund claim on the ground of doctrine of unjust enrichment is not legal and proper."

Recently in the case of CCE V/s Advance Steel [2018 (11) GSTL 341], the Hon'ble High Court of Allahabad has again held that the amount not paid at the time of clearance of goods but paid during investigation for past period, not subjected to unjust enrichment. The double bench Court held that:

**15.** The matter was, therefore, referred to the third Member. The third Member was of the categorical view that this was not the case of the unjust enrichment because the duty involved in refund was not paid at the time of clearance of goods but subsequently during the course of investigation for the past period. The goods had already been cleared earlier. The third Member also emphasized that the confirmed duty was adjusted from the pre-deposit made at the time of investigation by treating it as a sanctioned refund. Insofar as the amount which had been taken by the department during investigation that is a sum of Rs. 8,40,120/- the same had also been taken without considering the cost structure of the goods and despite that the department was invoking the bar of unjust enrichment to the balance amount for which the refund has been claimed and this would not be tenable.

14. In all the above decisions of Hon'ble High Court, it has been held that in case of amount, if any, is deposited during the pendency of adjudication proceedings or investigation, the amount so paid would be in the nature of deposit under protest and the principles of unjust enrichment would not apply in such cases. Looking into the facts of the instant case, I find that the ratio of all the above decisions is squarely applicable to the instant case.

15. Further, in the instant case, the appellant has vehemently argued that they had not passed on the incidents of duty, as claimed by the department, to their customer. To support their argument, they submitted Chartered Accountant's certificate dated 05.08.2019, Ledger Account showing the amount as "excise credit

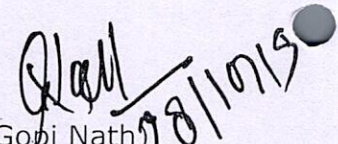




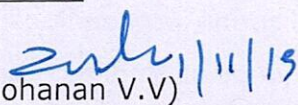
receivable' and sample copies of invoices issued during the periods, which shows that they had not collected any duty from their customers at the time of clearance. I have perused all the said documents. The Chartered Accountant's certificate stipulates that the amount in question deposited has not been charged as "expenditure" in books of account of appellant but shown as "receivable". Chartered Accountant certificate certifying extra duty paid not recovered from buyers to be given due evidentiary value especially when the said extra duty reflected in books of account as 'receivable' from the Revenue. I further find that the Hon'ble Tribunal, Ahmedabad in the case of CCE, Surat-II V/s Binkia Sythetics Ltd [2013 (294) ELT 157] has held that when the certificate of chartered accountant hold that the burden of duty has not been passed on to clients, the certificate cannot be turned as bad certificate. The decision was also followed in Jalandhar v. Shankar Printing Mills [2015 (391) E.L.T. 295 (Tri.-Del.)], and the Hon'ble Tribunal has also observed that as long as the amounts were shown in the balance sheet as recoverable and certified by the Chartered Accountant, the assessee can safely be held to have fulfilled principles of unjust enrichment. As such, I am of the view that the Chartered Accountant certificate is a good evidence to show that the disputed duty amounts have not been collected from the customers and the same cannot be sidelined lightly.

16. In view of above discussion, in any circumstances, bar of unjust enrichment is not applicable to the instant case, Therefore, I hold that the adjudicating authority has rightly sanctioned the refund claim in question, which has arisen as a consequence of order passed by the jurisdictional Commissioner by vacating the demands raised and cannot be denied on the ground of unjust enrichment. I, therefore, do not find any merit in the department appeal and accordingly, I reject the appeal.

17. The appeal stands disposed of in above terms.

  
 (Gopi Nath)  
 Commissioner (Appeals)  
 Date : .10.2019

Attested

  
 (Mohanan V.V)  
 Superintendent (Appeal),  
 Central Tax, Ahmedabad.

**BY R.P.A.D**

To

M/s Savino Micron (India) Private Ltd,  
 Survey No.269, Anandpura,  
 Nandasan Dangarva Road, Mehsana.

The Assistant Commissioner, CGST  
 Kadi Division.





**Copy to:-**

1. The Principal Chief Commissioner, Central Tax Zone, Ahmedabad.
2. The Principal Commissioner, Central Tax, Gandhinagar.
3. The Asstt. Commissioner, (Systems), CGST, Hq., Gandhinagar
4. Guard file.
5. ✓ P.A file.





