



सत्यमेव जयते

आयुक्त ( अपील ) का कार्यालय,  
Office of the Commissioner (Appeal),  
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद  
Central GST, Appeal Commissionerate, Ahmedabad  
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.  
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
07926305065- टेलिफैक्स 07926305136



**DIN :20201164SW00007707FD**

**स्पीड पोस्ट**

क फाइल संख्या : File No : V2(CEX)86/GNR/2019-20

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-040/20-21**  
दिनांक Date : **18-11-2020** जारी करने की तारीख Date of Issue 26-11-2020

आयुक्त (अपील) द्वारा पारित  
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **12/REF/CEX/NRM/2019-20** दिनांक: **30.12.2019** , issued by  
Assistnat Commissioner, Central GST, Division-Gandhinagar, Commissionerate-Gandhinagar

घ अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant / Respondent**

**M/s AGC Network Ltd,**  
**A/78/4/3, Flated Shades, GIDC Electronic Estate,**  
**Sector-25, 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।

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

भारत सरकार का पुनरीक्षण आवेदन :

**Revision application to Government of India :**

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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.





(क) 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।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

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।

(c) 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-बी/35-इ के अंतर्गत:-

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

(क) 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 2<sup>nd</sup> माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.





The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

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

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की 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 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस 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।

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."





**ORDER-IN-APPEAL**

1. This order arises out of an appeal filed by M/s. AGC Network Ltd., A/78/4/3, Flated Shades, GIDC Electronic Estate, Sector-25, Gandhinagar (hereinafter referred to as '*appellant*') against Order in Original No. 12/REF/CEX/NRM/2019-20 dated 30.12.2019 [hereinafter referred to as '*the impugned order*') passed by the Assistant Commissioner, Central GST, Division-Gandhinagar, Commissionerate-Gandhinagar (hereinafter referred to as '*the adjudicating authority*') vide which refund claim filed by the said appellant for an amount of Rs. 20,15,590/- has been rejected.

2. The background for filing the said refund claim is that the appellant was issued a show cause notice dated 13.01.2017, based on departmental audit, for recovery of wrongly availed Cenvat Credit amount of Rs. 21,48,053/- (Rs. 1,32,421/- pertaining to availment of excess credit and Rs. 20,15,590/- pertaining to availment of credit on the basis of ineligible invoices). The appellant also paid the amount of Rs. 1,32,421/- with interest and the amount of Rs. 20,15,590/- (without interest leviable thereon) on being pointed out by audit authority. The adjudicating authority vide OIO No. 21/D/GNR/NK/2017-18 dated 28.02.2018, disallowed the above mentioned Cenvat Credit and ordered appropriation of the amount paid by the appellant alongwith interest. Being aggrieved, an appeal was filed by the appellant against the said OIO dated 28.02.2018. The Commissioner (Appeals) vide OIA No. AHM-EXCUS-003-APP-82-18-19 dated 30.08.2018 set aside the OIO No. 21/D/GNR/NK/2017-18 dated 28.02.2018.

2.1 In terms of the OIA No. AHM-EXCUS-003-APP-82-18-19 dated 30.08.2018 passed by the Commissioner (Appeals), Central Tax, Ahmedabad, the appellant had filed refund application on 13.09.2019 for an amount of Rs. 20,15,590/-. The adjudicating authority vide the impugned order, rejected the refund claim of Rs. 20,15,590/- filed by the appellant, on the following grounds:

- (i) The Final Audit Report No. 18/2015-16 dated 13.09.2016 clearly states that the applicant agreed to the audit objection and paid the Service Tax of Rs. 20,15,590/- vide SAP accounting document No. 1111170713 dated 31.03.2016. Moreover, in absence of any documentary evidence or any submission stating that the amount claimed as refund was paid under protest, the contention of the applicant that the amount was paid under protest is not correct.





- (ii) The contention of the appellant to categorise the payment of Service Tax as pre-deposit is not proper and accordingly, the refund claim is governed by Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.
- (iii) In terms of the provisions of the Act i.e. Explanation (B)(ec) of Section 11B of the Central Excise Act, 1944, the relevant date should be the date of issuance of order and not the date of receipt, as contended by the applicant. Hence, the refund application is time barred.

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds reproduced below:

- (i) The adjudicating authority has not even refunded 10% of mandatory pre-deposit deposited as per Section 35 F of the Central Excise Act, 1944 and has rejected the entire refund claim. It is a settled legal position that pre-deposit cannot be subjected to the provisions of Section 11B and it has to be refunded as soon as an appeal is allowed by the appellate authority.
- (ii) They have received the copy of order on 15.09.2018 and have filed the refund claim on 13.09.2019, which is within the period of one year from the date of receipt of order. The relevant date for the purpose of limitation should be taken from the date of receipt of order and not the date when such order was passed or issued. The following judicial pronouncements have been relied upon:
- The CESTAT, Delhi in the case of Prontos Steerings Ltd. [2012 (27) STR 444] held that when an assessee becomes entitled for refund after an Appellate Order then the date of limitation is to be calculated from the date when the assessee actually received such order and not when such order was issued.*
  - The CESTAT, Mumbai has in the case of Omkar Engineers reported at [2017 (52) STR 72] held that the order was received by an assessee and not when the order was passed or issued by the Adjudicating Authority.*
  - The CESTAT, Ahmedabad has in the case of Killburn Engineering [2008 (226) ELT 154 held that the date for the purpose of limitation, the relevant date is to be computed from the either the date of receipt of order or when the assessee became aware or got information about such order.*
  - Hon'ble Supreme Court in the case of State of Punjab V/s. Amar Singh Harika [1966 SC 1313] held that for the purpose of limitation*





*the date when the order is actually communicated to a person is important and the mere passing of an order does not make it final unless the concerned person against whom such order is passed received such order.*

(iii) The proviso to Section 11B provides that the limitation of one year shall not apply where any duty and interest has been paid under protest. In the present case, the entire amount was paid subsequent to the Order in Original under protest and an appeal was filed against such order. In light of the various decisions of High Court and Tribunal, the present case falls under the proviso to Section 11B which stipulates that such amounts are not subject to limitation of one year in as much as they are just deposits and not payment of duty. The following judicial pronouncements have been relied upon:

- a) *The Hon'ble High Court of Gujarat in the case of H.V. Ceramics [2019 (365) ELT 390 (Guj)] held that when an amount is deposited pending investigation, then such amount is to be considered as a deposit and not a deposit of duty and, therefore the limitation of one year under Section 11B would not be applicable to amounts which are paid under protest.*
- b) *The CESTAT, Bangalore in the case of Ashok Shetty and Associates [2017 (4) GSTL 53] held that the deposit of entire duty during pendency of litigation between assessee and the department is deemed to be a deposit under protest and, therefore the limitation of one year under Section 11B would not be applicable in such cases.*
- c) *The CESTAT, Ahmedabad in case of Gujarat Engineering Works [2013 (292) ELT 547] held that amount which is deposited during adjudication of a case cannot be considered as duty deposit becoming refundable as a consequence of favourable judgement and, therefore is to be considered a pre-deposit during the course of adjudication, hence it cannot be subjected to the limitation under Section 11B of Central Excise Act. The CESTAT has relied upon the decision of the Hon'ble High Court of Gujarat in case of Shri Ram Food Industries [2003 (152) ELT 285 ] whereby it was held that when the payment is made under protest during the course of adjudication, then the limitation period is not applicable under Section 11B in as much as such amount is to be treated as a pre-deposit and not as a deposit of duty.*

(iv) Hon'ble Apex Court has in the case of Kamlakshi Finance Corporation [1991 (55) ELT 433] held that all the Appellate Authorities and the Adjudicating Authorities are bound by the order





of the Tribunal and the order of the Tribunal has to be followed. It is also held that an order of the Appellate Authority is binding to the Adjudicating Authorities and the order of the Tribunal is binding on all Appellate Authorities and Adjudicating Authorities under its jurisdiction. In the present case the CESTAT has categorically held that the date of limitation is to be counted from the date of receipt of order. It is also submitted that Article 227 of the Constitution of India states that the High Court has superintendence over all authorities within its jurisdiction and the law of the High Court has to be followed judiciously. In the facts of the present case the judgment of the Hon'ble High Court of Gujarat 2003 (152) ELT 285 & 2019 (365) ELT 390, whereby it has been held that the deposit made during adjudication is to be considered as pre-deposit and the limitation of Section 11B is not applicable, the said ratio is applicable and in light of Article 227 the said ratio has to be judiciously followed.

4. The appellant was granted opportunity for personal hearing on 23.09.2020 through video conferencing platform. Shri Pankaj Kumar Sharma, Advocate, appeared for personal hearing as a representative of the appellant. He re-iterated the submissions made in Appeal Memorandum.

5. I have carefully gone through the facts of the case available on record, grounds of appeal and oral submissions made by the appellant at the time of hearing. I find that the issues to be decided in this case are as below:

(i) *Whether the claim of the appellant for refund submitted to the adjudicating authority will be subjected to the compliance of the provisions of Section 11B of the Central Excise Act, 1944 which prescribed limitation of one year for filing refund claim from the "relevant date"? and*

(ii) *Whether the "relevant date" for the purpose of Section 11B (1) of the said act will be the date of issue of order by Appellate Authority or the date of receipt of such order by the appellant?*

5.1 I find that in the present case, as per the Final Audit Report No. 18/2015-16 dated 13.09.2016, the applicant agreed to the audit objection and paid the Service Tax amount of Rs. 20,15,590/- vide SAP accounting document No. 1111170713 dated 31.03.2016. The adjudicating authority vide OIO No. 21/D/GNR/NK/2017-18 dated 28.02.2018, confirmed the same





and ordered appropriation of the amount paid by the appellant alongwith interest. Subsequently, appeal was filed by the appellant against the said OIO which has been decided by Commissioner (Appeals) vide OIA No. AHM-EXCUS-003-APP-82-18-19 dated 30.08.2018 [issued on 11/09/2018] vide which the subject OIO has been set aside. In term of the said OIA, the appellant had filed refund application on 13.09.2019 for the said amount of Rs. 20,15,590/- and the same has been rejected by the adjudicating authority vide impugned order, as the same is not in compliance to the stipulated time prescribed under sub-section (1) of the Section 11 (B) of the Central Excise Act, 1944.

5.2 In order to analyze the issue in proper perspective, it is relevant to go through the legal provisions contained under Section 11B of Central Excise Act, 1944 which are re-produced below:

*"(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :*

***Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :*

***Provided** further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.*

**Explanation.** - For the purposes of this section, -

(A) "refund" includes rebate of duty of excise .....

(B) "relevant date" means, -

*(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction; "*

5.3 It is clear from the legal provisions of Section 11B of the Central Excise Act, 1944 that limitation of one year shall not apply in case of payment of duty and interest under protest. Further, the relevant date in case of refund becoming eligible as a consequence to order of the appellate authority etc. is from the date of such judgement. I find that the adjudicating authority in Para 14 of impugned order has observed that there was nothing on record which indicates that the amount of Rs. 20,15,990/-





was paid under protest. He has also made reference to Final Audit Report No. 18/2015-16 dated 13.09.2016 which mentioned that the appellant agreed to the audit objection and paid the amount on 31.03.2016. Hence, I am not in agreement with the contention of the appellant that they had paid duty under protest. I find that the refund claim would be governed under time limit prescribed under Section 11B of the Central Excise Act, 1944.

5.4 Further, as per explanation B (ec) of Section 11B, the relevant date is to be calculated with reference to issuance of order of appellate authority which is 11.09.2018. The refund claim was made on 13.09.2019 which is clearly after one year. Hence, the adjudicating authority has correctly held the refund to be time-barred in terms of provision of Section 11B of the Central Excise Act, 1944.

5.5 It is further observed that the appellant has in support of his contention that amount paid during investigation is a pre-deposit relied upon the Hon'ble Gujarat High Court judgment in the case of H.V. Ceramics [2019 (365) ELT 390 (Guj)]. I find that the said judgment was pronounced on 25.10.2018. On going through the said judgement, it is observed that the Hon'ble High Court has upheld the judgement dated 14.11.2017 of the Hon'ble Tribunal, Ahmedabad underwhich it was held that "*such limitation would not be applicable since it was not a collection of tax but it was a collection of amount during the course of investigation*". However, I find that the Hon'ble High Court has not concluded any specific question of law while delivering the said judgement.

5.6 I also find that CESTAT, WZB, Ahmedabad in a subsequent pronounced Order No. A/11311/2018-WZB/AHD dated 26.06.2018, in case of M/s. Ratnamani Metals & Tubes Ltd. has considered the similar issue and held a different view that:

*"As regard, the deposit made during the investigation it is obvious that there is no provision in Central Excise or to make a deposit. Whatever payment made it is towards the probable Excise duty liability for which the investigation is undergoing, therefore it cannot be said that any deposit made during the investigation so made by the assessee is not a duty but only a deposit. Once the adjudication authority confirms the demand the said amount stands confirmed as duty only, the same being the duty stands appropriate against the demand confirmed in the adjudication order. For this reason also the amount even though that paid during the investigation, shall be considered as payment of duty. When this be so the refund of such duty amount is clearly governed by the Section 11B of Central Excise Act, 1944."*

Being later judgment on the issue, the said judgment takes precedence over the earlier one.

5.7 Further, I also find that CESTAT, West Zonal Bench, Ahmedabad in a subsequent Order No. A/10859 /2020 dated 18.03.2020 issued in case of Comexx, Ahmedabad has considered the similar issue and held a different view. The Tribunal while deciding the said issue, the decision by Hon'ble Apex Court in the case of Collector of Chandigarh Vs. Doaba Co-operative Sugar Mills-1988 (37) ELT 478 (SC) has taken into consideration wherein it has been observed that:-

*"6. It appears that where the duty has been levied without the authority of law or without reference to any statutory authority or the specific provisions of the Act and the Rules framed thereunder have no*





*application, the decision will be guided by the general law and the date of limitation would be the starting point when the mistake or the error comes to light. But in making claims for refund before the departmental authority, an assessee is bound within four corners of the Statute and the period of limitation prescribed in the Central Excise Act and the Rules framed thereunder must be adhered to. The authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation prescribed in the Act will prevail."*

Further, the Tribunal also taken into consideration the decision given by Larger Bench of the Tribunal in the case of *Veer Overseas Limited vs. CCE, Panchkula - 2018 (15) GSTL 59 (Tri. LB)*, underwhich the Larger Bench in Para 8 and 9 examined the decisions of various Courts and came to the following conclusion:

**8.** Here it is relevant to note that in various cases the High Courts and the Apex Court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex Court are mainly by exercising powers under the Constitution, in writ jurisdiction. It is clear that neither the jurisdictional service tax authority nor the Tribunal has such constitutional powers for allowing refund beyond the statutory time-limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the jurisdictional tax authorities and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in *Mafatlal Industries Ltd.* (supra) categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex Court further observed that the only exception is where the provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy, in so far as the present dispute is concerned, held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. We hold that the decision of the Tribunal in *Monnet International Ltd.* (supra) has no application to decide the dispute in the present referred case. We take note of the decision of the Tribunal in *XL Telecom Ltd.* (supra). It had examined the legal implication with reference to the limitation applicable under Section 11B. We also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in *Miles India Limited v. Assistant Collector of Customs - 1987 (30) E.L.T. 641 (S.C.)*. The Apex Court upheld the decision of the Tribunal to the effect that the jurisdictional customs authorities are right in disallowing the refund claim in terms of limitation provided under Section 27(1) of the Customs Act, 1962. We also note that in *Assistant Collector of Customs v. Anam Electrical Manufacturing Co. - 1997 (90) E.L.T. 260 (S.C.)* referred to in the decision of the Tribunal in *XL Telecom Ltd.* (supra), the Hon'ble Supreme Court held that the claim filed beyond the statutory time limit cannot be entertained.





9. The Apex Court in *Mafatlal Industries Ltd.* (supra) observed that the Central Excise Act and the Rules made thereunder including Section 11B too constitute "law" within the meaning of Article 265 and that in the face of the said provisions - which are exclusive in their nature no claim for refund is maintainable except and in accordance therewith. The Apex Court emphasized that "the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said Article".

10. Having examined various decided cases and the submissions of both the sides, we are of the considered view that a claim for refund of service tax is governed by the provision of Section 11B for period of limitation. The statutory time limit cannot be extended by any authority, held by the Apex Court."

Further, the Tribunal has issued Order No. A/10859 /2020 dated 18.03.2020 in respect of the subject appeal, as herebelow:

*"In the aforesaid circumstances, we find that the decisions relied on by the appellant in his support were passed without appreciating the decision of Hon'ble Apex Court in the case of Doaba Co-operative Sugar Mills (supra) and in the case of Mafatlal Industries Limited vs. UOI - 1997 (89) ELT 247(SC). In both these decisions it has been categorically held that refund under Central Excise Act would be governed by Section 11B. In these circumstances, we find that the refund claim filed by the appellant would be governed by the provisions of limitation prescribed under Section 11B of Central Excise Act, 1944. Since the refund was filed after expiry of limitation the same cannot be entertained."*

Being later judgment on the issue, the said judgment takes precedence over the earlier one.

5.8 It is further observed that the Hon'ble High Court of Gujarat in case of *Ajni Interiors Versus Union of India* [Special Civil Application No. 10435 of 2018] considered the similar issue and passed an order on 04.09.2019 wherein it was held that *"in our view, it is clear that on appeal being allowed quashing and setting aside the order of the Authority imposing duty, the petitioner has to apply for refund in accordance with the provisions under the Act."* The Hon'ble Court has further observed that *"In view of the clear pronouncement of law by the Constitution Bench of the Supreme Court with regard to refund claim, precedents relied on by the petitioner are not applicable as they are not on the issue directly covering the field since the payment is made by the petitioner voluntarily during the course of investigation towards Central Excise Duty, in Form No. TR-6, without any protest and refund claim is also not filed in the prescribed form, that too, within a period of limitation as prescribed along with an affidavit stating that petitioner has not passed on duty to another person, this petition is liable to be rejected."*

Hence, the contentions made by the appellants are not backed by judicial pronouncements of jurisdictional Tribunal as well as of Hon'ble High Court and is rejected accordingly.





6. Now, as regard the contention of the appellant in respect of the "relevant date", I find that considering the principle laid down by the Supreme Court in Constitution Bench Judgement, it is incumbent upon the person claiming refund of duty/interest paid, has to claim it in accordance with the provisions of the Act. In terms of the provisions of Section 11B of Central Excise Act, 1944, it is clear that a claim for refund has to be filed in the prescribed form within one year from the relevant date. Further, I find that under Explanation (B) (ec) of Section 11B of Central Excise Act, 1944, relevant date is defined as "*in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, **the date of such judgment, decree, order or direction;***" and therefore, it was incumbent upon the appellant to file refund claim in prescribed form within a period of one year from 11.09.2018 i.e. the order passed by the Appellate Authority in favour of the appellant. In the instant case, I find that the refund claim filed by the appellant is not in compliance to the stipulated time prescribed under sub-section (1) of the Section 11B of Central Excise Act, 1944 and accordingly not fulfilled the requirements in accordance with Act.

7. On careful consideration of the relevant legal provisions and the judicial pronouncements of the Hon'ble High Court and the Tribunal, I am not in agreement with the contentions of the appellant that (1) Amount paid during the course of audit would be treated as deposit and in turn refund claim thereof will not be subjected to limitation in terms of Section 11B of the Central Excise Act, 1944 and (2) The "relevant date" will be the date of communication of order and not the date of issue of order in terms of Explanation (B) (ec) to Section 11B of the Central Excise Act, 1944. Hence, the appeal filed by the appellant is not legally maintainable on merits and is liable to be rejected.

8. It is further observed that in the instant appeal, the appellant has also made contention that "*The adjudicating authority has not even refunded 10% of mandatory pre-deposit deposited as per Section 35 F of the Central Excise Act, 1944 and has rejected the entire refund claim. It is a settled legal position that pre-deposit cannot be subjected to the provisions of Section 11B and it has to be refunded as soon as an appeal is allowed by the appellate authority.*"

8.1 As regards to the issue of refund of pre-deposit, I find that the CBEC vide Circular No. 984/08/2014-CX dated 16.09.2014 has issued certain clarifications which is re-produced below:





**"3. Payment made during investigation:**

3.1 Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10%, subject to the limit of Rs 10 crores, can be considered to be deposit made towards fulfillment of stipulation under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962. Any shortfall from the amount stipulated under these sections shall have to be paid before filing of appeal before the appellate authority. As a corollary, amounts paid over and above the amounts stipulated under Section 35 F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, shall not be treated as deposit under the said sections.

3.2 Since the amount paid during investigation/audit takes the colour of deposit under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962 only when the appeal is filed, the date of filing of appeal shall be deemed to be the date of deposit made in terms of the said sections.

**5. Refund of pre-deposit:**

5.1 Where the appeal is decided in favour of the party / assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944 or Section 129EE of the Customs Act, 1962.

5.2 Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962. Therefore, in all cases where the appellate authority has decided the matter in favour of the appellant, refund with interest should be paid to the appellant within 15 days of the receipt of the letter of the appellant seeking refund, irrespective of whether order of the appellate authority is proposed to be challenged by the Department or not.

**7. Procedure for refund:**

7.1 A simple letter from the person who has made such deposit, requesting for return of the said amount, along with a self attested Xerox copy of the order in appeal or the CESTAT order consequent to which the deposit becomes returnable and attested Xerox copy of the document evidencing payment of such deposit, addressed to Jurisdictional Assistant/Deputy Commissioner of Central Excise and Service Tax or the Assistant/Deputy Commissioner of Customs, as the case may be, would suffice for refund of the amount deposited along with interest at the rate specified.

7.2 Record of deposits made under Section 35F of the Central Excise Act, 1944 or section 129E of the Customs Act, 1962 should be maintained by the Commissionerate so as to facilitate seamless verification of the deposits at the time of processing the refund claims made in case of favourable order from the Appellate Authority."

8.2 It is observed that neither the appellant has pleaded on the said ground during adjudication nor the adjudicating authority has examined the said aspect as to whether refund claim to that extent may be considered to



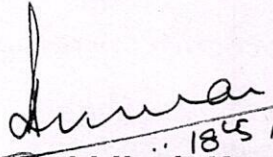


the appellant in terms of the clarifications issued by CBEC vide Circular No. 984/08/2014-CX dated 16.09.2014.

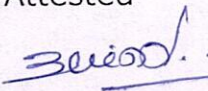
9 Accordingly, it would be proper to remand back the matter to the adjudicating authority to examine the issue as to whether refund claim to the extent of 7.5% of the duty paid by the appellant in the instant case may be considered to the appellant in terms of the clarifications issued by CBEC vide Circular No. 984/08/2014-CX dated 16.09.2014 and such other relevant clarifications issued by board, from time to time.

10. In view of the discussions made in the foregoing paras, I do not find any merit in the contentions of the appellant that (1) Amount paid during the course of audit would be treated as deposit and in turn refund claim thereof will not be subjected to limitation in terms of Section 11B of the Central Excise Act, 1944 and (2) The "relevant date" will be the date of communication of order and not the date of issue of order in terms of Explanation (B) (ec) to Section 11B of the Central Excise Act, 1944. Hence the appeal filed by the appellant is not legally maintainable on the said grounds and is accordingly rejected. However, I remand back the matter to the adjudicating authority to examine the issue of refund claim to the extent of 7.5% of the duty paid by the appellant, in terms of the clarifications issued by CBEC vide Circular No. 984/08/2014-CX dated 16.09.2014. Accordingly, appeal is allowed by way of remand back to the adjudicating authority for examination of applicability of Board's circular in the case.

11. The appeal filed by the appellant stands disposed off in above terms.

  
18<sup>th</sup> November, 2019  
(Akhilesh Kumar)  
Commissioner (Appeals)

Attested



(M.P. Sisodiya)

Superintendent (Appeals)  
Central Excise, Ahmedabad



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3. The Deputy /Asstt. Commissioner, Central GST, Division-Gandhinagar, Sector-10A, Opp. St. Xaviers School, Gandhinagar-382010.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-South.
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