



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, अम्बावाडी अहमदाबाद ३८००१५.  
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
☎ 07926305065- टेलिफैक्स 07926305136



**DIN :20201264SW0000555CFF**

**स्पीड पोस्ट**

क फाइल संख्या : File No : V2/10/RA/GNR/2019-20

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-045/20-21**  
दिनांक Date : **27-11-2020** जारी करने की तारीख Date of Issue 04-12-2020

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

ग Arising out of Order-in-Original No. **06/ST-REF/AC/18-19** दिनांक: **04.12.2019** , issued by  
Assistant Commissioner, CGST and Central Excise, Kalol Division, Gandhinagar

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

Assistant Commissioner,  
CGST and Central Excise,  
Kalol Division, Gandhinagar  
V/s

M/s Deepkiran Foods Pvt Ltd,  
228/2, Dantali Industrial Estate,  
Village Dantiali, Taluka Kalol,  
Gandhinagar District.

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 प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.



(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 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 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।

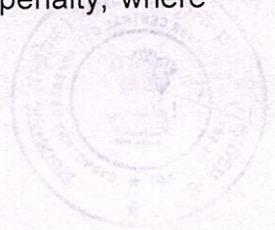
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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**

This appeal has been filed by the Assistant Commissioner of CGST & Central Excise, Kalol Division, Gandhinagar Commissionerate [hereinafter referred to as "department"] , in view of Review Order No.08/2019 dated 29.01.2020 issued under F.No.IV/18-256/REF/OIO/19-20 passed by the Commissioner of CGST, Gandhinagar, against Order-in-Original No.06/ST-REF/AC/18-19 dated 04.12.2019 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner, CGST & Central Excise, Kalol Divison, Gandhinagar [hereinafter referred to as "adjudicating authority"] in respect of M/s Deepkiran Food Pvt Ltd, 228/2, Dantali Industrial Estate, Village: Dantali, Taluka: Kalol, Gandhinagar District [hereinafter referred to as "respondent"].

2. Briefly stated, the facts of the case are that an appeal filed by the respondent against the Order-in-Original No.AHM-CEX-003-ADC-JN-009-012-18-19 dated 31.12.2018 was allowed by the Commissioner (Appeals), Ahmedabad vide Order-in-Appeal (in short 'OIA') No.AHM-EXCUS-003-APP-207-18-19 dated 01.05.2019. Upon allowing their appeal, the respondent filed a refund claim on 06.06.2019 for refund of pre-deposit amounting to Rs.5,28,161/- deposited by them under the provisions of Section 35F of the Central Excise Act, 1944. During scrutiny of the refund claim, it was observed that the amount of Rs.5,28,161/- was deposited by the respondent under CGST head on 04.03.2019 as per e-receipt CPIN No.1903200020673 and the same was lying in credit in their Electronic Cash Ledger and the said amount was debited to Government account only on 11.06.2019 which was after issuance of OIA dated 01.05.2019. Therefore, it appeared that the said amount debited on 11.06.2019 cannot be considered as payment of pre-deposit for filing of appeal and the refund claim filed by the respondent was not eligible. Accordingly, a Show Cause Notice dated 16.10.2019 was issued by the adjudicating authority asking the respondent as to why the refund claim filed by them should not be rejected. The said Show Cause Notice was decided by the adjudicating authority vide the impugned order wherein he has sanctioned the refund claimed by the respondent considering the amount paid by them as pre-deposit under Section 35F of the Central Excise Act, 1944 and holding that the debiting of the same on 11.06.2019 was a procedural lapse which can be condonable as there was no malafide intention on their part.

3. Being aggrieved with refund sanctioned by the adjudicating authority, the department has filed the instant appeal on the grounds that:

- In the present case, the deposit under dispute cannot be termed as pre-deposit under Section 35F of the Central Excise Act, 1944 as it was deposited to the Government account on 11.06.2019 i.e. after three months of filing of appeal and after one month of deciding the appeal;
- The pre-deposit prescribed under the Section 35F of the Central Excise Act, 1944 is mandatory in nature in as much as the section does not prescribe any

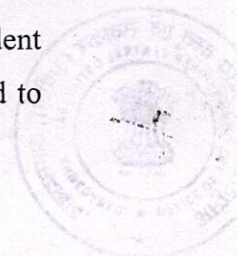


procedure to carry out any act which requires somewhere else under the statute rather, it mandates the pre-deposit and it can't be construed as procedural one, as observed by the refund sanctioning authority;

- There is no provision in law which allows such deposits to be considered as pre-deposit. Also law does not allow the lapse of crediting the deposited amount in the Government account subsequent to the disposal of appeal and therefore, refund of deposit made under the head CGST, considering as pre-deposit under Section 35F of the Central Excise Act, 1944 does not hold any legality;
- Section 35F of the Central Excise Act, 1944 provisioned for pre-deposit and therefore, the amount which could not be credited in advance for the purpose it intended, can't be termed as pre-deposit for the purpose of granting refund; and
- The respondent has made deposit (claimed as pre-deposit) wrongly under the head of CGST governed under the provisions of CGST Act, 2017 which again puts a question whether pre-deposit for filing appeal before Commissioner (Appeals), which was to be made under provisions of Section 35 F of Central Excise Act, 1944 at the time of filing the appeal, but made under the provisions of CGST Act, 2017 after one month from the date of Order-in-Appeal can be termed as 'pre-deposit' by the adjudicating authority and condoning the lapse a mere procedural, is proper and according to law? The mandatory provisions under the rule and section of the Act has to be adhered to and not overlooked. In this case, the adjudicating authority erred and sanctioned the refund claim exercising this authority beyond vested to him which is not proper on legal count.

4. The respondent vide their letter dated 20.05.2020 has submitted their Cross-Objection/Written submissions on the appeal filed by the department. The main contentions/objections of which are as under:

- The Department has filed the instant appeal against the impugned order without appreciating the actual facts of the case and does not vitiate the refund sanctioned by the lower authority;
- In present case, the Commissioner (Appeals) has considered the payment deposited by the respondent on 04.03.2019 by Challan No. 1903200020673 dated 04.03.2019 as mandatory pre-deposit under Section 35-F and considered the appeal on merits. The Assistant Commissioner has correctly sanctioned the refund amount after verifying the facts that the said amount has been credited to the Government account. When the Commissioner (Appeals) as well as the Assistant Commissioner had considered the payment made by the respondent as pre-deposit and accepted the fact that the said amount has been credited to



the Government account, challenging of the same at this stage is not sustainable under law;

- The amount in question got debited from their bank account on 04.03.2019 and the same was credited to Government account. They have submitted a copy of their bank statement in this regard. They have produced copy of Challan No. 1903200020673 dated 04.03.2019 as evidence of payment of pre-deposit to the Commissioner (Appeals). The Assistant Commissioner, though issued a show cause notice for rejection of refund on the ground that the DRC-03 submitted by the respondent is only generated on 11.06.2019 and therefore the date of deposit of the said amount is considered only 11.06.2019, after considering the whole facts of the case had considered the amount deposited as pre-deposit under Section 35F of the Central Excise Act, 1944 towards the appeal filed and condoned the delay in generation of DRC-03;
- As per Central Excise Act, 1944 and Finance Act 1994 as it stood at the relevant time, the date of deposit of any amount in the bank through Challan is considered as date of payment of duty. It may be appreciated that after introduction of GST with effect from 01.07.2017, Central Excise Act 1944 and Finance Act 1994 have been repealed and any payment of duty under Central Excise Act or Finance Act 1994 is collected under CGST Act, 2017 and no payment is possible as Central Excise duty or Service Tax through ACES portal by the assessee;
- It is not disputed in the subject appeal by the department about the payment of amount by the respondents. Only impediment in the eyes of department is that the respondent had generated DRC-03 after filing of appeal and its order. But the fact remained the same that the respondent had made the payment before filing the appeal i.e. in 04.03.2019 and generating DRC-03 is GST Portal is mere procedural requirement when the amount is deposited in government account. The department has not disputed the payment made by the respondent while filing of appeal before the Commissioner (Appeals). Further, the most important factor is that the Commissioner (Appeals) had not taken any objection while considering the appeal and the jurisdictional Central Excise/CGST officer to whom the copy of appeal is forwarded by the respondent is also not taken any objection at that time; and
- When the appeal filed by the respondent was decided in favour of them, the amount deposited towards filing of appeal is required to be refunded.

5. A personal hearing in the matter was held on 29.09.2020. Shri M.H.Raval, Consultant, appeared on behalf of the respondent for the hearing. He re-iterated the submissions made in written reply. He also submitted a written submission dated 29.09.2020 on 30.09.2020 again re-iterating the submissions made earlier.



6. I have carefully gone through the fact of the case and submission made in the appeal memorandum of the department as well as the cross-objection filed by the respondent. The issue to be decided in the matter is admissibility of refund of pre-deposit amounting to Rs.5,28,161/-, sanctioned by the adjudicating authority vide the impugned order.

7. After going through the facts and evidences available on records, I find that the amount in question for which refund is claimed by the respondent was paid or deposited by them for the purpose of filing appeal before the Commissioner (Appeals), Ahmedabad against Order-in-Original No.AHM-CEX-003-ADC-JN-009-012-18-19 dated 31.12.2018. This fact is not disputed by the appellant department. It is also a fact that the respondent's above said appeal was entertained by the Appellate Authority after considering the proof of payment of pre-deposit made by them in terms of Section 35F of the Central Excise Act, 1944, which was Payment Receipt/E-Challan No. 1903200020673 dated 04.03.2019 and it was only after that the appeal was considered on merit and the OIA referred above came to be issued. Thus, there cannot be any dispute now that the amount deposited by the respondent in the matter is not in the nature of pre-deposit. Further, a perusal of the Challan submitted as proof of payment of pre-deposit by the respondent shows the details of deposit under CGST head in Government Account. Once the amount in question stand deposited to the said Government account, further act of debiting it by way of generating DRC-03 is a technical procedure and the failure in doing so does not *ipso facto* take away or alter the nature/character of the said payment as pre-deposit. In the present case, it is not in dispute that the amount in question has not been debited but the dispute is only that the said amount has been debited by way of generating DRC03 after passing of the OIA. It is pertinent to note that the adjudicating authority has observed the amount in question deposited on 04.03.2019 was remained lying in the Electronics Cash Ledger of the respondent till 11.06.2019. This proves that the amount deposited was practically lying unutilized in the CGST head in Electronics Cash Ledger till its debit on 11.06.2019. Therefore, the amount deposited in question in the present case retain its colour and character as pre-deposit even on the date of its actual debit on 11.06.2019. In view thereof, I am of the considered view that the amount deposited in question, though debited subsequently after passing of OIA, would remain in the nature of a pre-deposit as accepted by the Commissioner (Appeals) and the respondent is rightly eligible for refund of the same once their appeal is allowed and for that reason, the adjudicating authority has correctly sanctioned the refund to respondent vide the impugned order. It is more so in view of settled law that the department cannot retain any amount deposited/paid by the assesseees without any authority of law.

8. It is observed that the appellant has also raised a question on the legality of the payment of the pre-deposit made by the respondent under CGST head. I do not find any merit in the said contentions of the appellant as the provisions of Section 142(8)(a) of the



CGST Act, 2017 envisages recovery of arrears under the existing law as clarified by the Central Board of Indirect Taxes & Customs vide their Circular No. 42/16/2018-GST dated 13.04.2018. Thus, payments if any to be made as per provisions of previous laws, viz. Central Excise Act, 1944 and the Finance Act, 1994 can be made under CGST Act. It is undisputed that the amount paid by the respondent in the case was the amount deposited as pre-deposit in terms of Section 35F of the Central Excise Act, 1944 for filing appeal.

9. In view of the above discussions, I do not find any merit in the contentions raised by the appellant department and accordingly the same is rejected and the impugned order is up held for being legal and proper.

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

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

*Akhilesh Kumar*  
 (Akhilesh Kumar )  
 Commissioner (Appeals)

Date: 27.11.2020.



Attested:

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

**BY R.P.A.D/SPEED POST**

To

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|----|---|------------|
| 1. | The Assistant Commissioner,<br>Central GST & Central Excise, Division-Kalol,<br>Gandhinagar Commissionerate.                  | Appellant  |
| 2. | M/s Deepkiran Foods Pvt. Ltd.<br>228/2, Dantali Industrial Estate,<br>Village Dantiali, Taluka Kalol,<br>Gandhinagar District | Respondent |

**Copy to:-**

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

