



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 : 20201264SW0000616486

स्पीड पोस्ट

- क फाइल संख्या : File No : V2(72)10/GNR/2020-21
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-046/20-21**
दिनांक Date : **27-11-2020** जारी करने की तारीख Date of Issue
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **02/C.Ex-Ref./AC/2020-21** दिनांक: **13.04.2020/17.04.2020**,
issued by Assisnat Commissioner, CGST and Central Excise, Division-Kalol, Gandhinagar
- घ अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant / Respondent**

M/s Shah Foils Limited,
1820/1, Santej-Khatraj Road,
Near GEB Sub-Station, Opp. Rajnagar Bus Stop,
Santej, Taluka-Kalol, District-Gandhinagar

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिती 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, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

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



(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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd 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 अनुसूचि-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. Shah Foils Limited, 1820/1, Santej-Khatraj Road, Near GEB Sub-Station, Opp. Rajnagar Bus Stop, Santej, Taluka-Kalol, District-Gandhinagar (hereinafter referred to as 'appellant') against Order in Original No. 02/C.Ex.-Ref./AC/2020-21 dated 13.04.2020/17.04.2020 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central GST, Division-Kalol, Commissionerate-Gandhinagar (hereinafter referred to as 'the adjudicating authority').

2. The background for filing the said refund claim is that search was conducted by the officers of the Directorate General of Central Excise Intelligence, Mumbai Zonal Unit (hereinafter referred to as "the DGCEI") on 10.07.2012 at the factory premise as well as other related premises of the appellant. During the course of investigation by DGCEI, the appellant has deposited certain amounts on various occasions during the period from July'2012 to January'2014 totalling Rs. 80,00,000/- towards Central Excise duty liabilities. Pursuant to the investigation, the appellant was issued a Show Cause Notice under F.No. DGCEI/MZU/I&IS'C'/12(4)104/12/3402 dated 06.05.2014 by the ADG, DGCEI, Zonal Unit, Mumbai proposing, inter-alia, demand of Central Excise Duty totalling Rs. 21,83,98,186/- alongwith interest and penalty on different grounds and it was also proposed to appropriate the amount of Rs. 80,00,000/- already paid by the appellant during investigation against the aforesaid demands.

2.1 Thereafter, the Show Cause Notice dated 06.05.2014 issued by DGCEI to the appellant had been adjudicated by the Commissioner of CGST & Central Excise, Gandhinagar vide Order-in-Original No. AHM-EXCUS-003-COM-12-17-18 dated 27.02.2018 wherein the demand of Central Excise Duty amounting to Rs. 21,83,98,186/-, as proposed in the show cause notice, has been confirmed and ordered to be recovered alongwith interest leviable thereon. Further, an amount of Rs. 80,00,000/- paid by the appellant during the course of investigation has also been ordered to be appropriated against the said confirmed liabilities and in addition, penalty amounting to Rs. 21,83,98,186/- was also imposed on the appellant vide the said OIO.



2.2 Thereafter, being aggrieved by the Order-in-Original No. AHM-EXCUS-003-COM-12-17-18 dated 27.02.2018, the appellant filed an appeal before the Hon'ble CESTAT, Ahmedabad vide Appeal No. E/12274/2018 on 05.06.2018 challenging the confirmation of duty demand of Rs. 21,83,98,186/- alongwith interest and penalty. While filing an appeal before the Tribunal, in compliance of Section 35F of the Central Excise Act, 1944 to deposit an amount of Rs. 1,63,79,864/- as pre-deposit @ 7.5% of the duty involved, the appellant had furnished a copy of the challans for payment of Rs. 80,00,000/- made during investigation and made remaining payment of Rs. 83,79,864/- by debiting their CGST credit account. The same was accepted by the Hon'ble CESTAT as a compliance of Section 35F of the Central Excise Act, 1944 and admitted the appeal allotting Appeal No. E/12274/2018. Subsequently, the said appeal filed by the appellant has been allowed by the Tribunal vide Final Order No. A/10120-10125/2019 dated 18.01.2019 by setting aside the demands confirmed by the Order-in-Original dated 27.02.2018.

2.3 Thereafter, being aggrieved by the Tribunal Order No. A/10120-10125/2019 dated 18.01.2019, the Department had filed an appeal before the Hon'ble High Court of Gujarat vide Tax Appeal No. 659 of 2019. The Hon'ble High Court of Gujarat vide its order dated 08.01.2020 has dismissed the appeal filed by the Department and hence, the Tribunal Order dated 18.01.2019 attained finality.

2.4 The appellant submitted a letter dated 12.02.2020 [submitted on 18.02.2020] to the adjudicating authority with a request to treat the same as a letter requesting for refund in terms of Para 5 of read with Para 7 of the CBEC Circular No. 984/8/2014-CX dated 16.09.2014 and requested to grant them refund of Rs. 80,00,000/- paid as pre-deposit vide challans in the matter of Appeal No. E/12274/2018. In the said letter, it was clarified by the appellant that they would seek the refund of the remaining pre-deposit of Rs. 83,79,864/- made by debiting the CGST ledger by filing a separate refund claim in Form GST RFD-01A.

3. The adjudicating authority vide the impugned order dated 13.04.2020 rejected the refund claim of pre-deposit of Rs. 80,00,000/- under Section 11B of the Central Excise Act, 1944 read with Section 142 (3)

of Central GST Act, 2017, on the following grounds:



- (i) The amount in question of Rs. 80,00,000/- paid by the appellant during the course of investigation being an amount as duty amount and the same has been confirmed and appropriated by the Commissioner of Central Excise, Gandhinagar vide OIO dated 27.02.2018. Therefore, the said amount is a part of duty paid by the appellant and as such same cannot be considered as an amount of pre-deposit made while filing an appeal before the Tribunal, Ahmedabad. Accordingly, the refund of the said amount cannot be considered for sanction in terms of the CBEC Circular No. 984/08/2014-CX dated 16.09.2014 i.e. as pre-deposit made under Section 35FF of Central Excise Act, 1944.
- (ii) The refund claim of Rs. 80,00,000/- filed by the appellant with adjudicating authority on 18.02.2020 i.e. after a gap of about one year and one month from the date of issue of CESTAT Final Order No. A/10120-10125/2019 dated 18.01.2019 vide which the demand of duty confirmed and penalty imposed under OIO No. AHM-EXCUS-003-COM-12-17-18 dated 27.02.2018 against the appellant has been set aside. Accordingly, the refund claim has been hit by the doctrine of limitation of time in terms of the provisions of Section 11B (1) read with Explanation at Sr. No. (B) (ec) of the said section of Central Excise Act, 1944.

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

- (i) Although the CBEC Circular dated 16.09.2014 has been relied upon by the adjudicating authority in the impugned order, he has not given any findings on the relevant paragraphs of the Circular that are relied upon by the appellant. Further, none of the case laws including a judgment of Hon'ble High Court of Gujarat relied upon by the appellant in the reply to the show cause notice have been discussed or distinguished in the impugned order. The adjudicating authority has not provided any reasons for not considering the submissions of the appellants in the reply to the show cause notice and accordingly, it has been passed in gross violation of principles of equity, fair play and natural justice.
- (ii) The CBEC Circular No. 984/8/2014-CX dated 16.09.2014, at para-3 specifically states that payment made during the course of investigation shall take the colour of pre-deposit made towards



fulfilment of stipulation under Section 35F of the Central Excise Act, 1944. The Tribunal, Ahmedabad has also considered the said amount of Rs. 80,00,000/- paid during the investigation, as pre-deposit in compliance of Section 35 of Central Excise Act, 1944. It is settled law that the provisions of Section 11B of Central Excise Act, 1944 are not applicable for refund of pre-deposit and accordingly, once the amount is a pre-deposit and the appeal is decided in favour of the assessee, the entire amount of such pre-deposit is required to be refunded without invoking the provisions of Section 11B of Central Excise Act, 1944. Further, the letter dated 18.02.2020 submitted to the adjudicating authority is required to be treated as a letter for refund in terms of Para 5.2 of the aforementioned Circular dated 16.09.2014 and refund is required to be granted to them alongwith interest within 15 days of receipt of such letter.

(iii) It has also been held in a plethora of case laws that provisions of Section 11B of the Central Excise Act, 1944 are not invocable for seeking refund of pre-deposits and the same should be refunded to the assessee upon receiving a favorable order. They placed reliance on the following judgments in favor of their contention:

- (a) Hon'ble High Court of Gujarat in case of Principal Commissioner of Customs Versus H.V Ceramics [2019 (365) ELT 390 (Guj.)]
- (b) Hon'ble High Court of Punjab in case of LSE Securities Ltd. Versus Asst. Commissioner, S.T., Chandigarh
- (c) CESTAT, Allahabad in case of Parle Agro Pvt. Ltd. Versus CCE, Noida [2018 (360) ELT 1005 (Tri.All.)]
- (d) Hon'ble High Court of Madras in case of Estee Auto Pressings (P) Ltd. Versus CCE, Chennai [2017 (346) ELT 72 (Mad.)]

(iv) As per the CBEC Circular No. 802/35/2004-CX dated 08.12.2004 and CBEC Circular No. 984/8/2014-CX dated 16.09.2014, they are eligible for refund of the amount of Rs. 80,00,000/- paid during investigation and considered as pre-deposit for filing of appeal before CESTAT under Section 35F of the Central Excise Act, 1944. It is settled law that the Circulars issued by the CBEC are binding upon the Department and the Department cannot take a contrary stand. They placed reliance on the following judgments in favor of their contention:



- (a) CCE, Bolpur Vs. Ratan Melting & Wire Industries [2008 (12) STR 416 (SC)]
- (b) CCE, Vadodara Vs. Dhiren Chemical Industries [2002 (139) ELT 3 (SC)]
- (c) Ranadey Micronutrients Vs. CCE [1996 (87) ELT 19 (SC)]
- (d) Paper Products Ltd. Vs. CCE [1999 (2) ELT 765 (SC)]
- (e) Darshan Boardlam Ltd. Vs. Union of India [2013 (287) ELT 401 (Guj. HC)]
- (v) Even if it is assumed for the sake of argument that provisions of Section 11B of the Central Excise Act, 1944 are applicable in the instant case, then the relevant date for the purpose of determining limitation should be the date of the judgment of the Hon'ble High Court dated 08.01.2020, dismissing the appeal of the department against the order of the Tribunal dated 18.01.2019. Accordingly, the refund claim is within the period of one year prescribed under Section 11B of the Central Excise Act, 1944. This submission is without prejudice to the submissions made supra that the amount of Rs. 80,00,000/- is a pre-deposit under Section 35F of the Central Excise Act, 1944 and the provisions of Section 11B of the Central Excise Act, 1944 are not applicable for seeking refund of such pre-deposit.

5. The appellant was granted opportunity for personal hearing on 27.10.2020 through video conferencing platform. Shri Ishan Bhatt, Advocate, appeared for personal hearing as a representative of the appellant. He re-iterated the submissions made in Appeal Memorandum. Subsequently, the appellant has also made an additional submission which is reproduced below:

"The amount of Rs. 80,00,000/- paid during the investigation and treated as pre-deposit under Section 35 F of the Central Excise Act, 1944 at the time of filing of appeal before Hon'ble CESTAT cannot be considered as payment of Central Excise duty once the Tribunal vide order dated 18.01.2019 set aside the OIO dated 27.02.2018 wherein the said amount was appropriated against the total duty demand. Once the duty demand has been set aside by Tribunal and affirmed by Hon'ble High Court of Gujarat, the amount of Rs. 80,00,000/- paid during the investigation and appropriated against the duty demand, loses the character of Central Excise duty and is simply a deposit with the Revenue. The same is also stated in Para 3 read with Para 5 of



CBEC Circular No. 984/8/2014-CX dated 16.09.2014. They also placed reliance on the following judgements:

- (a) *Nelco Limited Vs. Union of India [2001 (1) TMI 102] High Court of Judicature at Bombay*
- (b) *Commissioner of Customs (Import), Raigad Vs. Finacord Chemicals (P) Ltd. & Others [2015 (5) TMI 371] Supreme Court*
- (c) *Suvidhe Limited Vs. Union of India [1996 (82) ELT 177] affirmed by the Hon'ble Supreme Court in Union of India [1997 (94) ELT A154 (SC)]*
- (d) *Sankla Industries Vs. C.C & C.E. Commissioner of Central Tax, Bangalore North West Commissionerate [2020 (1) TMI 1060] CESTAT Bangalore"*

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

"Whether the claim of the appellant submitted to the adjudicating authority for refund of an amount of Rs. 80,00,000/- paid during the course of investigation 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"?"

6.1 In the present case, it is an admitted fact that an amount of Rs. 80,00,000/- paid by the appellant during the course of investigation was appropriated against the confirmed liabilities of Central Excise duty by the Commissioner of CGST & Central Excise, Gandhinagar vide Order-in-Original No. AHM-EXCUS-003-COM-12-17-18 issued on date 27.02.2018. Subsequently, the appellant has filed an appeal before the Tribunal against the said OIO dated 27.02.2018. Now, the provisions of Section 35F of the Central Excise Act, 1944 are re-produced below:

"The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal —

- (i) *under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];*
- (ii) *against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;"*



Further, as per the copy of Form of Appeal to CESTAT in FORM No. E.A-3 submitted with appeal memorandum, I find that while filing an appeal before the Tribunal against OIO dated 27.02.2018, the appellant at Sr.No. 14 of the said form clearly mentioned the payment of Rs. 80,00,000/- made during investigation as a part of pre-deposit, in compliance of Section 35F of the Central Excise Act, 1944 which had also been accepted by the Hon'ble CESTAT. Subsequently, the appeal filed by the appellant has been allowed by the Tribunal vide Final Order No. A/10120-10125/2019 dated 18.01.2019 and set aside the demands confirmed by the Order-in-Original dated 27.02.2018.

6.2 Further, I find that CBEC vide Circular No. 984/8/2014-CX dated 16.09.2014 has also issued certain clarification on the similar issue. The contents of the relevant paras i.e. para-3 are reproduced 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.

7. Accordingly, in view of the CBEC Circular No. 984/8/2014-CX dated 16.09.2014 and the fact that Hon'ble CESTAT has also accepted the said amount of Rs. 80,00,000/- paid during the course of investigation as a pre-deposit in compliance of Section 35F of the Central Excise Act, 1944, I do not find any merit in the contention of the adjudicating authority that "the amount of Rs. 80,00,000/- paid by the appellant during the course of investigation is a part of duty paid by the appellant and as such same cannot be considered as an amount of pre-deposit made while filing an appeal before the Tribunal, Ahmedabad."



8. Further, it is observed that the appellant has vide their letter dated 12.02.2020 (submitted on 18.02.2020) requested the adjudicating authority to treat the said letter requesting for refund in terms of Para 5 read with Para 7 of the CBEC Circular No. 984/8/2014-CX dated 16.09.2014 and to grant them refund of Rs. 80,00,000/- paid as pre-deposit". The contents of the para-5 and para 7 of the said CBEC Circular are re-produced below:

"5. Refund of pre-deposit:

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.

8.1 However, it is observed that the adjudicating authority under the impugned order did not consider the same as pre-deposit and in turn, rejected the refund claim on the grounds of limitation in terms of the provisions of Section 11 B of the Central Excise Act, 1944. I find that this is in contravention of the instructions issued vide Board's circular mentioned above.

9. Accordingly, I find that when the amount of Rs. 80,00,000/-paid during the investigation took the character and colour of pre-deposit in terms of Board's circular dated 16.09.2014, the refund claim thereof would not be subjected to the compliance of the provisions of Section 11 B of the Central Excise Act, 1944. Hence, the refund claim rejected vide impugned order on the grounds of limitation in terms of the provisions of Section 11 B of the Central Excise Act, 1944 is not legally correct.



10. In view of the foregoing discussion, I set aside the impugned order passed by the adjudicating authority and allowed the appeal of the appellant with consequential relief.

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

Akhil Kumar
27th November, 2020
(Akhil Kumar)
Commissioner (Appeals)

Date: 27.11.2020



Attested

M.P. Sisodiya

(M.P. Sisodiya)
Superintendent (Appeals)
Central Excise, Ahmedabad

By Regd. Post A. D

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Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Gandhinagar.
3. The Deputy /Asstt. Commissioner, Central GST, Division-Kalol, Commissionerate-Gandhinagar.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-South.
5. ✓ Guard file
6. PA File

