



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 :20210364SW000000B07D**

**स्पीड पोस्ट**

- क फाइल संख्या : File No : V2(48)1/EA2/GNR/2020-21 and GAPPL/COM/CEX/206/2020
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-62 to 63/2020-21**  
दिनांक Date : **23-02-2021** जारी करने की तारीख Date of Issue 08.03.2021  
आयुक्त (अपील) द्वारा पारित  
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **15/REF/CEX/NRM/2019-20** दिनांक: **25.02.2020** and **02/REF/CEX/KP/2020-21** दिनांक: **03.07.2020**, both issued by Assistant Commissioner of CGST & Central Excise, Gandhinagar Division, Gandhinagar Commissionerate
- घ अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant / Respondent**

M/s Aditya Paptech Pvt Ltd.,  
Survey No. 149, Dehgam-Bayad Road,  
Dist-Gandhinagar, Gujarat-382305.

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 finished 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 जाएगी और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाएगी।

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 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।

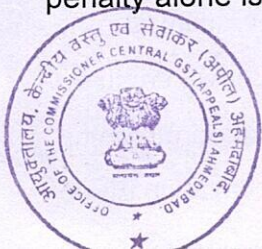
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

An Appeal has been filed by the Assistant Commissioner of CGST & Central Excise, Gandhinagar Division, Gandhinagar Commissionerate before this authority in view of Review Order No. 10/2019-20 dated 28.04.2020, passed by the Commissioner of CGST & Central Excise, Gandhinagar Commissionerate, in respect of the Order-in-Original No. 15/REF/CEX/NRM/2019-20 dated 25.02.2020 passed by the Assistant Commissioner of CGST & Central Excise, Gandhinagar Division, allowing Refund to M/s. Aaditya Paptech Pvt. Ltd., Survey No.149, Dehgam-Bayad Road, Pahadiya Village, Dehgam, Distt-Gandhinagar-382305. Besides that, another Appeal has been preferred by M/s. Aaditya Paptech Pvt. Ltd., Survey No.149, Dehgam-Bayad Road, Pahadiya Village, Dehgam, Distt-Gandhinagar-382305 against the Order-in-Original No. 02/REF/CEX/KP/2020-21 dated 03.07.2020 passed by the Assistant Commissioner of CGST & Central Excise, Gandhinagar Division, allowing refund, but transferring it to the Consumer Welfare Fund. The details in respect of these appeals are as under :

Srl. No.	Order-in-Original No., Date and Appeal No.	Appellant	Respondent	Refund Allowed (in Rs.)
(A)	(B)	(C)	(D)	(E)
1	15/REF/CEX/NRM/2019-20 Dated : 25.02.2020 Appeal No. : V2(48)1/EA2/GNR/2020-21	Asstt. Commissioner, CGST & Central Excise, Gandhinagar Division, Gandhinagar Comm'rate.	M/s. Aaditya Paptech Pvt.Ltd.	12,11,530
2	02/REF/CEX/KP/2020-21 Dated : 03.07.2020 Appeal No. : GAPPL/COM/CEX/206/2020 (V2(48)34/GNR/2020-21)	M/s. Aaditya Paptech Pvt.Ltd.	Asstt. Commissioner, CGST & Central Excise, Gandhinagar Division, Gandhinagar Comm'rate.	5,33,206 But transferred to Consumer Welfare Fund

Hereinafter in this order (i) Show Cause Notice will be referred as "SCN"; (ii) Order-in-Original No. 15/REF/CEX/NRM/2019-20 dated 25.02.2020 will be referred as "*impugned order-1*"; (iii) Order-in-Original No.02/REF/CEX/KP/2020-21 dated 03.07.2020 will be referred as "*impugned order-2*"; (iv) Appellant shown at Srl. No.1 in the Column (C) will be referred as "*Department*" (v) Respondent shown at Srl. No.2 in the Column (D) will be referred as "*adjudicating authority*"; (vi) M/s. Aaditya Paptech Pvt. Ltd. will be referred as "*Company*" (vii) Order-in-Original will be referred as "*OIO*" and (viii) Order-in-Appeal will be referred as "*OIA*"

2(i). The facts of the cases, in brief, are that the Company is engaged in the manufacture of Multilayer Board falling under Chapter 48 of the First Schedule to the Central Excise Tariff Act, 1985 and holding Central Excise Registration No.AAJCA9178PEM001. During the course of audit of the records of the Company for the period May-2012 to March-2015, it was noticed that the Company has taken cenvat credit on MS Plate, HR Plate and MS Angle etc which are used in laying of the foundation of capital goods in support of the capital goods. It appeared to the audit team that the cenvat credit on



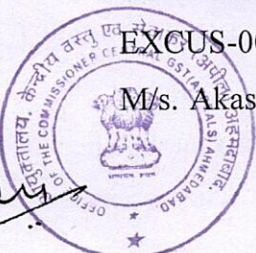
these items are not available to the Company as the said goods are not falling within the purview of the definition of capital goods as defined under Rule 2(a) of Cenvat Credit Rules, 2004.

2(ii). FAR No.311/2015-16 dated 05.01.2017 was issued by the Assistant Commissioner of (Audit-I), Central Excise & Service Tax, Ahmedabad in this respect, incorporating the said observation as Revenue Para-1. Accordingly, a SCN dated 16.03.2017 was issued to the Company proposing recovery of wrongly availed cenvat credit under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A alongwith interest under Section 11AA of Central Excise Act, 1944. Penalty under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 was also proposed to be imposed upon the Company. The Company paid an amount of Rs.12,11,530/- vide challan No.00799 dated 30.11.2016, under protest, and the same was informed vide their letter dated 04.02.2017.

2(iii). The said SCN was adjudicated vide OIO No.20/D/GNR/NK/2017-18 dated 23.02.2018 under which the proposal made in the SCN was confirmed and the amount paid by the Company was appropriated against the said demand. Meanwhile, the Company also paid the interest of Rs.2,30,323/- and penalty of Rs.3,02,883/- vide Challan No.00013 dated 23.03.2018 and No.00012 dated 23.03.2018 respectively. The Company filed appeal against the said OIO with the then Commissioner(Appeals), Central Tax, Ahmedabad who vide OIA No.AHM-EXCUS-003-APP-81-18-19 dated 30.08.2018 remanded the matter back to the authority, who passed the OIO No.20/D/GNR/NK/2017-18 dated 23.02.2018, for passing speaking order in view of the decision of Hon'ble Supreme Court in case of M/s. Rajasthan Spinning & Weaving Mills Ltd. reported at 2010(255)ELT 481(SC) after verification of the goods in question individually as to how they have been specifically used.

2(iv). In the remand proceedings, the authority found that the goods in question fall under the definition of capital goods defined under Rule 2(a) of the Cenvat Credit Rules, 2004 and accordingly vide OIO No.07/D/GNR/NRM/2019-20 dated 26.12.2019, allowed the cenvat credit of Rs.12,11,530/- and ordered to refund the said amount as the amount was paid by the Company vide Challan No.00799 dated 30.11.2016.

2(v). In view of the said OIO No.07/D/GNR/NRM/2019-20 dated 26.12.2019, the Company filed the application for refund of Rs.12,11,530/- and Rs.5,33,206/- paid by them during the proceedings against the Demand, interest & penalty amount. The refund amount of Rs.12,11,530/- was sanctioned to them vide the impugned order-1 and while sanctioning, it was held that principle of unjust enrichment is not applicable to the case as prescribed under Section 11B of the Central Excise Act, 1944 by relying upon the OIA No. AHM-EXCUS-003-APP-166-18-19 dated 31.12.2018 passed by Commissioner(Appeals) in case of M/s. Akash Ceramics Pvt. Ltd. However, in case of refund of interest and penalty amount,



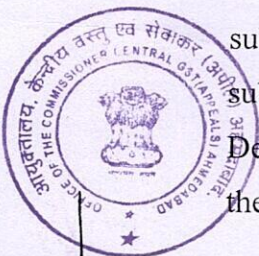
the adjudicating authority vide the impugned order-2 concluded that the Company failed to prove the fulfillment of unjust enrichment as per Section 12B of the Central Excise Act, 1944. Thus, the adjudicating authority allowed the refund of an amount of Rs.5,33,206/- but transferred it to the Consumer Welfare Fund as per Section 11B of the Central Excise Act, 1944.

2(vi). The Department preferred the appeal against the impugned order-1 sanctioning refund of Rs.12,11,530/-, on the ground that test of unjust enrichment is essential for sanctioning the refund. The Department also relied upon various case laws in the matter especially the judgement of Ho'ble Supreme Court of India in case of M/s. Sahakari Khand Udyog Mandal Ltd. reported at 2005(181)ELT 328(SC). The Company preferred the appeal against the impugned order-2 transferring Rs.5,33,206/- to the Consumer Welfare Fund.

3. Opportunity of personal hearing in these cases was accorded through virtual mode on 15.12.2020. Shri Ketan Mistry and Ms. Sonal Jain, both Chartered Accountants, on behalf of the Company, attended the hearing. They reiterated that the amount was paid under protest and as per Board's Circular a Certificate was also produced before the adjudicating authority that they had not recovered the duty from the customer. Further, the matter pertained to Cenvat on capital goods and hence there was no question of any unjust enrichment. They also submitted written submission in the matter and raised the following contentions towards the Departmental Appeal against sanctioning of refund and towards their Appeal against transferring the refund amount to Consumer Welfare Fund :

- (a) that doctrine of unjust enrichment does not apply in case when amount is paid under protest;
- (b) that amount paid under investigation is not subject to doctrine of unjust enrichment. [Reference case law of Lorenzo Bestonso 2015(315)ELT 478(Tri-Mum);
- (c) that the real nature of amount paid by them under protest is pre-deposit;
- (d) that the amount paid by them is shown under '*Amount receivable from Government Authority*' under Balance Sheet [Reference case law of Maruti Udyog Ltd. 2003(155)ELT 523(Tri-Del)];
- (e) that reliance is placed on Draft Circular F.No.137/29/2016-Service Tax;
- (f) that Chartered Accountant vide its Certificate No.Cert/20-21/90 dated 19.12.2020 has certified in this respect that the incidence of central excise duty claimed as refund has not been passed on directly or indirectly to any other person;
- (g) that they have not increased the price of finished goods after payment of the said amount;
- (h) that when basic amount is refunded then even interest and penalty amount should also be refunded;

4. I have carefully gone through the facts of the case available on records, submissions made by the Company in the Appeal Memorandum, in cross-objection, & oral submissions made during the course of personal hearing and the submissions made by the Department in Appeal Memorandum. The issue involved in both the appeals is that whether the unjust enrichment is applicable to the matter pertaining to refund in case where cenvat



credit was initially denied and it is paid back by the Company alongwith interest and penalty by way of challan.

5. The undisputed facts in both the matter is that the certain amount of cenvat credit, availed by the company, was denied and the same was paid by the Company under protest alongwith interest and penalty by way of challan. Later on, it was held that the cenvat credit is admissible to the Company and accordingly refund of cenvat credit (disallowed earlier and paid by the Company) was sanctioned to the Company. However, it is the contention of the Department that for any amount of refund, there would be test of unjust enrichment. Further, the adjudicating authority later on vide impugned order-2 though sanctioned the refund of interest and penalty amount to the Company but transferred the amount to the Consumer Welfare Fund on account of failure to prove unjust enrichment on part of the Company.

6. I find that the Hon'ble Apex Court in case of M/s. Mafatlal Industries Ltd. [1997(89)ELT 247(SC)] has held as under :

- (a) *Refunds of Central Excise and Customs Duties – All claims for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to third party – no civil suit for refund of duty maintainable – Writ jurisdiction of High Courts under Article 226 and of Supreme Court under Article 32 unaffected by said Section 11B or Section 27 but writ court to have due regard to the provisions of Central Excise and Customs Act and to refuse grant of relief where burden of duty passed on to third party – Favourable order not to result in automatic refund and claimant to prove burden of duty not passed on to third party.*
- (b) *Refund – Bar of unjust enrichment – Incidence of duty – Refund of duty either under Central Excise Act, Customs Act, in a civil suit or a writ petition grantable only when it is established that burden of duty has not been passed on to others – Person ultimately bearing the burden of duty can legitimately claim its refund otherwise amount to be retained by the State – Section 11B of the Central Excise Act, 1994 – Section 27 of the Customs Act, 1962 – Section 72 of the Contract Act and Articles 32 and 226 of the Constitution of India.*
- (l) *Protest – Duty paid under order of the court whether by way of order granting stay, suspension, injunction or otherwise is to be treated as a payment under protest – Protest under Rule 233B of the Central Excise Rules, 1944 need not to be lodged – Section 11B of the Central Excise Act, 1944.*

7. The relevant part of Section 11B of the Central Excise Act, 1944 reads as under :

*Section 11B : Claim for refund of duty and interest, if any, paid on such duty –*

- (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** .....



*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.*

(2) *If, on receipt of any such application, the Assistant Commissioner or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :*

*Provided ... ..*

*Provided further ... ..*

(3) *Notwithstanding anything to the contrary contained in any judgement, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).*

(4) ... ..

(5) ... ..

**Explanation** – *For the purpose of this section, -*

(A) ... ..

(B) *“relevant date” means –*

(a) .....

(b) .....

(c) .....

(d) .....

(e) *in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;*

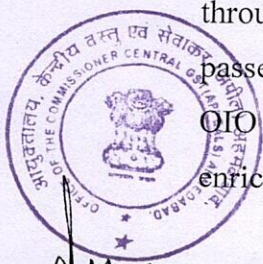
(ea) ... ..

(eb) ... ..

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

(f) *in any other case, the date of payment of duty.*

8. On perusal of the judgement of the Hon'ble Apex Court as shown in para 6 above, it is observed that refund can be granted only when it is established that burden of duty has not been passed on to others. Section 11B of the Central Excise Act, 1944 also expressly provides that the person claiming refund has to establish that the incidence of duty has not been passed on by him to any other person. The purpose of the unjust enrichment is to see that the claimant of the refund is not enriched at both ends i.e. at one end the claimant gets refund and at another end passes on the duty to others. So by this way, restriction on enrichment is put on the claimant. Hence, it is apparent from above legal provisions that in case of refund, the test of unjust enrichment would always exist, even if the duty, interest, etc. is paid under protest. No exemption has been given to the claimant of refund under the law or by the Apex Court, that if the duty is paid under protest, the test of unjust enrichment is not necessary. By paying the amount under protest the only benefit available to the refund claimant is that the time limit for filing the refund claim will not apply. Thus, the contention of the Company that the unjust enrichment will not apply in case where payment is made under protest, does not hold any ground and therefore is not acceptable. I have also gone through the Order-in-Appeal No. AHM-EXCUS-003-APP-166-18-19 dated 31.12.2018 passed in case of M/s. Akash Ceramics Pvt. Ltd. I find that the authority (who passed the OIO No.07/D/GNR/NRM/2019-20 dated 26.12.2019), while holding that the unjust enrichment will not apply in a case of payment under protest, has failed to appreciate the





facts in correct perspective as the facts of both the case are distinct in the way that in case of M/s. Akash Ceramic Pvt. Ltd., the refund was for the pre-deposit amount paid under protest, whereas in the present matter it is for the amount of duty, interest and penalty paid under protest. Further, the Company has relied upon a Draft Circular which has not attained finality and therefore can not be taken into consideration.

9(i). However, records of the case reveal that certain amount of cenvat credit was denied to the Company who paid the same with interest and penalty under protest. So, it can be safely concluded that the Company was not enriched at one end as the cenvat credit availed by them was not allowed to them though at other end they paid the duty over the final product. Thereby, it can be seen that the Company, while paying the duty on their final product, was not in a position to avail the cenvat credit, disallowed to them (as the same was paid back by the Company with interest and penalty), which in normal case they could have utilized to pay the duty and there would not have been any situation of refund. Thus, it can be said that they were not enriched unjustly. If the Company had not paid back the disallowed cenvat credit with interest and penalty through challan and would have contested the order of disallowance of cenvat credit before the proper authority, there would not be a position of any refund in case of finalization of issue in their favour.

9(ii). I also find that the Company has submitted the photocopy of a Certificate No.Cert/20-21/90 dated 19.12.2020 of Mistry & Shah LLP, Chartered Accountants, certifying that the incidence of central excise duty claimed as refund has not been passed on directly or indirectly to any other person. The said certificate further claims that the duty paid on the capital goods has not been capitalized and the depreciation has not been claimed on the duty portion under the Income Tax Act, 1961. The claim of them is further supported by the Balance Sheet as on 31.03.2017 and as on 31.03.2020. In the Balance Sheet as on 31.03.2020 it has been mentioned as under

*"The balance with Government Authorities includes the amount of Rs.17,44,736/- paid as pre-deposit against filing of appeal under Central Board of Indirect Taxes. Out of Rs.17,44,736/-, Rs.12,11,530/- pertains to Basic Duty and Rs.2,30,323/- as interest and Rs.3,02,883/- as penalty....."*

The adjudicating authority, without specifying any reason in detail, has simply not accepted the facts available on record which is not acceptable. The transactions of availment of cenvat credit and payment of duty on final product, during the relevant period, had already taken place when audit was conducted. Further, for wrong availment of cenvat credit on part of the Company (as per the Department) for which interest and penalty has been paid by them could not have been recovered from the customers or passed on to the customers.



10. In view of above, I uphold the impugned order-1 and reject the appeal filed by the Department. Since the impugned order-1 is upheld and the Refund is allowed to the Company there is no reason to transfer the interest and penalty amount paid by the Company to the Consumer Welfare Fund. Thus, the impugned order-2 is set aside so far as it relates to transfers of refund to Consumer Welfare Fund. The refund may be given to the Company.

11. The appeal filed by the Department is rejected and the appeal filed by the Company is allowed. Both the appeals are disposed of accordingly.

*Akhil*  
23rd February 2021  
(Akhilish Kumar)  
Commissioner (Appeals)

Date : .02.2021.

Attested

*Jitendra Dave*  
08/03/21

(Jitendra Dave)  
Superintendent (Appeal)  
CGST, Ahmedabad.



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

M/s. Aaditya Paptech Pvt. Ltd.,  
Survey No.149, Dehgam-Bayad Road,  
Pahadiya Village, Dehgam,  
Distt-Gandhinagar-382305.

**Copy to :-**

1. The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Principal Commissioner/Commissioner, CGST & Central Excise, Gandhinagar Comm'rate.
3. The Addl./Jt. Commissioner, (Systems), CGST & Cen. Excise, Gandhinagar Comm'rate.
4. The Dy./Asstt. Commissioner, CGST & Cen. Excise, Gandhinagar Divn, Gandhinagar Comm'rate.
5. Guard File.
6. P.A. File.