



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
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DIN :20210364SW000000C79F

स्पीड पोस्ट

क फाइल संख्या : File No : V2/13/RA/GNR/2019-20

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-65/2020-21**
दिनांक Date : **24.02.2021** जारी करने की तारीख Date of Issue 05-03-2021

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

ग Arising out of Order-in-Original No. **05/Refund/Excise/AC/19-20** दिनांक: **18.12.2019** , issued by
Assistant Commissioner, CGST and Central Excise, Mehsana Division, Gandhinagar

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

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

M/s Apex (Guj) Plastrochem Pvt Ltd,
Plot No. 83 & 103, GIDC,
Gozaria, Taluka-Vijapur,
Mehsana, Gujarat.

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, 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 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

The Assistant Commissioner, Central GST & Central Excise, Division-Mehsana, Commissionerate-Gandhinagar (hereinafter referred to as the 'Department'), in pursuance of the Review Order No. 09/2019-20 dated 11.03.2020 issued from F.No. IV/18-279/REF/OIO/2019 by the Commissioner, Central GST & Central Excise, Gandhinagar has filed this appeal against the Order-in-Original No.05/Refund/Excise/AC/19-20dated 18.12.2019 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner, Central GST & Central Excise, Division-Mehsana, Commissionerate-Gandhinagar (hereinafter referred to as the "adjudicating authority") in the matter of M/s. Apex (Guj) Plastochem Pvt. Ltd., Plot No. 83 & 103, GIDC Gozaria, Taluka-Vijapur, Mehsana (hereinafter referred to as the "respondent").

2. The facts of the case, in brief, are that the respondent is engaged in the manufacture of Plastic Containers (Jars) falling under Chapter 39 of Central Excise Tariff Act' 1985 and was not registered with Central Excise department at the material time, availing the benefit of SSI exemption having clearance value below threshold limit of one crore per year.

2.1 During the investigation by the department, it was observed that the said respondent was engaged in the manufacturing of Plastic Jars on job work basis for principals, who are manufacturers of edible oils, namely M/s. Vimal Oil & Food Ltd., Mehsana and M/s. Gujarat Spices and Oil Seeds Growers Co-Operative Union Ltd., Anjar (Kutch) and cleared them without following the procedure prescribed under Notification No. 214/86-CE dated 25.03.1986 as amended. Since the final products i.e. edible oils and vanaspati ghee are exempted from payment of Central Excise duty, the benefit of exemption notification was not available.

2.2 During investigation, it was observed that the respondent has made clearance of the said final product to tune of Rs. 1,19,10,917/- during the year 2005-06 which is in excess of Rs. 19,10,917/- after crossing the threshold limit of Rs. One Crore and the said respondent had also paid Central Excise duty of Rs. 3,11,862/- (including cess) leviable thereon vide TR-6 Challan dated 23.08.2006 and 07.09.2006. Thereafter, a Show Cause Notice No. V.85/3-2/D/2007-08 dated 04.04.2007 was issued by the Deputy Commissioner, Central Excise & Customs, Gandhinagar Division which was subsequently adjudicated vide OIO NO. 13/D/2007-08 dated 23.01.2008 by the Division Adjudicating Authority who confirmed the demand of Central Excise duty of Rs. 3,11,862/- and



appropriated the payment already made by the respondent towards the said liability. Further, the demand of recovery of interest under Section 11AB of Central Excise Act, 1944 was also confirmed and penalty of Rs. 3,11,862/- was imposed on the respondent under Section 11AC of the Central Excise Act, 1944.

2.3 Being aggrieved by the OIO dated 23.01.2008, an appeal was filed by the respondent before the Commissioner (Appeals), Central Excise, Ahmedabad which was rejected and the subject OIO dated 23.01.2008 was upheld. Thereafter, an appeal was filed by the respondent against the said order passed by the Commissioner (Appeals) before the CESTAT, Ahmedabad. However, CESTAT Ahmedabad vide Order No. A/11852-11853/2018 dated 03.08.2018 (hereinafter referred as "CESTAT Order-1") confirmed the demand of duty alongwith interest, however reduced the penalty to 25% subject to condition that the amount of duty alongwith interest and 25% penalty is paid within one month from the date of receipt of the said order. In pursuance of the said CESTAT Order-1, the respondent deposited the reduced penalty of 25% amounting to Rs. 77,966/- vide Challan No. 00002 dated 03.10.2018 and also paid interest of Rs. 27000/- vide Challan No. 0009 dated 03.01.2019.

2.4 Thereafter, on the basis of decision of Larger Bench in the case of M/s. Thermax Babcock Wilox Ltd. 2018 (364) ELT 945 (Tri. LB), the respondent again filed an application before Hon'ble CESTAT, Ahmedabad for restoration of appeal in respect of CESTAT Order-1 which was allowed. The CESTAT, Ahmedabad vide Order NO. A/11707-11714/2019 dated 06.09.2019 (hereinafter referred as "CESTAT Order-2") allowed the respondent's plea for the demand of the extended period as not sustainable and remanded the matter to the adjudicating authority for re-quantification of the demand for the normal period. The Hon'ble CESTAT also held that *"it is made clear that since we have held that there was no malafide on the part of the appellant, no penalty is imposable on all the appellant in respect of any duty liability arise after re-quantification."*

2.5 In pursuance of the issuance of CESTAT Order-2 by Hon'ble Tribunal, the respondent has submitted an application for refund of Rs. 4,16,828/- which comprised of (i) Central Excise duty of Rs. 3,11,862/- deposited by them prior to issuance of the SCN vide TR-6 Challan dated 23.08.2006 & 07.09.2006 (ii) Interest amount of Rs. 27000/- paid vide Challan No. 0009 dated 03.01.2019 and (iii) 25% Penalty amount of Rs. 77,966/- paid vide Challan No. 00002 dated 03.10.2018. The



adjudicating authority vide issuance of impugned order, sanctioned the refund amount of Rs. 4,16,828/- to the respondent considering the grounds reproduced below:

- (i) CBEC Circular NO. 1053/02/2017-CX dated 10.03.2017 specifying the refund of pre-deposit and its procedures.
- (ii) CBEC Circular No. 984/08/2014-CX dated 16.09.2014 has been relied which states that any payment made during the course of investigation on which appeal is filed can be considered to be deposit made towards fulfillment of stipulation under Section 35F of Central Excise Act, 1944.
- (iii) Reliance is placed on the decision of the Hon'ble High Court in case of *Nelco Ltd. Vs. Union of India* 2002 (144) ELT 56 (Bom) observing that when the matter has been remanded for re-adjudication, there is no provision for withholding the amount of pre-deposit. Hence the pre-deposit must be returned.
- (iv) The decision of the Tribunal in case of *M/s. Voltas Ltd Vs. UOI* reported in 1999 (112) ELT 34 (Del.) has also been relied upon holding that if the appellate authority sets aside the order and remands the matter to adjudicating authority, the duty deposited pending appeal should be refunded. This is because once the order is set aside and matter is remanded, there is no appeal pending and deposit pending appeal cannot be withheld.

3. Being aggrieved with the impugned order, the Department has preferred this appeal on the following grounds:

- (i) The adjudicating authority, in pursuance of CESTAT Order-2 remanding the case back to the adjudicating authority for re-quantification of the duty amount has sanctioned the refund claim of Central Excise duty which was paid by them during the course of investigation, is not legally correct as the case did not attained finality.
- (ii) The respondent had paid the duty liability of Rs. 3,11,862/- (including Cess) during the course of investigation which was confirmed and appropriated vide the OIO No. 13/D/2007-08 dated 23.01.2008 which was also upheld at the first appellate stage before Commissioner (Appeals). In terms of the provisions of Section 3 of the Central Excise Act, 1944 readwith Rule 2 of Central Excise Rules and Section 35 of the Central Excise Act, 1944, the amount of Central Excise duty is quite different from the amount paid under Section 35F termed as pre-deposit. The refund in question of the instant case is of the amount of payment of Central Excise duty governed under the provisions of Section 11B of Central Excise Act,



1944 and not under the provisions of Section 35F of Central Excise Act as equated by the adjudicating authority is not legally tenable.

(iii) The adjudicating authority while deciding the instant refund case has relied upon the following judgements:

- 1) Hon'ble High Court of Mumbai in case of Nelco Limited Vs. Union of India as reported in 2002[144] ELT 56 (Bom):

In case of Nelco Limited, the Hon'ble High Court of Bombay has observed that amount deposited under Section 35F as a condition precedent to hearing an appeal has a character of security deposit and that refund of pre-deposit is limited only for the amount prescribed as deposit under Section 35F of CEA, 1944. Further, the High Court in the said case was dealing the matter under Article 226 of the Constitution of India. However, the adjudicating authority working within four corners of the statute cannot extend such relief in absence of any specific rules. Reliance is also placed on the judgments of Hon'ble Supreme Court in case of (i) Mafatlal Industries Ltd. [1997 (89) ELT 247 (SC)] (ii) Miles India Limited [1987 (30) ELT 641] (iii) Kirloskar Pneumatic Company [1996 (84) ELT 401 (SC)]

- 2) Voltas Ltd Vs. Union of India as reported in 1999 (112) ELT 34 (Del.)

The case of Voltas Limited decided by Hon'ble High Court of Delhi also deals with amount deposited in terms of Section 35F. However, in the instant case, the adjudicating authority has sanctioned the entire amount of Central Excise duty and penalty paid by the respondent banking on the provisions of Section 35F which is an error of judgment on his part while dealing with provisions of Section 35F of Central Excise Act, 1944.

(iv) The adjudicating authority has observed that doctrine of unjust enrichment is not applicable in the present case. Such an observation of the adjudicating authority is flawed in as much as in the case of Sahkari Khand Udyog Mandal reported in 2005 (181) ELT 328 (SC), the Hon'ble Supreme Court of India held that:

"From the above discussion, it is clear that the doctrine of 'unjust enrichment' is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of



Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss. [para 48]"

In the instant case, the entire Central Excise duty paid during the investigation has been refunded to the respondent by the adjudicating authority. However, the adjudicating authority has not at all gone into details as to whether such duty was already collected from consumers by the assessee and in case of its refund no undue benefit is retained by him. The doctrine of unjust enrichment is very much applicable in this case for which the adjudication order is silent.

4. Personal Hearing in the case was held on 15.12.2020 through video conferencing. Shri K. C. Rathod, Retired Superintendent of Central Excise, appeared on behalf of the respondent. He stated that he would make a written submission based on which case may be decided. Further, the respondent in their additional submission dated 15.12.2020 has submitted as below:

- (i) *The amount paid as deposit during investigation is as good as amount paid as pre-deposit because such amount is treated as Pre-Deposit while filing Appeals to higher authorities such as Commissioner (Appeals) and Hon'ble CESTAT.*
- (ii) *As mentioned in our refund application dated 30.09.2019, this matter does not fall under the normal period and Hon'ble CESTAT has allowed the demand pertains to the extended period.*

5. I have carefully gone through the facts of the case, grounds of appeal, the oral submissions made at the time of personal hearing and additional submission given by the respondent. It is observed that the issue to be decided in this case is that:

"Whether Central Excise duty of Rs. 3,11,862/- deposited by the respondent prior to issuance of the SCN vide TR-6 Challan dated 23.08.2006 & 07.09.2006 would be treated as 'Pre-deposit' or 'deposit', subsequent to the issuance of Order No. A/11707-



11714/2019 dated 06.09.2019 by Hon'ble CESTAT, Ahmedabad vide which the demand of the extended period is set aside and remanded the matter to the adjudicating authority for re-quantification of the demand for the normal period?"

5.1 As per the chronological events in the matter, I find that the amount of Rs. 3,11,862/- was paid by the said respondent during investigation towards their liability of Central Excise duty (including Cess) leviable on their clearances in excess of threshold limit during the year 2005-06. The said amount has been confirmed by the Adjudicating Authority vide OIO NO. 13/D/2007-08 dated 23.01.2008 as Central Excise duty leviable (including Cess) and also appropriated towards the said liability. Further, the demand of recovery of interest under Section 11AB of Central Excise Act, 1944 was also confirmed and penalty of Rs. 3,11,862/- was imposed under Section 11AC of the Central Excise Act, 1944.

5.2 Further, it is observed that as per the CESTAT Order-2 on the basis of which the refund claim has been filed by the respondent, the demand of the extended period is set aside and remanded the matter to the adjudicating authority for re-quantification of the demand for the normal period. Further, it would also be proper to consider the facts reported by the Jurisdictional Range Superintendent and recorded in the impugned order that "the demand in the present case was issued within 1 year to the respondent". Accordingly, I find that this is the case where the matter is remanded by Hon'ble CESTAT to the adjudicating authority for re-quantification of the demand, particularly for the normal period and hence, the amount of refund sanctioned by the adjudicating authority before the final quantification of the amount is not proper.

5.3 In similar case, I find that Hon'ble CESTAT, Ahmedabad in case of Ratnamani Metals & Tubes Ltd. Versus Commr. Of C. Ex. & S.T, Ahmedabad-III reported at [2019 (366) ELT 139 (Tri. Ahmd.)] held as reproduced below:

5. I find that the limited issue to be decided by all this case is that in case, of deposit made during the investigation of the demand case whether interest on refund of such amount shall be payable from the date of deposit of such amount or from the date after 3 months of filling the refund application. 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.

5.4 The adjudicating authority has relied upon the CBEC Circular No. 1053/02/2017-CX dated 10.03.2017 and CBEC Circular No. 984/08/2014-CX dated 16.09.2014 (Para 3.1) which specifies the refund of pre-deposit and its procedures. However, it is observed that these Circulars deal with Pre-Deposit before the Appellate Authorities where a fix percentage of duty or penalty has to be deposited. However, I find that the refund in question of the present case is of the amount of payment of Central Excise duty governed under the provisions of Section 11B of Central Excise Act, 1944 and not under the provisions of Section 35F of Central Excise Act, 1944 as wrongly equated by the adjudicating authority and the same is not proper.

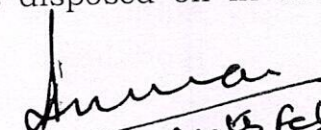
5.5 Accordingly, I find that the refund of Central Excise duty of Rs. 3,11,862/- and Interest of Rs. 27,000/- sanctioned by the adjudicating authority vide the impugned order is legally not sustainable.

6. Further, I find that Hon'ble CESTAT, Ahmedabad vide Order No. A/11707-11714/2019 dated 06.09.2019 set aside the penalty imposed in the present case. Accordingly, I do not find any reason to intervene in the impugned order to the extent of refund of Rs. 77,966/- which was paid towards 25% penalty by the respondent in pursuance of the CESTAT Order-1 issued by Hon'ble CESTAT.

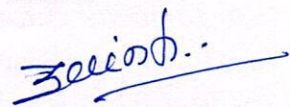
7. In view of the above, I pass the following order:

- (i) The impugned order to the extent of refund granted by the adjudicating authority in respect of Central Excise duty of Rs. 3,11,862/- (including Cess) and Interest of Rs. 27,000/- is not legally maintainable and hence set aside.
- (ii) The impugned order to the extent of refund granted of penalty amount of Rs. 77,966/- to the respondent is upheld.

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


 (Akhilesh Kumar)
 Commissioner (Appeals)
 Date: 24th February, 2021

Attested



(M.P. Sisodiya)
 Superintendent (Appeals)
 CGST & CE, Ahmedabad



By Regd. Post A. D

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|---|------------|
| 1. The Assistant Commissioner
CGST & C.Excise, Div-Mehsana
Commissionerate-Gandhinagar | APPELLANT |
| 2. M/s. Apex (Guj) Plastochem Pvt. Ltd,
Plot No. 83 & 103, GIDC-Gozaria,
Ta. Vijapur, Dist. Mehsana | RESPONDENT |

Copy to :

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



