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 Bhawan, Revenue Marg, Ambawadi, Ahmedabad 380015

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रजिस्टर्ड डाक ए.डी. द्वारा DIN: 20210564SW000000CD90

क फाइल संख्या : File No : GAPPL/COM/CEXP/209 to 211/2020 / 1153 TO 1156

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP- 02 to 04/2021-22**

दिनाँक Date : **21-04-2021** जारी करने की तारीख Date of Issue 02/06/2021

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No **17to19/C.EX./Ref./AC/2019 dated 03.03.2020** issued by Assistant Commissioner, Central GST, Division-Kalol, Gandhinagar

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

M/s Zest Packers Private Limited(Unit-5), Plot No. 95/3, Shed No. B/3, Trimul Estate, Village-Khatraj, Tal:Kalol, Distt.-Gandhinagar

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944,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.

(b) 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.

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

(ख) 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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.

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

(c) 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 डयूटी केडिट 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।

(d) 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 दिनॉक 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 रूपये या उससे कम हो तो रूपये 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) **केंद्रीय जीएसटी** अधिनियम, 2017 की धारा 112 के अंतर्गत:–

Under Section 112 of CGST act 2017 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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 in 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 अपीलो 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) -

(x) *(Section)* **खंड** 11D **के तहत निर्धारित राशि;**
(xi) **लिया गलत सेनवैट क्रेडिट की राशि;**
(xii) **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:

(lxx) amount determined under Section 11 D;
(lxxi) amount of erroneous Cenvat Credit taken;
(lxxii) 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।

6(I) 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."

II. **Any person aggrieved by an Order-In-Appeal issued under** the Central Goods and Services Tax Act,2017/Integrated Goods and Services Tax Act,2017/ Goods and Services Tax(Compensation to states) Act,2017,may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

1. This order arises out of three separate appeals viz. **(i)** an appeal (hereinafter referred to as '**appeal-1**') filed by **M/s. Zest Packers Pvt. Ltd.** (**Unit-5**), Plot No. 95/3, Shed No. B/3, Trimul Estate, Village-Khatraj, Tal:Kalol, Distt.-Gandhinagar having Central Excise Registration No. AAACZ4200CEM005 (hereinafter referred to as '*appellant-1*') against Order in Original No. 17/C.Ex./Ref./AC/2019 dated 03.03.2020 (hereinafter referred to as '*the impugned order-1*') passed by the Assistant Commissioner, Central GST& Excise, Division-Kalol, Commissionerate-Gandhinagar (hereinafter referred to as '*the adjudicating authority*') **(ii)** an appeal (hereinafter referred to as '**appeal-2'**) filed by M/s. Zest Packers Pvt. Ltd. (**Unit-8**), Plot No. 95/3, Shed No. B/4, Trimul Estate, Village-Khatraj, Tal-Kalol, Distt.-Gandhinagar having Central Excise Registration No. AAACZ4200CEM008 (hereinafter referred to as '*appellant-2*') against Order in Original No. 18/C.Ex./Ref./AC/2019 dated 03.03.2020 (hereinafter referred to as '*the impugned order-2*') passed by the adjudicating authority and **(iii)** an appeal (hereinafter referred to as '**appeal-3'**) filed by M/s. Zest Packers Pvt. Ltd. (**Unit-7**), Plot No. 95/3, Shed No. B/4-A, Trimul Estate, Village-Khatraj, Tal-Kalol, Distt.-Gandhinagar having Central Excise Registration No. AAACZ4200CEM007 (hereinafter referred to as '*appellant-3*') against Order in Original No. 19/C.Ex./Ref./AC/2019 dated 03.03.2020 (hereinafter referred to as '*the impugned order-3*') passed by the adjudicating authority.

1.1 In all the abovementioned three (3 Nos.) appeals, it is observed that the facts of the case and grounds on which refund claims were filed by the respective appellant as well as rejection by the adjudicating authority were the same. Accordingly, all the three appeals have been taken up for consideration under common appeal proceedings.

2. Facts of the case, in brief, are that the appellants were engaged in the manufacture of pouch packing from bulk Chewing Tobacco as well as Jarda Scented Tobacco and discharging their Central Excise

duty under Section 3A of the Central Excise Act, 1944 readwith Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination & Collection of Duty) Rules, 2010 made vide Notification No. 18/2010-CE (NT) dated 13.04.2010 and were holding separate Central Excise Registration Nos. as mentioned in para-1 above.

2.1 The appellants have filed separate refund claims with the adjudicating authority for claiming refund of the unutilized balance lying in their respective RG-23A Pt. II as on October, 2019, as mentioned below:

(Amount in Rs.)

	Addl.Duty Surcharge	N.C.C.D	Edu. Cess	S.H.E. Cess	Total Amount
Appellant-1	196222	327038	86904	43455	653619
Appellant-2	63720	52857	0	0	116577
Appellant-3	87975	72414	124844	62420	347653

2.2 The refund claims filed by the Appellant-1, Appellant-2 and Appellant-3, as mentioned in the table in para-2.1, have been rejected by the adjudicating authority vide impugned order-1, impugned order-2 and impugned order-3 respectively, on the grounds that "the appellants have carried forwarded the unutilized balance of credit of Additional Duty Surcharge in their TRAN-1 and in terms of the proviso to Section 142 (3) of the CGST Act, 2017, no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act."

3. Being aggrieved with the impugned order-1, impugned order-2 & impugned order-3 passed by the adjudicating authority, the appellant-1, appellant-2 and appellant-3 have preferred an appeal as mentioned in above para-1 on the grounds reproduced below:

(i) As per the provisions of Rule 3 (1) of the Cenvat Credit Rules, 2004 prevailing as on 01-07-2017 (upto 29-03-2018) i.e. date on which the budget of 2018-19 (pronounced on 1st February, 2018) assented on 29.03.2018, the Additional duty surcharge, N.C.C.D, Edu. Cess and S.H.E. Cess were defined as Cenvat Credit and therefore, such unutilized amounts lying in balance (as on

30.06.2017) were taken/carried forward as transitional credit in TRAN-1 on 27-12-2017.

(ii) However, in terms of the Explanation 3 inserted (w.e.f. 1.07.2017) through Budget of year 2018-19 (pronounced on 1st February, 2018) in Section 140 of CGST Act, 2017, the above duties (the Additional duty surcharge, N.C.C.D, Edu. Cess and S.H.E. Cess) were not considered as eligible CENVAT Credit and hence, such amount initially taken as transitional credit in TRAN-1 was reversed/debited from the Electronic Credit Ledger in the month of March, 2019. Further, as they were still holding Central Excise registration under Central Excise Act, the reversed credit was again taken in their RG 23-A Pt.II in the month of October, 2019 which was lying as unutilized closing balance as on 30.10.2019.

(iii) The provisions of Second Proviso to Section 142 (3) of the CGST Act, 2017 are not applicable to the facts of their case. It is very much apparent from the facts and documents that once the carry forward of CENVAT has been reversed by them on account of insertion of Explanation (3) to Section 140 of the CGST Act with retrospective effect from 01.07.2017, the contention of the adjudicating authority that the amount of CENVAT Credit had been carried forwarded and accordingly rejected the refund referring to Second Proviso to Section 142 (3) of the said act is not correct.

(iv) Once an action is reversed, it means that such action had not taken place. Accordingly, once the transfer of CENVAT Credit has been reversed, it means legally that the amount of CENVAT has not been carried forward under the CGST Act.

(v) Different benches of the Tribunal held that where lawful Cenvat Credit accumulated in the accounts of an assesse becomes unutilizable due to closure of the factory or that the factory was shifted to another area which was exempt from payment of duty, refund of such credit valid earned could be granted in cash. The following judicial

pronouncements have been relied upon in support of their contention.

- CCE, Hyderabad Vs. Apex Drugs & Intermediates Ltd. [2014 (314) ELT 729 (Tri. Mum)]
- Leo Oils & Lubricants Vs. CCE, Chennai-I [2016 (343) ELT 1105 (Tri. Che.)]
- Bangalore Cables P. Ltd. Vs. CCE, Bangalore-III [2017 (347) ELT 100 (Tri. Bang)]

(vi) Hon'ble High Courts in the following cases, also held that where the credit becomes un-utilizable due to some reason like stoppage of factory, it can be granted by cash as there is no provision in the central excise law which prohibits such credit.

- Commr. of C, CE & ST, Hyd.-IV Vs. Apex Drugs & Intermediates Ltd. [2015 (322) ELT 834 (A.P)]
- CCE Vs. Birla Textile Mills [2015 (325) ELT (Del.)]
- Slovak India Trading Co. Pvt. Ltd. [2006 (201) ELT 559 (Kar)]

(vii) They also relied upon Hon'ble Supreme Court judgement in the case of Eicher Motors Vs. UOI [1999 (106) ELT 3 (SC)] held that the right to credit becomes a vested and duly crystallized right in favour of assesse the moment input goods/services are received and by virtue of assesse paying the duty thereon by reimbursing the said amounts to the supplier of goods.

4. The appellants were granted opportunity for personal hearing on 23.03.2021 through video conferencing platform. Shri. V. K. Agrawal, Advocate, appeared for personal hearing as authorised representative of all the three appellants. He re-iterated the submissions made in the Appeal Memorandum and in the common additional written submission dated 19.03.2021.

4.1 The appellants have also made an additional submission through letter dated 19.03.2021, submitted on date 22.03.2021, in respect of all the three appeals vide which they have contested on two points, as mentioned below:

(A). **Cenvat Credit once reversed means no credit was transferred in TRAN-1**:-

It is an admitted fact that they had balance in their Cenvat Credit Account as on 01.07.2017 and after being carried forward, it has been reversed by them. The legal effect of reversal is that the CENVAT credit was not carried forwarded. It is settled law that reversal of CENVAT credit amounts to non-availment of credit. It is established from judicial pronouncement made by the Supreme Court, High Courts and Tribunal that once the credit is reversed, it tantamounts to not taking the credit at all. In view of such judicial pronouncements, Second Proviso to Section 142-(3) of the CGST Act is not applicable as it cannot be said that the appellant had carried forwarded the amount of Cenvat Credit.

They have relied upon the following judicial pronouncements in support of their contention:

- Hon'ble Supreme Court in case of Chandrapur Magnet Wires Pvt. Ltd. Vs. CCE, [1996 (81) ELT 3 (SC)]
- Hon'ble Supreme Court in case of CCE Vs. Bombay Dyeing Mfg. Co. Ltd. [2007 (215) ELT 3 (SC)]
- Gujarat High Court in case of CCE Vs. Ashima Dyecot Ltd. [2008 (232) ELT 580 (Guj)]
- Allahabad High Court in case of Hello Minerals Water Pvt. Ltd. Vs. U.O.I, [2004 (174) ELT 422 (All)]
- Tribunal in case of Mould Equipment Ltd. Vs. CGST & Central Excise [2020-TIOL-1713-CESTAT-KOL]
- Tribunal in case of Jai Balaji Industries Ltd. Vs. CCE [2017 (352) ELT 86 (Tri. Del)]

(B). **They are eligible for refund of unutilized Credit of Additional duty surcharge, N.C.C.D, Edu. Cess and S.H.E. Cess, in balance:-**

It has been decided in a number of cases that credit amount balance is admissible to the assessee. They have relied upon the following decisions.

- The Punjab and Haryana High Court has held in **Adfert**

Technologies Pvt. Ltd. Vs. Union of India [2019-TIOL-2519-HC-P&H-GST] that Section 140 of CGST Act indicates that there is no intention of government to deny carry forward of unutilised credit of duty/tax already paid on the ground of time limit.

- The Gujarat High Court in case of **Siddharth Enterprises [2019-TIOL-2068-HC-AHM-GST]** held that denial of credit of tax/duty paid under the existing Acts would amount to violation of Article 14 and Article 300A of the Constitution of India. The unutilised credit has been recognised as vested right and property in terms of Article 300A of the Constitution.

- The Madras High Court in the case of **Sutherland Global Services Pvt. Ltd. Vs. Assistant Commissioner of CGST [2019 (30) GSTL 628 (Mad)]** held that accumulated credit of Edu. Cess, S.H.E. Cess and Krishi Kalyan Cess continues to be available till such time it is expressly stated to have lapsed.

- The Tribunal in case of **Bharat Heavy Electricals Ltd. Vs. Commissioner, CGST [Appeal No. 50081 of 2019 decided on 26.4.2019]** held that *"We agree with learned Counsel of the appellant that the credits earned were a vested right in terms of the Hon'ble Apex Court judgement in Eicher Motors case [1999 (106) ELT 3 (SC)] and will not extinguish with the change of law unless there was a specific provision which would debar such refund".* The Tribunal has then held that the assessee is eligible for the cash refund of the Cesses lying as CENVAT credit balance as on 30.06.2017 **in terms of the judgment of Karnataka High Court in the case of Slovak India Trading Co. Pvt. Ltd. [2006 (201) ELT 559 (Kar)]** and similar other judgments/decisions.

5. I have carefully gone through the facts of the case available on record, grounds of appeal in respective appeal memorandum filed in all the three appeals and submissions made by the appellant through a common authorized representative at the time of hearing as well as the additional submission received on date 22.03.2021.

5.1 The issues to be decided under the present appeals are as under:-

(1) Whether the refund of amount of CENVAT Credit lying in balance (as on 30.06.2017) can be allowed in terms of the provisions of Section 142 (3) of the CGST Act, 2017, when such amounts had been carried forward through TRAN-1 in terms of Section 140 (1) of the CGST Act, 2017 and subsequently reversed in the month of March, 2019, after insertion of Explanation 3 (w.e.f 01.07.2017) by the CGST (Amendment) Act, 2018 (No.31 of 2018) brought into force w.e.f. 1st February, 2019?

(2) Whether the appellants are eligible for refund of unutilized Cenvat Credit of the Additional duty surcharge, N.C.C.D, Edu. Cess and S.H.E. Cess, accumulated and lying in balance?

6. As per the statement of facts mentioned in the appeal memorandum submitted by the respective appellants, it is observed in all the cases that the unutilized amount of CENVAT Credit lying in balance as on 30.06.2017 has been taken/carried forward by the appellants in their respective TRAN-1 filed on 27.12.2017, as per the provisions of Section 140 (1) of the CGST Act, 2017. They were subsequently reversed in the month of March, 2019, as per the Explanation 3 inserted (w.e.f 01.07.2017) by the CGST (Amendment) Act, 2018 (No.31 of 2018).

6.1 In order to appreciate the matter in proper perspective, the relevant provisions of the CGST Act, 2017 and CGST Rules, 2017 are reproduced below:

Section-140. Transitional arrangements for input tax credit.—

"(1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit [of eligible duties] carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law [within such time and] in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

[Explanation 3.—For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975.]"

Rule-117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-

"(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1, duly signed, on the common portal specifying therein, separately, the amount of input tax credit of eligible duties and taxes, as defined in Explanation 2 to section 140, to which he is entitled under the provisions of the said section:

(3) The amount of credit specified in the application in FORM GST TRAN-1 shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the common portal."

Rule-121. Recovery of credit wrongly availed.-

"The amount credited under sub-rule (3) of rule 117 may be verified and proceedings under section 73 or, as the case may be, section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly."

6.2 In the present cases, it is observed that when the Cenvat Credit (lying in balance as on 30.06.2017) has been carried forward by the appellants through filing their respective TRAN-1 in terms of the provisions of Section 140 (1) of the CGST Act, 2017, such amount of Cenvat Credit (taken under the provisions of erstwhile Cenvat Credit Rules, 2004) has been credited to the electronic credit ledger (as Input Tax Credit) as per the provisions of Rule 117 (3) of the CGST Rules, 2017. Accordingly, such amount of Cenvat Credit after transition merged into the "Input Tax Credit" governed under the provisions of CGST Act, 2017 and rules made thereunder.

6.3 Further, it is observed that such amount of Credit carried forward through TRAN-1 under the provisions of Section 140 (1) of the CGST Act, 2017 have been subsequently reversed in the month of

March'2019 as per the clarification issued as per Explanation 3 to the Section 140 of the said act. I find that any credit wrongly availed, whether wholly or partly under Rule 117 (3) of the CGST Rules, 2017 are subjected to the recovery proceedings under Section 73 or Section 74 of the CGST Act, 2017, as per the provisions of the Rule 121 of the CSGT Rules, 2017.

6.4 Accordingly, I am not in agreement with the contention of the appellants that "CENVAT Credit (in balance as on 01.07.2017) after being carried forward, when it has been subsequently reversed, the legal effect of such reversal is that the CENVAT Credit was not carried forwarded."

6.5 Further, I have also gone through the decisions made by Hon'ble Supreme Court and the Allahabad High Court as well as the Karnataka High Court which have been relied upon by the appellants as discussed in Para 4.1 (A) above, in support of their contention. It is observed that the decisions rendered in the aforesaid cases by the Hon'ble Supreme Court and High Courts arose out of a case where the assessee claimed benefit of an exemption notification. The question which was put for consideration in those cases is as to whether reversal after the removal of the final product would entitle the assesee therein to the benefits of exemption notification, which states that the reversal of the credit should be done before the removal of the products. In such circumstances, the Courts considered the issue and said that for the purpose of extending the benefits of exemption notification, the time of reversal was not the material and reversal of the credit would amount to "no credit" being taken. In these decisions, the reversal of Cenvat Credit wrongly availed was not the subject matter for consideration. Therefore, these decisions relied upon by the appellants are clearly distinguishable by facts, when read in the context of the facts and relevant notification which are applicable to the facts of the case.

6.6 In view of the above, I do not find any merit in the contention of the appellant that "the amount of Cenvat Credit (in balance as on 30.06.2017) carried forward through TRAN-1 under the provisions of Section 140 (1) of the CGST Act, 2017 which have been subsequently reversed in the month of March'2019 and accordingly, the condition of the second proviso to Section 142 (3) is fulfilled and they are eligible for refund in terms of the provisions of Section 142 (3) of the CGST Act, 2017."

7. Further it is observed that even otherwise if the contention of the appellant is accepted then the refund claim would be subjected to process under the provisions of Section 142 (3) of the CGST Act, 2017 readwith Rule 5 of Cenvat Credit Rules, 2004. The provisions of Section 142 (3) of the CGST Act, 2017 and Rule 5 of Cenvat Credit Rules, 2004 are as below:

Section 142 (3) of* CGST Act, 2017:*

"Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed off in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:"

Rule 5 of Cenvat Credit Rules, 2004:

"(1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette :"

7.1 Further, I find that as such there exists no provisions in the Cenvat Credit Rules, 2004 underwhich refund claim of Cenvat Credit which is lying in balance can be considered, except in the cases of export as provided under the Rule 5 of Cenvat Credit Rules, 2004.

8. Now, as regards the contention of the appellants for eligibility for refund of unutilized and accumulated Cenvat Credit of the Additional duty surcharge, N.C.C.D, Edu. Cess and S.H.E. Cess, and lying in balance, I find that the appellants have relied upon various judgments in support of their contention, as mentioned in para-4.1 (B) above.

8.1 I have gone through the decision of Hon'ble Punjab and Haryana High Court in case of Adfert Technologies Pvt. Ltd. Vs. Union of India [2019-TIOL-2519-HC-P&H-GST] and the decision of Hon'ble Gujarat High Court in case of Siddharth Enterprises [2019-TIOL-2068-

HC-AHM-GST]. I find that both the said judgements relate to filing of TRAN-1 issue and Hon'ble High Courts have directed the government to allow the petitioner to file or revise the TRAN-1. Accordingly, I find that these judgements are not squarely applicable to the facts of the appellant's cases wherein they have already carried forwarded their Cenvat Credit in their TRAN-1 by filling the same.

8.2 I have also gone through the decision of Hon'ble Madras High Court in the case of Sutherland Global Services Pvt. Ltd. Vs. Assistant Commissioner of CGST [2019 (30) GSTL 628 (Mad)]. Further, I find that the Division Bench of the Madras High Court vide their Judgment dated 16.10.2020 in WA No.53 of 2020, set aside the said judgment of the learned Single Judge dated 05.09.2019 and held that a taxpayer is not entitled to carry forward credit of unutilised and accumulated Central Value Added Tax (CENVAT) credit of the cesses (namely, Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess, collectively referred to as cesses) and utilise them against any output liability under the goods and services tax (GST).

8.3 Further, I have gone through the decision of Hon'ble Tribunal in case of Bharat Heavy Electricals Ltd. Vs. Commissioner, CGST [Appeal No. 50081 of 2019 decided on 26.4.2019]. In this case, the Tribunal held that the assessee is eligible for the cash refund of the Cesses lying as CENVAT credit balance as on 30.06.2017 in terms of the judgment of Karnataka High Court in the case of Slovak India Trading Co. Pvt. Ltd. [2006 (201) ELT 559 (Kar)] and similar other judgments/decisions.

In this regard, I find that Hon'ble CESTAT, Chandigarh in case of M/s. Saera Electric Auto Pvt. Ltd. [2020 (372) E.L.T. 452 (Tri. - Chan.)] held as under:

> **"9.** *A plain reading of Section 11B shows that it provides for refund of excise duty paid. It does not provide for the refund of unutilized Cenvat Credit. The entire Cenvat credit is governed by the Cenvat Credit Rules, 2004, which provide for availment/utilization of the Cenvat credit. In some specific cases, refund of unutilized Cenvat credit in cash has also been provided under Rule 5 of the Cenvat Credit Rules, 2004. The appellant's case is not under this rule. The appellant has applied for refund under Section 11B of the Central Excise Act, 1944 read with Rule 10 of the Cenvat Credit Rules, 2004. This rule only provides for transfer of unutilized Cenvat credit but not encashment. The fact that they have subsequently come under GST regime makes no difference and the appellant cannot claim*

the refund under a legal provision which does not exist. Rule 5 of the Cenvat Credit Rules, 2004 provides for refund of Cenvat credit in case of export of goods or export of services if the assessee is not able to utilize the corresponding Cenvat credit. ***Earlier, prior to 1-4-2012, this Rule also provided the refund of the Cenvat credit if the Cenvat credit could not be utilized for any other reason. In that context, the Hon'ble High Court of Karnataka in the case of Slovak India Trading Company Pvt. Ltd. (supra) has held that refund of the Cenvat credit is admissible under Rule 5 of the Cenvat Credit Rules, 2004 if the factory is closed. Subsequently, this rule has been amended and right now there is no scope of refund of the Cenvat credit which has not been utilized at the time of closer of the factory.*** *At any rate, the appellant's application was not under Rule 5 of the Cenvat Credit Rules, 2004.*

10. *In view of the above, we find that the appellant's request for cash refund of unutilized Cenvat credit cannot be admitted under any legal provision."*

Accordingly, considering the present set of facts of the cases of the appellant and existing provisions of Cenvat Credit Rules, 2004, the above decision of Hon'ble Tribunal can be distinguished.

8.4 Further, I also find that the Larger Bench of the Hon'ble High Court of Bombay in the case of Gauri Plasticulture Pvt Ltd [2019-TIOL-1248-HC-MUM-CX-LB] has also considered the similar issue, in which questions framed by the Hon'ble Larger Bench were as follows:

"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B (2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?

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(c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

The Larger Bench has answered these questions as follows:

"40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India."

8.5 In view of the various judicial pronouncements, as discussed above, I do not find any force in the contention of the appellant that they are eligible for refund of un-utilised and accumulated balance of CENVAT Credit in the present case, in absence of a legal provision under which their claim could be entertained.

9. On careful consideration of the relevant legal provisions, judicial pronouncements and submission made by the appellant and in view of the discussions made in the foregoing paras, I do not find any merit in the contentions of the appellants so as to interfere in the impugned order-1, impugned order-2 and impugned order-3 passed by the adjudicating authority in case of appellant-1, appellant-2 and appellant-3 respectively.

10. In view of the above, the impugned order-1, impugned order-2 and impugned order-3 passed by the adjudicating authority are upheld and the appeal-1, appeal-2 and appeal-3 filed by the appellant-1, appellant-2 and appellant-3 respectively are rejected.

11. All the appeals (appeal-1, appeal-2 and appeal-3) filed by the respective appellants, as mentioned in para-1 above stands disposed off in above terms.

Akhilesh Kumar
21st April, 2021.

(Akhilesh Kumar)
Commissioner
(Appeals)

Attested

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

By Regd. Post A. D

(1) Appellant-1: M/s. Zest Packers Pvt. Ltd. (Unit-5)
Plot No. 95/3, Shed No. B/3,
Trimul Estate, Village-Khatraj,
Ta-Kalol, Dist-Gandhinagar

(2) Appellant-2: M/s. Zest Packers Pvt. Ltd. (Unit-8)
Plot No. 95/3, Shed No. B/4,
Trimul Estate, Village-Khatraj,
Ta-Kalol, Dist-Gandhinagar

(3) Appellant-3: M/s. Zest Packers Pvt. Ltd. (Unit-7)
Plot No. 95/3, Shed No. B/4-A,

Trimul Estate, Village-Khatraj,

Ta-Kalol, Dist-Gandhinagar

[All appellants having office at
M/s. Zest Packers Pvt. Ltd.,
8th floor, "The Chambers",
Opp. Gurudwara, S.G. Highway,
Ahmedabad-380054]

Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Commissionerate-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