



सत्यमेव जयते

आयुक्त(अपील) का कार्यालय,  
Office of the Commissioner (Appeal),  
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद  
Central GST, Appeal Commissionerate, Ahmedabad  
जीएसटी भवन, राजस्वमार्ग, अम्बावाडी अहमदाबाद 380015.  
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
☎ 07926305065- टेलीफैक्स 07926305136



**DIN : 20211064SW000000ED33**

**स्पीड पोस्ट**

- क फाइल संख्या : File No : GAPPL/COM/STP/1211/2020 / H025 TO H029
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-46/2021-22**  
दिनांक Date : **14-10-2021** जारी करने की तारीख Date of Issue 21.10.2021  
आयुक्त (अपील) द्वारा पारित  
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **03/REF/S.Tax/AC/2020-21** दिनांक: **27.10.2020** issued by Assistant Commissioner, CGST & Central Excise, Division Mehsana, Gandhinagar Commissionerate
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s John Energy Ltd,  
220, GIDC Estate, Mehsana  
Industrial Estate, 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 :**

- (i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत 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 मजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।
- (ii) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :
- (ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।
- (ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.



(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जोड्यूटीकेडिटमान्य 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 ईए-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.कामुख्य शीर्ष 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 कर एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न कर 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.

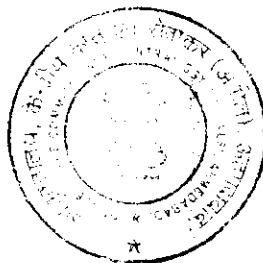
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Customs, Excise, & Service Tax Appellate Tribunal.

(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) उक्त लिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलों 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 न्यायाधिकरणको एक अपील या केन्द्रीय सरकारको 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गतनिर्धारितकिए अनुसारउक्तआवेदन या मूलआदेश यथास्थितिनिर्णयनप्राधिकारी के आदेशमेंसेप्रत्येक की एक प्रतिपर रु.6.50 पैसेका न्यायालय शुल्कटिकटलगाहोना 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) इनओरसंबंधितमामलोंकोनियंत्रण करनेवालेनियमों की ओरभी ध्यानआकर्षितकियाजाताहैजोसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 मेंनिहितहै।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (24) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामलेमेंकर्तव्यमांग(Demand) एवंदंड(Penalty) का10%पूर्वजमाकरनाअनिवार्यहै। हालांकि, अधिकतमपूर्वजमा10 करोड़रुपएहै।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीयउत्पादशुल्कऔरसेवाकरकेअंतर्गत, शामिलहोगा "कर्तव्यकीमांग"(Duty Demanded)-

- (i) (Section) खंड 11D केतहतनिर्धारितराशि;
- (ii) लियागलतसेनवैटक्रेडिटकीराशि;
- (iii) सेनवैटक्रेडिटनियमोंकेनियम 6 केतहतदेयराशि.

⇒ यहपूर्वजमा 'लंबितअपील' मेंपहलेपूर्वजमाकीतुलनामें, अपील' दाखिलकरनेकेलिएपूर्वशर्तबनादियागयाहै.

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:

- (iv) amount determined under Section 11 D;
- (lv) amount of erroneous Cenvat Credit taken;
- (lvii) amount payable under Rule 6 of the Cenvat Credit Rules.

इसइस 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.



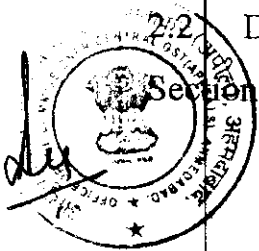
**ORDER-IN-APPEAL**

The present appeal has been filed by M/s. John Energy Limited, 220, GIDC Estate, Mehsana, Gujarat – 384 002 (hereinafter referred to as the appellant) against Order in Original No. 03/REF/S.Tax/AC/2020-21 dated 27-10-2020 [hereinafter referred to as “*impugned order*”] passed by the Assistant Commissioner, Central GST, Division : Mehsana, Commissionerate- Gandhinagar [hereinafter referred to as “*adjudicating authority*”].

2. The facts of the case, in brief, is that the appellant is engaged in providing services of mining of mineral, Oil or Gas services and availing Cenvat Credit in terms of Cenvat Credit Rules, 2004. They are having Service Tax Registration No. AAACJ5184FST001. The appellant vide letter dated 04.09.2020 (received on 09.09.2020) submitted an application for refund of an amount of Rs.18,02,256/- on the basis of CESTAT Order No. A/12620/2018 dated 26.11.2018.

2.1 The background for filing said refund claim was that intelligence was gathered by the officers of DGCEI that the appellant was suppressing the correct taxable value and escaping assessment of tax liabilities with malafide intention. During the course of investigation, the appellant paid an amount of Rs.17,51,253/- along with interest on various dates. Subsequently, a SCN was issued to the appellant for recovery of Service Tax amounting to Rs.17,51,253/- not paid on Banking and other Financial services. The SCN was adjudicated vide OIO No. 01/JC(IS)/2009 dated 09.01.2009 wherein the demand for Service Tax was confirmed along with interest. Penalties were also imposed on the appellant. The appellant subsequently preferred appeal before the Commissioner (Appeals), Ahmedabad, which was allowed to the extent that the penalty under Section 78 of the ACT was reduced to 25% of the confirmed demand. The appellant thereafter approached the Hon'ble Tribunal, Ahmedabad who vide Order No. A/12620/2018 dated 26.11.2018 partly allowed the appeal and set aside the demand for the extended period of limitation. Consequently, the appellant submitted an application for refund of Rs.18,02,256/- vide letter dated 04.09.2020.

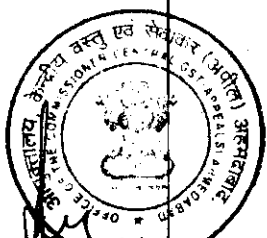
2.2 During scrutiny of refund application, it was observed that in terms of Section 11B of the Central Excise Act, 1944 application for refund has to be made



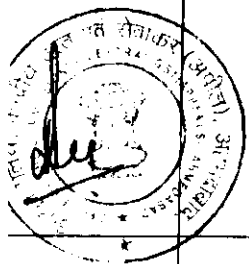
within one year from the relevant date. In the instant case, as the refund is on account of the judgement dated 26.11.2018 of the Hon'ble Tribunal, the relevant date for counting limitation is 26.11.2018 and the refund application has to be filed before expiry of one year on 25.11.2019. Since the refund was filed on 09.09.2020, it appeared to have not been filed within the stipulated period of one year. Further, it was also observed that the appellant had also not submitted documentary evidence to establish that the incidence of the service tax amount, claimed as refund, was not passed on to any other person. Therefore, the appellant was issued a SCN dated 18.09.2020 for rejection of the claim for refund. The SCN was adjudicated vide the impugned order wherein the claim for refund was rejected on the ground of limitation.

3. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds:

- A. In the facts of this case, no formal refund application was required to be made. The amount of Rs.18,02,256/- was deposited during the investigation under protest and the same was retained in appellant proceedings under the provisions of Section 35F for hearing the appeal on merits. Thus, this amount was a pre-deposit made under Section 35F. Since the dispute was decided in their favour, the department was not authorized to retain the pre-deposit. In the case of Sony Pictures Networks India Pvt Ltd. reported at 2020 (373) ELT 320, it was held by the Hon'ble Tribunal that refund was to be given even without any formal application.
- B. The provisions of Section 11B are not applicable where the duty has been deposited under protest. There is a catena of judgements which hold that any payment which is contested by way of appeal, revision or in higher courts, would be payment under protest and consequently the provisions of Section 11B would not be applicable.
- C. In the present case since they have been contesting the SCN at various states of litigation, their protest while depositing the amount pending adjudication is not a fact which can be disputed. They were paying the tax which was otherwise not leviable to avoid interest which would have been demanded had the case been decided against them.



- D. When any amount is paid during investigation, it is not payment of duty. It is payment of an amount which the department claims as due and not paid by the assessee. It is not payment of duty but deposit of a disputed amount, hence, time limit of one year under Section 11B is not applicable.
- E. They refer to and rely upon the decision in the case of : 1) Parle International Ltd reported at 2001 (127) ELT 329 (Guj); 2) Jayant Glass Ind (P) Ltd Vs. CCE reported at 2003 (155) ELT 188; 3) Suri Industries Vs. CCE, Bangalore reported at 2001 (132) ELT 480; 4) CCE Vs. Ravi Shankar Ind. Ltd reported at 2002 (150) ELT 1317; 5) Steel Products Limited Vs. CCE reported in 2003 (158) ELT 476; 6) Tata SSL Ltd Vs. UOI reported at 2002 (140) ELT 338 (Guj.); 7) Commissioner Vs. Mahalaxmi Exports reported at 2010 (258) ELT 217 (Guj); 8) Commissioner Vs. Shayona Enterprises reported in 2008 (230) ELT 378; 9) Sanmar Foundries Ltd. reported at 2015 (325) ELT 854; 10) Sanitary Metal Recycling Pvt Ltd reported at 2009 (234) ELT 234.
- F. They have paid service tax as recipient of service, inasmuch as the provider of the service is not within India. When a service provider provides service then the duty is passed on to the recipient, but a recipient cannot pass on the duty to the overseas supplier. Further, the period covered in the present case is May, 2006 to 31.03.2007 while the amount has been deposited by them in September and December, 2007. Therefore, it is a case where the amount of deposit is made much after they had remitted the amount to the overseas service provider and therefore, they could have not occasion to transfer the amount of duty belatedly under the reverse charge mechanism.
- G. It is a settled legal position that the amount of pre-deposit has to be returned without any trappings including the limitations of time for claiming its restitution or unjust enrichment.
- H. It has been the consistent view of various Courts that any amount deposited during pendency of adjudication proceedings or investigation is in the nature of deposit made under protest or pre-deposit and therefore, principles of unjust enrichment would not be attracted.



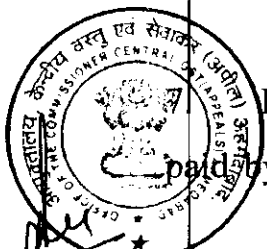
4. Personal Hearing in the case was held on 16.09.2021 through virtual mode. Shri Amal P. Dave and Shri Sudhanshu Bissa, Advocates, appeared on behalf of the appellant for the hearing. They reiterated the submissions made in the appeal memorandum.

5. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and evidences available on records. I find that the adjudicating authority has rejected the refund claim of the appellant on the ground of limitation. Therefore, the issue to be decided is whether the time limit for filing of refund claim in terms of Section 11B of the Central Excise Act, 1944 are applicable in the present case.

5.1 I find that the applicability of limitation has been contested by the appellant primarily on the grounds that the amount which was paid by them in the course of the investigation was not duty but deposit and that deposits made in the course of investigation, which has been contested in various appellate forums, are payment under protest and, therefore, in terms of the second proviso to Section 11B (1) of the Central Excise Act, 1944, the limitation of one year for filing refund claim shall not apply.

6. I find that the appellant has not disputed the fact that the application for claim of refund was filed by them beyond the period of one year from the relevant date prescribed under Section 11B(1) of the Central Excise Act, 1944. In the present case, the application for refund has arisen consequent to the appellant succeeding before the Hon'ble Tribunal and therefore, in terms of Explanation (B) (ec) of Section 11B of the Central Excise Act, 1944, the relevant date for filing refund claim would be the date of order of the Hon'ble Tribunal. In the present case, the order of the Hon'ble Tribunal is dated 26.11.2018 and therefore, the claim for refund would have to be filed on or before 25.11.2019. However, the appellant had filed the application for refund on 09.09.2020 i.e. after expiry of the period of one year from the date of the Order of the Hon'ble Tribunal.

It is further observed that the appellant have also contended that the amount paid by them during investigation was retained in the appeal proceedings under



Section 35F and thus the amount was a pre-deposit under Section 35F of the Central Excise Act, 1944. The Order No. S/1460/WZB/AHD/2009 dated 01.09.2009 of the Hon'ble Tribunal granting stay in the matter is as under :

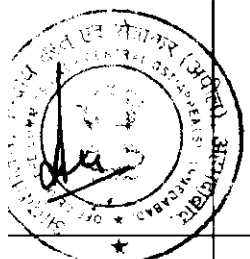
"After rejecting the request for adjournment, we proceed to decide the stay petition, inasmuch as we find that the entire service tax of Rs.17,51,253/- stands deposited by the appellants. In view of the above, we dispense with the condition of pre-deposit of interest and penalties imposed upon them and allow the stay petition accordingly."

7.1 By the above order, the Hon'ble Tribunal had only dispensed with the requirement of pre-deposit of interest and penalties. Therefore, I do not find any merit in the contention of the appellant that the amount deposited by them was retained as pre-deposit under Section 35F of the Central Excise Act, 1944 in the appeal proceedings.

8. As regards the contention of the appellant that the amount paid in the course of the investigation is deposit and that provisions of Section 11B would not apply for refund of the same, I find that under the Central Excise Act, 1944 refunds are dealt with only under Section 11B and there is no other provision for any refunds under the Central Excise Act, 1944.

8.1 I find that what was paid by the appellant in the course of the investigation is nothing but duty/Service Tax and accordingly, they had paid the same with interest. The appellant have referred to and relied upon various judgements in support of their contention that what was paid by them was not duty but deposit. However, I find it relevant to refer to the judgement dated 04.09.2019 of the Hon'ble High Court of Gujarat in Special Civil Application No. 10435 of 2018 in the case of M/s.Ajni Interiors Vs. UOI. The said judgement was passed in a case involving facts similar to that in the present appeal. The relevant paragraphs of the said judgement are as under :

14. Considering the arguments advanced by learned advocates of the parties and scanning the material on record, it is clear that the case of the petitioner that payment towards Excise Duty is in the form of pre-deposit is misconceived. Considering the annexures annexed with the petition i.e. Challans for deposit of Central Excise Duty in Form No.TR-6, that too, without protest is the payment towards the Excise Duty and can never be



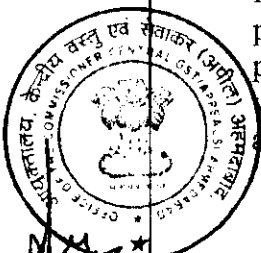


considered as pre-deposit. If any payment is made as a pre-condition for exercising the statutory right it can be termed as pre-deposit. However, it cannot be equated with voluntary deposit of Excise Duty paid even during the course of investigation and prior to show cause notice or adjudication to assert that it is pre-deposit. The payment of duty was intended to prevent the incidence of interest and liability accruing from the non-payment of duty, and hence, it cannot be termed as deposit. Therefore, the payments made by the petitioner towards Excise Duty in Challans Form No.TR-6, can never partake characteristic of pre-deposit as mentioned in Section 35F of the Act, as argued by learned advocate for the petitioner.

Under the circumstances, the contention that the amounts were paid involuntarily and, therefore, are deemed to be under protest and should be considered as deposits deserves to be rejected. Firstly as discussed hereinabove the payments made by the petitioner are in the nature of Central Excise Duty and hence, cannot be considered to be akin to or in the nature of pre-deposit as contemplated under Section 35-F of the Act; and secondly there is nothing on record to establish that the petitioner had paid the amount in question under protest, and hence the second proviso to sub-section (1) of Section 11B of the Act which provides that the limitation of one year shall not apply where duty and interest, if any, paid on such duty has been paid under protest would not be applicable. Once it is held that the payments made by the petitioner were in the nature of excise duty and were not deposits, the provisions of Section 11B of the Act would be attracted; and having regard to the fact that the amounts in question had not been deposited under protest, the petitioner would be liable to file the claim within the prescribed period of limitation and in the manner prescribed by the statute, viz. in the prescribed format. It is an admitted position that the petitioner has not filed the refund claim within the prescribed period of limitation and hence, the Tribunal was wholly justified in rejecting the claim as being time barred.

18. Considering the Constitution Bench Judgment, it is clear that when the tax/duty collected by misinterpreting or misapplying the provisions of the Act or rules or regulations or notifications, issued under the said enactment, the claim for refund has to be necessarily preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. Though, the Constitution Bench of the Supreme Court has held that jurisdiction of the High Court under Article 226 of the Constitution of India or of the Supreme Court under Article 32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. In view of Constitution Bench decision on the issue, any other view by any Court, Tribunal, etc. is unsustainable. Therefore, the decisions cited by the learned advocate for the petitioner requires no specific considerations thereof.

20. Therefore, in our view, it is clear that on appeal being allowed quashing and setting aside the order of the Authority imposing duty, the petitioner has to apply for refund in accordance with the provisions under the Act. It is not the case of the petitioner that it has applied for refund in a prescribed form and within time. Over and above, it is not the case that it is paid under protest and on the contrary payment towards excise duty was voluntary and not under any protest. Even for payment made under protest also one has to apply in prescribed form under the enactment. Not only that



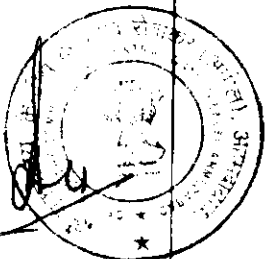
it has to be supported by affidavit that it has not passed on the duty to another person.

21. Considering the principle laid down by the Supreme Court in Constitution Bench judgment, it is incumbent upon the person claiming refund of the duty / interest paid, has to claim it in accordance with provisions of the Act. Considering Section 11B of the Act, it is clear that for claiming refund under the Act, a person is to apply for the refund, in a prescribed form, of the duty / interest paid under protest, within a period of one year from the relevant date. Under Explanation below Section 11B of the Act, relevant date is also defined and therefore, it was incumbent upon the petitioner to file refund claim in prescribed form within a period of one year from 7.8.2007 i.e. the order passed by the Tribunal in favour of the petitioner. In our view, the ratio propounded by the Constitution Bench of the Supreme Court, clearly obliges the petitioner to file refund claim in accordance with the Act. Therefore, not only this petition is not maintainable as equally efficacious remedy is not exhausted but it cannot be entertained under Article 226 of the Constitution of India as petitioner has not fulfilled the requirements to claim refund in accordance with the Act, as also the aforesaid judgments.

22. In our view, the scope for claim of refund is strictly governed by Section 11B of the Act and though in past, there were some judicial pronouncements widening the scope of claim of refund after Supreme Court elaborated reasonings in the case of Mafatlal (supra), there remains hardly any scope for judicial intervention to enlarge it further than what is permissible. The claim of refund and time limit prescribed, therefore, has an avowed aim of attaching finality to the government receipt. Hence, before making any order or direction, affecting it or seeking any writ resulting in refund, the claimant has to make out an extra ordinary case not covered by the decision of the Supreme Court in the case of Mafatlal (supra).

23. In view of the clear pronouncement of law by the Constitution Bench of the Supreme Court with regard to refund claim, precedents relied on by the petitioner are not applicable as they are not on the issue directly covering the field since the payment is made by the petitioner voluntarily during the course of investigation towards Central Excise Duty, in Form No.TR-6, without any protest and refund claim is also not filed in the prescribed form, that too, within a period of limitation as prescribed along with an affidavit stating that petitioner has not passed on duty to another person, this petition is liable to be rejected."

8.1 I find that the above judgement of the Hon'ble High Court of Gujarat is squarely applicable to the facts involved in the present appeal inasmuch as the appellant had paid the service tax in the course of the investigation, without any protest and, therefore, the same is to be considered as voluntary payment of duty/service tax. Accordingly, the provisions of Section 11B of the Central Excise Act, 1944 are applicable to the refund claim preferred by the appellant.

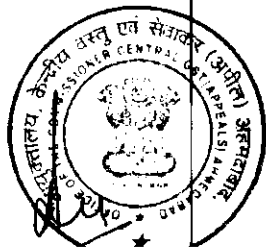


8.2 I further find that the Hon'ble Tribunal in the case of Ratnamani Metals & Tubes Ltd. Vs. Commr. of C.Ex. & S.T, Ahmedabad-III reported at 2019 (366) BLT 139 (Tri.-Ahmd) held that :

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.

8.3 Similarly, in the case of Comexx Vs. Commissioner of C.Ex. & S.T., Ahmedabad, the Hon'ble Tribunal had in Order No. A/10859/2020 dated 18.03.2020 held that :

"8. Here it is relevant to note that in various cases the High Courts and the Apex Court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex Court are mainly by exercising powers under the Constitution, in writ jurisdiction. It is clear that neither the jurisdictional service tax authority nor the Tribunal has such constitutional powers for allowing refund beyond the statutory time-limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the jurisdictional tax authorities and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in Mafatlal Industries Ltd. (supra) categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act. The Apex Court further observed that the only exception is where the provision of the Act whereunder the duty has been levied is found to be unconstitutional for violation of any of the constitutional limitations. This is a situation not contemplated by the Act. We note in the present case there is no such situation of the provision of any tax levy, in so far as the present dispute is concerned, held to be unconstitutional. As already held that the appellant is liable to pay service tax on reverse charge basis but for the exemption which was not availed by them. We hold that the decision of the Tribunal in Monnet International Ltd. (supra) has no application to decide the dispute in the present referred case. We take note of the decision of the Tribunal in XL Telecom Ltd. (supra). It had examined



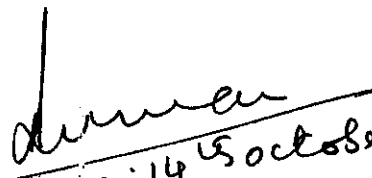
the legal implication with reference to the limitation applicable under Section 11B. We also note that the said ratio has been consistently followed by the Tribunal in various decisions. In fact, one such decision reached Hon'ble Supreme Court in Miles India Limited v. Assistant Collector of Customs - 1987 (30) E.L.T. 641 (S.C.). The Apex Court upheld the decision of the Tribunal to the effect that the jurisdictional customs authorities are right in disallowing the refund claim in terms of limitation provided under Section 27(1) of the Customs Act, 1962. We also note that in Assistant Collector of Customs v. Anam Electrical Manufacturing Co. - 1997 (90) E.L.T. 260 (S.C.) referred to in the decision of the Tribunal in XL Telecom Ltd. (supra), the Hon'ble Supreme Court held that the claim filed beyond the statutory time limit cannot be entertained."

9. In view of the above judgements of the Hon'ble High Court of Gujarat and the Hon'ble Tribunal, Ahmedabad, I am of the considered view that the claim for refund preferred by the appellant is governed by the provisions of Section 11B of the Central Excise Act, 1944. Consequently, the refund claim was required to have been filed by the appellant within the period of limitation as prescribed under Section 11B of the Central Excise Act, 1944. Since the appellant have filed the claim for refund at a much later date after the expiry of the period of one year from the relevant date, which in the instant is the date of the order of the Hon'ble Tribunal, their claim is hit by limitation. I, therefore, find that the adjudicating authority has rightly rejected their refund claim as barred by limitation.


10. In view of the above discussions, I reject the appeal filed by the appellant and uphold the impugned order.

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

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

  
( Akhilesh Kumar )  
Commissioner (Appeals)

Attested:

  
(N. Suryanarayanan. Iyer)  
Superintendent(Appeals),  
CGST, Ahmedabad.



BY RPAD / SPEED POST

To  
M/s. John Energy Limited,  
220, GIDC Estate,  
Mehsana, Gujarat -384 002

Appellant

The Assistant Commissioner  
CGST & Central Excise,  
Division- Mehsana  
Commissionerate, Gandhinagar

Respondent

Copy to:

- 1) The Chief Commissioner, Central GST, Ahmedabad Zone.
- 2) The Commissioner, CGST, Gandhinagar.
- 3) The Assistant Commissioner (HQ System), CGST, Gandhinagar.  
(for uploading the OIA)
- ✓ 4) Guard File.
- 5) P.A. File.

