आयुक्त(अपील)का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065- टेलेफैक्स07926305136

DIN : **20211164SW0000888A3F**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/81/2021/H664 TO H668

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-59/2021-22**
दिनॉक Date : **18-11-2021** जारी करने की तारीख Date of Issue 30.11.2021

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

ग Arising out of Order-in-Original No. **07/REF/CEX/NRM/2020-21** दिनॉक: **08.12.2020** issued by Assistant Commissioner, CGST& Central Excise, Division Gandhinagar, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पताName & Address of the **Appellant / ~~Respondent~~**

M/s BLG Electronics Ltd.
E-26, GIDC Electronic Estate,
Gandhinagar, Gujarat-382044

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 अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा की 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 हानिकार खाने 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 मे 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 मामलें 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 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।

(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 दिनाँक से तीन मास के भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य 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 रकम एक लाख रूपये या उससे कम होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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,BahumaliBhawan,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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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.

(37) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर 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:
(xciv) amount determined under Section 11 D;
(xcv) amount of erroneous Cenvat Credit taken;
(xcvi) amount payable under Rule 6 of the Cenvat Credit Rules.

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 present appeal has been filed by M/s. BLG Electronics Ltd, E-26, GIDC Electronic Estate, Gandhinagar – 382 044 (hereinafter referred to as the appellant) against Order in Original No. 07/REF/CEX/NRM/2020-21 dated 08-12-2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division- Gandhinagar, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant are engaged in the manufacturing and export of LED - light emitting diodes and were holding Central Excise Registration No. AACB0321PXM001. After implementation of GST, they migrated to GST regime and are holding GSTIN No. 24AACB0321PiZZ. The appellant filed a claim for refund of Rs.9,29,346/- under Section 11B of the Central Excise Act, 1944 read with the provision of Section 142 (3) of the CGST Act, 2017 on the grounds that they had paid Rs.9,29,346/-, vide TR-6 Challan No.167 dated 14.08.2019, being the duty saved at the time of import of capital goods vide Bill of Entry No. 4414704 dated 29.02.2016 and 4415421 dated 29.02.2016. They stated that they were not in a position to fulfill their export obligation against the EPCG Authorisation and had accordingly paid all the applicable duty foregone at the time of import under EPCG Authorisation, along with interest. After introduction of GST, they were unable to claim/utilize the Cenvat credit that would have entitled them to utilize such Cenvat credit for payment of duty on their output supply under the existing law.

2.1 In view of the provisions of Section 142 (8) of the CGST Act, 2017, it appeared that no credit of the amount recovered under the existing law after the appointed day is admissible, of such amount has become payable due to assessment or adjudication. In the instant, the duty was paid by the appellant on their of their own volition/self assessment. This credit of the duty paid by the appellant was not admissible and, therefore, the refund of such amount is inadmissible. Further, there are no provisions under the GST Act, 2017 to allow refund of ITC of such duty paid by the appellant in view of the transitional provisions of Section 142 of the CGST Act, 2017. Therefore,

the appellant was issued a SCN from F.No. GEXCOM/RFD/CE/60/2020 dated 26.10.2020 proposing rejection of the claim for refund under Section 11B of the Central Excise Act, 1944 read with Section 142 of the CGST Act, 2017.

2.2 The said SCN was adjudicated vide the impugned order and the claim for refund preferred by the appellant was rejected.

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

i) In terms of the provisions of Section 142 (3) and 142 (6) (a) of the CGST Act, 2017, refund under the category of transitional provisions is specifically granted to take care of the situation where an assessee is otherwise capable to get the Cenvat Credit or in absence of any provision to enable them to avail and utilize the credit, refund can be said to accrue under Section 142 of the CGST Act, 2017.

ii) They paid the duty – CVD and SAD on the imported capital goods being used for manufacturing of the final products. These duties were available to them as Cenvat Credit under the old regime. The only fact that the occasion and aspect giving rise to such liability of payment of duty under the existing law arose after the repealing of the existing law, their right to avail and utilize the same for payment of duty is not taken away by any provision of the new GST regime including any other provisions specified for transition from the old regime.

iii) The transitional provision in the GST regime is a facilitation provision to allow smooth transition of availability of credit in the GST regime which otherwise was also available in the old regime. Mere repealing of the existing legislation with the GST legislation does not take away the rights vested under the existing law.

iv) The admissibility of Cenvat Credit under the existing law is a vested right and the same cannot be deprived merely because of repeal or enactment of new legislation.

v) The impugned order rejecting the refund is arbitrary and illegal in that, by restricting the benefit to specific class of person to take

away a vested right and resulting collection of tax without authority of law and an unjust enrichment to the government of an amount which the government is not entitled to retain.

vi) The provision of Section 174 of the CGST Act, 2017 deals with repeal and saving. Such section provides under sub-section 2(c) that amendment to the CGST Act should not be made to affect any right, privilege, obligation or liability acquired and incurred under the amended act or repealed act.

vii) The refund application filed for such accrued right in view of Section 142 of the CGST Act, 2017 should be allowed since they are likely to suffer loss of the credit that it is entitled to.

viii) They rely upon the decision in the case of Eicher Motora Vs. UOI – 199 (106) ELT 3 (SC) and Dai Ichi Karkaria – 1999 (112) ELT 353 (SC) wherein it has been recognized that credit is a vested and indefeasible right and is as good as tax paid till tax is adjusted on future goods.

ix) They rely upon the judgement dated 06.09.2019 of the Hon'ble Gujarat High Court in the case of M/s.Siddharth Enterprises Vs. Nodal Officer in which Cenvat Credit is recognized and held to be vested right which cannot be taken away by virtue of Rule 117.

x) They also rely on the decision in the case of Adfert Technologies (P) Ltd vs. UOI – (2019) 11 Taxmaan.com 27 (P&H) and judgement dated 19.11.2019 of the Hon'ble High Court of Karnataka in the case of Asiad Paints Ltd vs. UOI.

xi) Substantial benefits cannot be deprived off merely because of procedural inflictions. They rely upon the decision of the Apex Court in the case of Commissioner of C.Ex., New Delhi Vs. Hari Chand Shri Gopal – 2010 (260) ELT 3 (SC).

xii) Their view is also supported by Section 142(6) (a) of the CGST Act, 2017. The refund application filed by them squarely falls within the ambit of Section 142 (6) (a) read with Section 142 (3) of the CGST Act, 2017.

xiii) Section 142(8) (a) of the CGST Act, 2017 is not applicable. The said section covers the situation wherein the tax and or duty payments have been made under the existing law. It provides for inadmissibility of duties or taxes under the GST law, however, it

does not provide that such duties or taxes would not be admissible as refund under other transitional provisions.

xiv) Section 142 (8)(a) of the CGST Act, 2017 is not a non obstante clause. Claiming refund under the existing law as provided under Section 142 (3)& (6) operates pari passu the provisions of Section 142 (8) (a) of the CGST Act, 2017.

xv) On similar matter refund has been sanctioned by : 1) Assistant Commissioner, GST, Division-II, Ahmedabad North ; 2) Assistant Commissioner, Division-VII, Vadodara-I. They submit copies of the orders in these case.

xvi) They also rely on the decision of the Commissioner (Appeals) in OIA No. PUN-EXCUS-001-APP-603/18-19 dated 21.01.2019 in the case of M/s.Pluscon Systems Pvt Ltd and OIA No. AHM-EXCUS-0030APP-99-18-19 dated 14.09.2019 in the case of M.s, Maxm Tubes Company Pvt Ltd.

xvii) The Hon'ble Tribunal, New Delhi in the case of Flexi Caps and Polymers Pvt Ltd had vide Order No. 51825/2021 dated 15.09.2021 held that the appellant became eligible to take Cenvat Credit of the CVD and Additional SAD paid on the imports as per erstwhile Cenvat Credit Rules, 2004. The credit could not be availed due to the new GST regime. The act contains a provision to take care of such unutilized credit to be refunded to them in cash.

4. Personal Hearing in the case was held on 12.10.2021 through virtual mode. Shri Pratik Trivedi, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum. He further stated that recently Hon'ble Tribunal, Delhi had passed a judgement in similar matter.

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 material available on records. The issue to be decided in the present appeal is whether the appellant's claims for refund of CVD and SAD paid post introduction of GST in respect of imports made under EPCG during pre-GST period is permissible as per the provisions of Section 11B of the Central

Excise Act, 1944 read with Section 142(3) of the CGST Act, 2017 or otherwise?

5.1 I find that the appellant had imported capital goods under Bills of Entry No. 4414704 and 4415421 both dated 29.02.2016. The said goods were imported under EPCG authorization issued by the DGFT in terms of the Foreign Trade Policy 2015-20. However, as they were not in a position to fulfill the export obligation cast upon them in terms of the EPCG authorization, the appellant paid the amount of Customs duty foregone at the time of import along with interest on 14.08.2019. The appellant have contended that the amount paid by them towards CVD and SAD is eligible to them as Cenvat Credit under the erstwhile Cenvat Credit Rules, but due to introduction of GST w.e.f 01.07.2017, they could not avail the said amount as Cenvat Credit and, therefore, they had filed a refund claim under the provisions of Section 142 of the CGST Act, 2017.

6. I find that the issue involved in the instant case has been decided earlier by me in the case of M/s.Navratna Specialty Chemicals LLP vide Order-In-Appeal No. AHM-EXCUS-002-APP-001-20-21 dated 20.04.2020 and Order-In-Appeal No. AHM-EXCUS-002-APP-039-20-21 dated 24.12.2020. The relevant extracts of the order dated 24.12.2020 is reproduced below for reference:

> *" 7. I find that the provisions of Section 142(3) and 142(6) (a) of the CGST Act, 2017 deals with the refund relating to Cenvat Credit, duty, interest under the existing law. They are reproduced below:*
>
> ➢ *Section 142(3) of the CGST Act, 2017:*
>
> *(3) 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 of 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 (1 of 1944) :*
>
> ***Provided** that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse :*

***Provided** further that 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.*

- *Section 142(6) (a) of the CGST Act, 2017:*

> *(6) (a) every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him 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 and the amount rejected, if any, shall not be admissible as input tax credit under this Act:*

9. In the instant case, I find that the appellant has filed the refund claim in respect of CVD & SAD paid against earlier duty free import of items under the Advance Authorization, as they could not avail the Cenvat credit of such payment. Section 142 (3) ibid states that in case of refund of <u>any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law</u>, filed before, on or after 01.07.2017, shall be disposed of 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 CEA. A plain reading of the said provisions makes it amply clear that for refund of any amount paid under the said Section, be it Cenvat Credit or duty or tax or interest or another other amount, the amount should have been paid under the existing law. It is only in respect of amounts paid under the existing law that the refund envisaged under Section 142(3) of CGST Act would be applicable. In the present case, the amount paid towards CVD & SAD, while import of materials, is paid under Customs law and is not a duty prescribed under the existing law i.e. under Central Excise Act. Further, the said amounts are not cenvat credit paid under the existing law. When the amount paid is not under the existing law, the provisions of Section 142 ibid cannot be applicable and consequently, no refund in terms of Section 142 ibid arises in the case.

9.1 The appellant has further contended that they were eligible to take Cenvat Credit of the said amount under the erstwhile Cenvat Credit Rules and in the present situation, they could not take any credit of such duty. Therefore, the only option left out is to file refund of the amount. I find that this argument does not have any legal backup. For getting refund of Cenvat Credit under existing law i.e under the Cenvat Credit Rules, 2004, one has to avail the Cenvat Credit first under the said Rule. The provisions under Cenvat Credit Rules do not allow refund of Cenvat Credit in cash, unless it is availed. I find that the appellant had procured duty free raw materials under Advance Authorization and hence were not eligible for availment of Cenvat at the time of receipt in their premises. Therefore, there is no merit in the said contention of the appellant.

9.2 Another contention of the appellant is that upon payment of the CVD and SAD involved in the imports, they have earned or there accrued a right to avail the cenvat credit on such duties paid and as per the provision of Section

174 (2) (c) of the CGST Act, they are entitled to the credit of such duties paid. I do not find any merit in the said contention of the appellant for the reason that accrual of any rights or privileges mentioned under Section 174 ibid would be only to extent available on date of repeal of the relevant law viz. Cenvat Credit Rules, 2004 which is 01.07.2017. Regarding saving clauses of repealed laws, it is settled principle that saving means that it saves all the rights, it previously had, it does not give any new rights. Saving clauses are introduced in the Act, safeguard right after repeal, which but for saving would have been lost. It is not dispute in the present case that the amount towards CVD and SAD were paid after 01.07.2017.Therefore, even if the appellant's argument is considered, then also a right for credit of the said duties paid can be said to have earned or accrued only upon payment of such duty, not before that. It is more so when considering that at the time of import of goods, there was no intention of availing cenvat credit in respect of the said duties as the excess goods were imported duty free against Advance Authorization and the duties came to be paid as a consequence of that breach. The contention of the appellant in this regard is, therefore, not legally sustainable for there being no right for claim of cenvat credit accrues to them as on the date of repeal in this case. My above view is supported by the decision of the Hon'ble CESTAT in the case of Escorts Ltd. Vs. Commissioner of Central Excise, Delhi-IV [2017 (358) ELT 1140 (Tri.-Chan.)], wherein the Hon'ble Tribunal dealing with a similar kind of argument in the context of Rule 57E of the erstwhile Central Excise Rules, 1944 has held that:

> *" **9.** The appellants have also submitted that the dispute in the present case pertains to the period from March 1995 to November 1995 as they had procured the inputs during that period. They argued that Section 38A protects their rights and privileges which have accrued to the appellants. The appellants relied upon the case law of Tamil Nadu Petro Products Ltd. (supra). They are apparently referring to Section 38A(c) of the Act on the basis that they had received the inputs in the year 1995 and had manufactured their final products.*
>
> ***10.** We find that in the present case the spare parts were supplied to M/s. Escorts Ltd. - AMG (Tractor Plant) in 1995, the cause of action for payment of differential duty as per Settlement Commission took place in 2004 when the duty was paid in three equal installments between October, 2004 and December, 2004. Rule 57E of the Central Excise Rules, which is the basis of refund claim, was abolished w.e.f. 1-4-2000. Even if the party's claim of accrual of rights under Section 38A is admitted for a moment, it would only protect the claim of duty paid on date of abolition of the said rule. The accrual of any rights and privileges to the appellants would be limited to the extent available on the date of repeal of Rule 57E. Since on the date of repeal of Rule 57E, the extra differential duty liability fixed by Settlement Commission had not been paid, the same cannot be protected under Rule 57E, which had already been extinguished from the statute book on the date of such payment. It is the established principle that the law has to be applied as it existed at the time it was invoked. The refund claim for differential duty was filed in 2005 under Rule 57E but the said Rule was not in existence at that point of time. Hence, the relief sought by*

appellants under Rule 57E is not available to the appellants even by virtue of provision of Section 38A ibid."

9.3. The appellant has further referred to Section 142(6) (a) of CGST Act, 2017. The said Section referred pertains to refund claim arising out of proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after GST regime. I find that the instant refund claim is not arising out of any appeal, review or reference proceedings under the existing law relating to a claim for Cenvat Credit. Therefore, the argument placed by the appellant in terms of Section ibid has no relevance in the matter.

10. Further, I find that the adjudicating authority has also considered provisions of Section 142 (8) (a) of the CGST Act, 2017 for rejecting the refund claim in question. In this regard, it is observed that the adjudicating authority's reliance on Section 142(8) (a) ibid is totally misplaced on the facts of the case as the amount of duty paid in the case was not under the existing law but under the Customs law, for which the above said provisions of CGST can not be applied. Section 142(8) (a) ibid would be applicable only in cases of duties/taxes recoverable under the existing law. Therefore, the adjudicating authority has erred in applying the above provision of CGST law for the present case. I agree with the contention of the appellant in this regard, but I hold that this fact, in any way, does not support their cause for refund under reference.

11. The appellant has relied on the Orders-in-Appeal issued by the Commissioner (Appeals), Central Tax, Raigad in case of M/s Sudarshan Chemicals Industries Ltd on similar matter. I do not agree with the views taken by the above authorities in the matter for the reasons discussed in the foregoing paras. The appellant have also relied upon the decision of Hon'ble High Court of Gujarat in case of M/s Thermax Ltd versus Union of India reported in 2019 (31) G.S.T.L 60(Guj) which are distinguishable from the facts of the instant case.

12. In this regards, I find that recently, the Hon'ble CESTAT, Chennai has decided an identical issue in the case of M/s Servo Packaging Ltd [2020-VIL-72-CESTAT-CH-CE], denying refund of CVD and SAD paid on unfulfilled export obligation against Advance Authorization. The Relevant para of the said decision is as under:

> *"10. Thus, the availability of CENVAT paid on inputs despite failure to meet with the export obligation may not hold good here since, firstly, it was a conditional import and secondly, such import was to be exclusively used as per FTP. Moreover, such imported inputs cannot be used anywhere else but for export and hence, claiming input credit upon failure would defeat the very purpose/mandate of the Advance Licence. Hence, claim as to the benefit of CENVAT just as a normal import which is suffering duty is also unavailable for the very same reasons, also since the rules/procedures/conditions governing normal import VILGST Passion to Deliver VATinfoline Multimedia www.vilgst.com Page - 5 - of 5 compared to the one under Advance Authorization may vary because of the nature of import.*
>
> *11. The import which would have normally suffered duty having escaped due to one which ultimately stood unsatisfied, naturally*

loses the privileges and the only way is to tax the import. The governing Notification No. 18/2015 (supra), paragraph 2.35 of the FTP which requires execution of bond, etc., in case of non-fulfilment of export obligation and paragraph 4.50 of the HBP read together would mean that the legislature has visualized the case of nonfulfilment of export obligation, which drives an assessee to paragraph 4.50 of the HBP whereby the payment of duty has been prescribed in case of bona fide default in export obligation, which also takes care of voluntary payment of duty with interest as well. Admittedly, the inputs imported have gone into the manufacture of goods meant for export, but the export did not take place. At best, the appellant could have availed the CENVAT Credit, but that would not ipso facto give them any right to claim refund of such credit in cash with the onset of G.S.T. because CENVAT is an option available to an assessee to be exercised and the same cannot be enforced by the CESTAT at this stage."

13. Looking into the facts and circumstances of the instant case and by following the decision of the Hon'ble Tribunal referred to above, I find that the adjudicating authority has correctly rejected the refund claims and I do not find any reason to interfere with the impugned order passed by the adjudicating authority. I also observed that the identical issue has been decided by me vide OIA No. AHM-EXCUS-002-APP-35/2020-21 dated 23.11.2020 in case of M/s. Baxter Pharmaceuticals India Private Limited, Bodakdev, Ahmedabad wherein same view has been taken. Therefore, I reject the appeal filed by the appellant, being devoid of merits, and uphold the impugned order."

7. I find that the appellant have relied upon Final Order No. 51825/2021 dated 15.09.2021 passed by the Hon'ble Tribunal in the case of M/s. Flexi Caps & Polymers Pvt Ltd Vs. Commissioner of CGST & Central Excise, Indore. The relevant part of the said order is reproduced as under :

" The apparent fact on record is that the appellant has paid the entire CVD/SAD upon the goods imported by the appellant, as inputs, for manufacturing its final product. No doubt, initially the import was made duty free but for the reason that the appellant was granted an advance license No.5610005102 dated 21.03.2017 as is apparent from the Show Cause Notice itself. It is also nowhere been denied that the appellant could not fulfill the export obligation arising out of the said license. The only course of action with the appellant in the given circumstances was to seek the redemption which has also not been denied. The letter of DGFT dated 17.01.2018 is apparently and admittedly pursuant to the appellant's own request of seeking redemption. The apparent and admitted fact remains on record is that the entire customs duty with respect to the inputs imported by the appellant stands fully deposited by the appellant not only alongwith interest but also with the penalty as was directed to be paid while seeking said redemption. These admitted facts are sufficient to hold that the appellant became entitled to avail Cenvat Credit of the CVD/SAD paid by him on the imported inputs in terms of Rule 3 of Cenvat Credit Rules, 2004 (CCR).

7. Apparently, the said Cenvat Credit could not be availed any more due to the erstwhile law i.e. Central Excise Act, 1944 being taken over by New GST Act,

2017. Perusal thereof shows that the Act contains a provision to take care of such unutilized credits of the assessee to be refunded to them in cash. The relevant provision is Section 142 of GST Act, with sub-section (3) thereof reads as follows:-

> *"(3) 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 of 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:"*

and sub-section (8) (a) and (b) reads as follows:-

> "**(8) (a)** where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so covered shall not be admissible as input tax credit under this Act:
>
> **(b)** where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act."

In view of these provisions, denying the said entitlement, that too, on the ground that the letter of DGFT cannot be considered as the assessment order is not appropriate to my opinion because the fact still remains is that the requisite duty stands paid in full by the appellant which entitles the appellant to have credit thereof though in the form of cash in terms of the provisions of the new Act. Hence, I hold that the view formed by Commissioner (Appeals) while rejecting the refund is not appropriate. Rather it is beyond the intention of the Legislature.

8. Further, it is also observed that the appeal before Commissioner (Appeals) was filed by the Department not under the erstwhile law but under the GST Act, 2017. As objected by ld. DR himself that this Tribunal is not competent to deal with the appeals under GST Act. The appeal before Commissioner (Appeals) was not maintainable under GST Act for a refund application which was filed under the erstwhile law. The appeal as such was not maintainable. The order under challenge cannot sustain for the said reason as well. Seen either from the point of view of preliminary objection as has come in rebuttal from the appellant and keeping in view the entire above observation as far as the merits of the case are concerned, it is held that the order under challenge has wrongly rejected the refund despite an unambiguous provision not only giving entitlement of refund to the appellant but also recognizing for the refund eligible under erstwhile law to have been given in cash under new law. Order accordingly, is hereby set aside appeal resultantly stands allowed."

8. Having perused the above said order in the case of Flexi Caps & Polymers Pvt Limited, I find that the issue involved in the said case is the

same as that in the case of the decision in the case of M/s Servo Packaging Ltd supra. I further find that both these judgements have been passed by single member bench of the Hon'ble Tribunal. Further, the judgement in the case of M/s Servo Packaging Ltd has neither been referred to nor distinguished in the judgement in the case of M/s.Flexi Caps & Polymers Pvt Ltd. Therefore, the both these judgements hold good on the issue involved. I have earlier decided cases following the judgement in the case of M/s Servo Packaging Ltd, which, I find, has not been overruled. Therefore, I do not find any reason to deviate from my earlier decisions on this issue. Accordingly, by following the stand in my earlier orders, the appeal of the appellant is rejected and the impugned order is upheld for being legal and proper.

9. 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.

18 November, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Attested:

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

Date: .11.2021.

BY RPAD / SPEED POST

To

M/s. BLG Electronics Ltd,
E-26, GIDC Electronic Estate,
Gandhinagar – 382 044

Appellant

The Assistant Commissioner,
CGST & Central Excise,
Division- Gandhinagar
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.