



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 : 20211164SW0000421700

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STD/131/2020 **14669 TO 4673**
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-63/2021-22**
 दिनांक Date : **29-11-2021** जारी करने की तारीख Date of Issue 30.11.2021
 आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **06/REF/STAX/KP/2020-21** दिनांक: **29.07.2020** issued by Assistant Commissioner, CGST & Central Excise, Division Gandhinagar, Gandhinagar Commissionerate
- घ अपीलकर्ता का नाम एवं पता Name & Address:

Appellant:

The Assistant Commissioner,
 CGST Division Gandhinagar,
 1st Floor, CGST Bhavan, Sector-10A,
 Gandhinagar-382010

Respondent:

M/s Murlidhar Horticulture Pvt Ltd.
 Plot No. 332, Sector 1-C, 1st Floor,
 Gandhinagar-382001

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

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी 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 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 जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या 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.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 रुपये या उससे कम होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

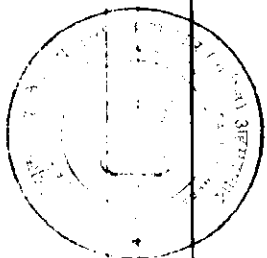
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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, 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 पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

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

- (41) 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:

- (cvi) amount determined under Section 11 D;
- (cvii) amount of erroneous Cenvat Credit taken;
- (cviii) amount payable under Rule 6 of the Cenvat Credit Rules.

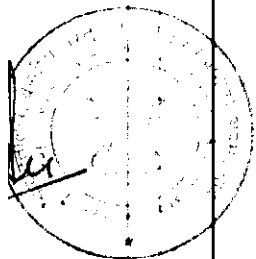
इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

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 the Assistant Commissioner, CGST & C.Ex., Division : Gandhinagar, Commissionerate- Gandhinagar (hereinafter referred to as the appellant), on the basis of Review Order No. 13/2020-21 dated 02.12.2020 passed by the Commissioner, Central GST & C.Ex., Gandhinagar Commissionerate in terms of Section 84 of the Finance Act, 1994 against Order in Original No. 06/REF/STX/KP/2020-21 dated 29.07.2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST & C.Ex. Division : Gandhinagar, Commissionerate- Gandhinagar [hereinafter referred to as "*adjudicating authority*"] in the case of M/s. Murlidhar Horticulture Pvt Ltd, Plot No. 332, Sector-1-C, 1st Floor, Gandhinagar-382 001 [hereinafter referred to as the respondent].

2. Briefly stated, the facts of the case is that the respondent is holding Service Tax Registration No. AAGCM4497GSE011. The respondent had preferred an appeal before the Commissioner (Appeals), Ahmedabad against OIO No. AHM-STX-003-ADC-AJS-001-17-18 dated 25.04.2017. At the time of filing appeal, the respondent had made payment of pre-deposit amounting to Rs.5,56,350/- vide Challan dated 19.05.2017. The Commissioner (Appeals), Ahmedabad vide OIA No. AHM-EXCUS-003-APP-131-132-17-18 dated 06.11.2017 allowed the appeal. The department challenged the order passed by the Commissioner (Appeals), Ahmedabad before the Hon'ble Tribunal but the appeal of the department was rejected vide Order dated 25.03.2019 passed by the Hon'ble Tribunal. The appeal by the department before the Hon'ble Supreme Court was dismissed on monetary ground vide Order dated 14.10.2020. The respondent had filed an application on 16.07.2020 for refund of pre-deposit amount of Rs.5,56,350/-.



3. The adjudicating authority vide the impugned order sanctioned refund of the pre-deposit amounting to Rs.5,56,350/- along with interest of Rs.1,06,728/-.

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

- i) Section 11B of the Central Excise Act, 1944 deals with refund of tax and for claiming any refund, the assessee has to comply with the provision of Section 11B. The adjudicating authority has failed to consider the relevant date for filing refund claim as provided in explanation (B) of Section 11B of the Central Excise Act, 1944. The relevant date as defined in the above explanation reckons the date of judgment which is applicable in the present case.
- ii) The refund claim was filed on 16.07.2020 on the basis of OIA No. AHM-EXCUS-003-APP-131-132-17-18 dated 06.11.2017 passed by the Commissioner (Appeals), Ahmedabad. Thus, when the OIA was passed in their favour the refund claim should have been filed within one year from the relevant date as per the provision of Section 11B of the Central Excise Act, 1944. Therefore, the adjudicating authority has committed a gross error in not considering the relevant date for filing refund claim.
- iii) They rely upon the judgment of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd – 1997 (89) ELT 247 (SC) wherein it was held that all claims for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962.
- iv) The adjudicating authority has made an error of judgment in relying upon the CBIC Circular No. 984/08/2014-CX dated



16.09.2014 in view of the instructions contained in CBIC Circular No. 1006/13/2015-CX dated 21.09.2015.

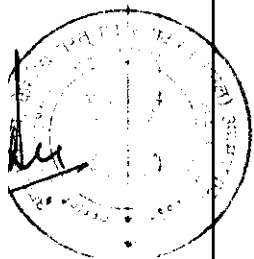
- v) The respondent failed to file refund claim within one year from the relevant date which is the date of the OIA and this the refund claim was clearly hit by the bar of limitation.

5. A copy of the appeal was forwarded to the respondent vide letter dated 16.12.2020 asking them to file their cross-objections. However, the same was returned un-delivered. The respondent were granted opportunities of Personal Hearing on four different dates viz. 16.09.2021, 12.10.2021, 28.10.2021 and 17.11.2021 however, the same were not availed by the respondent and the letters for personal hearing were returned undelivered. Therefore, I proceed to decide the case on the basis of the material available on record.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum and material available on records. I find that the appellant department have contested the impugned order on the ground that the refund sanctioned to the respondent was barred by limitation in view of the provisions of Section 11B of the Central Excise Act, 1944.

6.1 I find that Explanation (B) of Section 11B of the Central Excise Act, 1944 defines relevant date and the department has relied upon clause (ec) of in support of their contention that the refund claim was barred by limitation. Clause (ec) of Explanation (B) of Section 11B of the Central Excise Act, 1944 is reproduced as under :

“ in case where the duty/tax becomes refundable as a consequence of judgment, decree, order or direction of appellant authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;”



6.2 I find that the reliance of the appellant department upon the above said explanation is misplaced. It is observed from the impugned order that the respondent had sought refund of pre-deposit of Rs.5,56,350/- made vide Challan No. 50092 dated 19.05.2017 at the time of filing appeal. It is, therefore, apparent that what was refunded to the respondent vide the impugned order is not duty or tax, it was the amount paid by the respondent as pre-deposit, while filing appeal before the Commissioner (Appeals), in terms of Section 35F of the Central Excise Act, 1944.

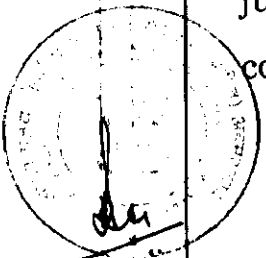
6.3 I find that the adjudicating authority has rightly referred to and relied upon Circular No. 984/08/2014-CX dated 16.09.2014 issued by the CBIC. The said Circular at para 5 deals with refund of pre-deposit and at para 5.2 it is clearly stated that :

“ Pre-deposit for filing appeal is not payment of duty. Hence, refund of pre-deposit need not be subjected to the process of refund under Section 11B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962.....”

6.4 I further find that the judgment of the Hon'ble High Court of Madras in the case of Daily Thanthi Vs. Commissioner of Customs (Appeals), Chennai – 2021 (376) ELT 615 (Mad.) is squarely applicable to the facts of the present appeal. The relevant para of the said judgment is reproduced as under :

“107.Pre-deposits as a condition under Section 129E of the Customs Act, 1962 or under Section 35F of the Central Excise Act, 1944 are not governed by the Section 27 and 11B of the respective enactments.”

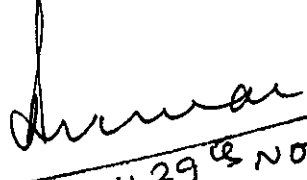
7 In view of the facts discussed hereinabove and considering the judgment of the Hon'ble High Court of Madras supra, I am of the considered view that there is no merit in the appeal filed by the



appellant department. Accordingly, I reject the appeal filed by the appellant department and uphold the impugned order.


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

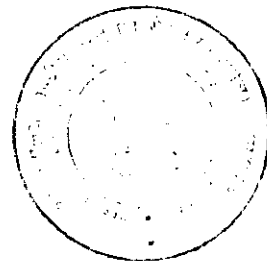
The appeal filed by the appellant department stands disposed off in above terms.


 29th November, 2021
 (Akhilesh Kumar)
 Commissioner (Appeals)

Date: .11.2021.

Attested:


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



BY RPAD / SPEED POST

To

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

Appellant

M/s. Murlidhar Horticulture Pvt Ltd,
 Plot No. 332, Sector-1-C, 1st Floor,
 Gandhinagar-382 001

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.