



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 : 20211264SW00002228E9

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/ADC/GSTP/22/2021 **14690 to 14694**

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-64/2021-22**
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. **05/ST/Refund/DC/2020-21** दिनांक: **05.11.2020** issued by
Deputy Commissioner, CGST & Central Excise, Division Kalol, Gandhinagar Commissionerate

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

M/s Tilak Polypack (P) Ltd
Plot No. 729/2, Rakanpur, Kalol,
Gandhinagar

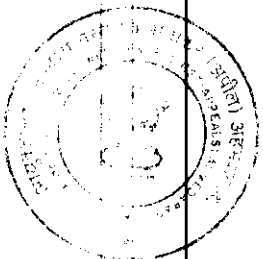
कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal 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 इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनोंक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इका 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 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.

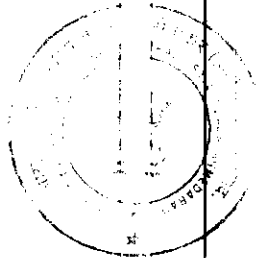
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 2ndमाला, 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 Appellate 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 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.

- (42) 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.

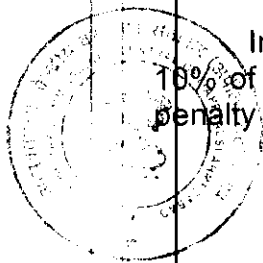
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (cix) amount determined under Section 11 D;
- (cx) amount of erroneous Cenvat Credit taken;
- (cxi) 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."

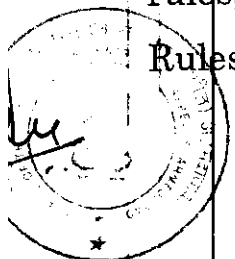


ORDER-IN-APPEAL

The present appeal has been filed by M/s. Tilak Polypack Pvt Ltd, Village : Rakanpur, Taluka : Kalol, District : Gandhinagar (hereinafter referred to as the appellant) against Order in Original No. 05/ST/Refund/DC/2020-21 dated 05-11-2020 [hereinafter referred to as "*impugned order*"] passed by the Deputy Commissioner, CGST, Division- Kalol, 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 of goods falling under Chapter 3919, 3920, 3921 & 3923 of the Central Excise Tariff Act, 1985 and holding Central Excise Registration No. AABCT3049AXM001 and Service Tax Registration No. AABCT3049AST001. The appellant vide letter dated 17.08.2020 filed a claim for refund of an amount of Rs.1,99,089/-, under Section 11B of the Central Excise Act, 1944, which was willingly paid by them for wrong availment and utilization of Service Tax credit for the construction work carried out in the new building in their premises. The refund was filed on the grounds that during the course of audit conducted on their records by the department, it was pointed out that they had wrongly availed and utilized Service Tax credit amounting to Rs.1,29,092/- for construction work carried out in their new building in their premises. They had, as per the query of the audit, paid the amount along with Interest of Rs.50,633/- and Penalty of Rs.19,364/- vide cash ledger debit entry dated 22.10.2019.

2.1 On scrutiny of the refund claim, it was found that though the claim was filed under Section 11B of the Central Excise Act, 1944, the appellant had referred to Section 142(3) of the CGST Act, 2017 seeking refund of the amount paid by them. It appeared that as per the existing rules, i.e., provision of the erstwhile Finance Act, 1994, Service Tax Rules, 1994 and as per Rule 2 (1) of the Cenvat Credit Rules, 2004



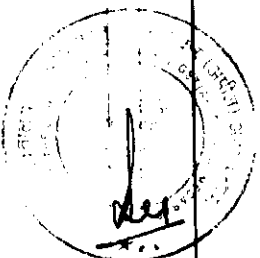
(hereinafter referred to as the CCR, 2004), construction work carried out in the new building in the premises of the appellant was not an input service and, therefore, the refund claim was not covered by sub-section 3 of Section 142 of the CGST Act, 2017. It further appeared that as per Section 142 (8) of the CGST Act, 2017, it is clear that no credit of the amount recovered under the existing law after the appointed day is admissible. Thus, when there is no admissibility of credit, the question of refund of such amount is ruled out.

2.2 The appellant was therefore, issued Show Cause Notice No. GEXCOM/RFD/ST/33/2020 dated 31.09.2020 seeking to reject the claim for refund filed by them

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

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

- i) The adjudicating authority has not given any findings on the judgement relied upon by them. Therefore, it is violation of the principles of natural justice and the order is not sustainable on this count.
- ii) They had claimed Service Tax credit with respect to construction of premises in existing registered premises under the Excise law and within the framework of the CCR, 2004.
- iii) The Central Excise audit party had not appreciated the facts and circumstances though it was specifically explained that the construction activity has taken place within the area of registered premises. They had reversed the credit along with interest and penalty and immediately filed refund claim.
- iv) They had not given any waiver letter for SCN under Section 11A. Therefore, the question does not arise to reject the refund



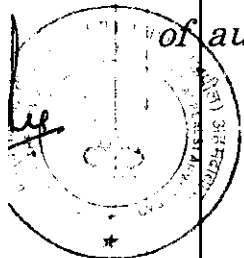
claim. They rely upon the Final Order No. A/10462/2019 dated 08.02.2019 of the Hon'ble Tribunal, Ahmedabad in the case of Safex Electromech (P) Ltd.

- v) Input Service defined under Rule 2(l) of the CCR, 2004 includes services used in relation to modernization, renovation or repairs of a factory and therefore, construction done in existing premises is covered under the clause of modernization, renovation or repairs of a factory.
- vi) They refer and rely upon the decisions in the case of : Supreme Ind. Ltd Vs. CCE & ST, Vadodara-II – 2020 (373) ELT 97; Bhanu Dyes Pvt Ltd Vs. CCE, Bharuch – 2018 (01) LCX 0023; Ion Exchange (India) Ltd Vs. C.Ex., Cus & ST, Surat-II – 2017 (11) LCX 0040; NSSL Pvt Ltd Vs. C.C.Ex & CGST, Nagpur – 2021 (53) GSTL 410 (Tri.-Mumbai).

5. Personal Hearing in the case was held on 17.11.2021 through virtual mode. Shri Naimesh K. Oza, Advocate, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

6. 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. I find that the issue to be decided is whether the appellant are entitled to refund of the amount of Service Tax credit paid along with Interest and Penalty.

6.1 I find that the adjudicating authority has rejected the refund claim on the ground that *"the credit taken on the services which is not define as "input service" does not qualify as Credit either in the erstwhile existing law or in the CGST Act, 2017 and accordingly the assessee is not eligible for refund of the S.Tax credit amount wrongly availed and utilized and thereafter willingly paid by them in the course of audit by the audit officers"*. I find that the above finding of the



adjudicating authority has been made in Para 25 of the impugned order deciding the claim for refund filed by the appellant. I am of the considered view that the issue of whether Cenvat Credit has been correctly availed or otherwise cannot be decided in the course of adjudicating the claim for refund. The claim for refund of the Cenvat Credit paid along with interest and penalty has to be strictly examined as per the provisions of Section 11B of the Central Excise Act, 1944 or Section 142 (3) of the CGST Act, 2017.

7. The appellant have contended that though they had paid the Service Tax credit, objected to by the audit officers, along with interest and penalty they had not given any letter for waiver of SCN under Section 11A of the Central Excise Act, 1944. They have also relied upon the decision of the Hon'ble Tribunal in the case of Safex Electromech (P) Ltd Vs. C.C.E, Ahmedabad-I - 2019 (27) GSTL 535 (Tri.-Ahmd.), wherein it was held that:

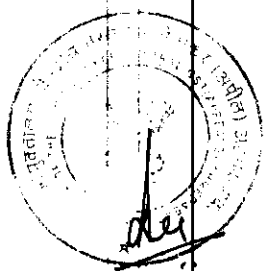
“4. On careful consideration of the submissions made by both the sides and perusal of the records, I find that though the appellant had paid Cenvat amount along with interest and 25% penalty on the instance of audit objection but subsequently, they claimed the refund. The only reason for rejection of the claim is that the appellant had opted for the provision made under sub-section (6) & (7) of Section 11A which reproduced below :-

(6) Any person chargeable with duty under sub-section (5), may, before service of show cause notice on him, pay the duty in full or in part, as may be accepted by him along with the interest payable thereon under section 11AA and penalty equal to one per cent of such duty per month to be calculated from the month following the month in which such duty was payable, but not exceeding a maximum of twenty-five per cent of the duty, and inform the Central Excise Officer of such payment in writing.

(7) The Central Excise Officer, on receipt of information under sub-section (6) shall -

(i) *not serve any notice in respect of the amount so paid and all proceedings in respect of the said duty shall be deemed to be concluded* where it is found by the Central Excise Officer that the amount of duty, interest and penalty as provided under sub-section (6) has been fully paid;

(ii) proceed for recovery of such amount if found to be short-paid in the manner specified under sub-section (1) and the period



of one year shall be computed from the date of receipt of such information.

XXXXXXXXXXXXXXXXXX

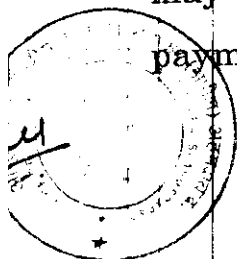
(emphasis

added)

5. On plain reading of the above provision it is not only the payment of amount, interest and 25% penalty but the appellant needs to give an intimation to the department accepting their liability which the appellant had not given, in such case if at all the Revenue is of the view that the amount is legally payable, it was incumbent on the Revenue to issue a SCN which they failed to do so. Therefore, in these circumstances, the appellant is rightly entitled for refund of the amount of Cenvat credit, interest and penalty paid by them. Accordingly, I set aside the impugned order and allow the appeal. The adjudicating authority shall process the refund in accordance with law."

7.1 It is pertinent to mention that the provisions of Section 11A (6) and (7) of the Central Excise Act, 1944 have been omitted by the Finance Act, 2015 dated 14.05.2015. Therefore, the provision for conclusion of proceedings without issuance of notice, where the duty along with interest and penalty has been paid, was not in existence during the period when the appellant had made such payment. It is a settled position of law that any amount paid towards duty or cenvat credit by an assessee has to be confirmed in adjudication. In the present case, apparently no SCN has been issued by the department for confirming and appropriating the amounts paid by the appellant.

7.2 I find that the CBIC had vide Circular No. 137/46/2015-Service Tax dated 18.08.2015 had clarified that in cases where the assessee pays the service tax/central excise duty, interest and penalty equal to 15% of the tax/duty and makes a request in writing that a written SCN may not be issued to them, in such cases SCN can be oral. In the instant case, I find that though the appellant had, in acceptance of the audit objection, paid the amounts involved, there is nothing on record to indicate that the appellant had requested in writing that a written SCN may not be issued to them. I further find that the appellant had made payment of the disputed service tax credit along with interest and

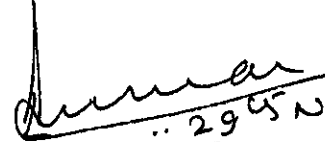


penalty by Cash Ledger debit entry dated 22.10.2019. Therefore, the appellant is entitled to claim refund of the amounts paid by them when no SCN was issued for confirming and appropriating the amounts paid.

8. In view of the facts as discussed hereinabove and also by following the decision in the case of Safex Electromech Pvt Ltd, supra, I set aside the impugned order and allow the appeal filed by the appellant.


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

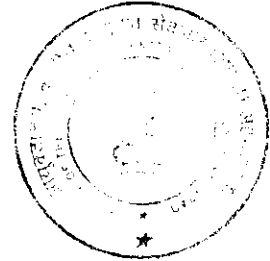
The appeal filed by the appellant stands disposed off in above terms.


(Akhilesh Kumar)
Commissioner (Appeals)

Attested:

Date: .11.2021.


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



BY RPAD / SPEED POST

To

M/s. Tilak Polypack Pvt Ltd,
Village : Rakanpur, Taluka : Kalol,
District : Gandhinagar

Appellant

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