आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By SPEED POST
DIN:- 20230364SW000000C9FB

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/CEXP/200/2022-APPEAL/9653-57
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-135/2022-23 and 28.02.2023
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	20.03.2023
(ङ)	Arising out of Order-In-Original No. AC/S.R./06/C.Ex./Kadi/2021-22 dated 01.02.2022 passed by the Assistant Commissioner, CGST, Division-Kadi, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Gujarat Ambuja Exports Ltd., Kadi-Thor Road, Taluka – Kadi, Mehsana, Gujarat-382715

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 पूवोक्त 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 :-

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 : -

(क) 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।

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.

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

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

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

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

(घ) 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।

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.

(2) 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.

(3) 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 अपीलः-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गतः-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(2) उक्तलिखित परिच्छेद 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।

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2ndfloor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad: 380004. In case of appeals other than as mentioned above para.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of

Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner 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 शुल्क अधिनियम 1970 यथा संषोधित की अनुसूची -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 का न्यायालय शुल्क टिकट लगा होना चाहिए ।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

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

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपीलो 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)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

(6)(i) 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."

अपीलियआदेश / ORDER-IN-APPEAL

The present appeal has been filed by M/s. Gujarat Ambuja Exports Ltd., Kadi-Thor Road, Kadi, Mehsana-382715 (hereinafter referred to as the "appellant") against Order-In-Original No. AC/SR/06/C.EX./Kadi/2021-22, dated 31.01.2022/01.02.2022 (hereinafter referred to as the "*impugned order*"] passed by the Assistant Commissioner, CGST, Division: Kadi, Commissionerate: Gandhinagar (hereinafter referred to as the "*adjudicating authority*").

2. Briefly stated, the facts of the case are that the appellant were engaged in the manufacture and clearance of Soyabean De-Oiled Cake, Rapeseed De-Oiled Cake, Castor De-oiled cake and Lecithin falling under Chapter No. 15 and Chapter 23 of the Schedule to the Central Excise Tariff Act, 1985 [CETA,1985] and were holding Central Excise Registration No.AAACG3980AXM007 and Service Tax Registration No. AAACG3980AST003. They had filed 7 refund claims for different periods, as detailed in table below, for refund of unutilized Cenvat Credit under Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No. 05/2006-C.E. (N.T.), dated 14.03.2006 as well as refund of Service Tax paid on input services in view of the Notification No. 41/2007-ST, dated 06.10.2007, as per details below:-

(Amount in Rs.)

Sl. No.	Date of filing of Refund Claim	Period for which Refund Claim filed	Amount of refund (in Rs.)	No. and Date of SCN	No. and Date of OIO	Refund rejected under Rule 5 of Cenvat Credit Rules, 2004	Refund rejected under Noti. No.41/ 2007, dated 06.10.2007
1.	23.06.06	01.04.05 to 31.03.06	75,78,840	V/ 18-4/Ref/ Kadi/06, dtd.27.12.06	01/ S.Tax/ Ref/Kadi/ 07- 08, 31.03.08	48,11,578	27,67,262
2.	05.10.06	01.04.06 to 30.06.06	15,56,265	V/ 18-7/Ref/ Kadi/06, 27.12.06	02/ S.Tax/ Ref/ Kadi/ 07-08, 31.03.08	10,86,894	4,69,371
3.	21.01.07	01.07.06 to 30.09.06	12,40,209	V/ 18-13/Ref/ Kadi/06, 27.12.06	03/ S.Tax/ Ref/Kadi/ 07- 08, 31.03.08	9,47,227	2,93,002
4.	28.03.07	01.10.06 to 31.12.06	43,46,538	V/ 18-2/Ref/ Kadi/06, 11.01.08	04/S.Tax/ Ref/Kadi/ 07-08, 31.03.08	28,35,497	15,11,041

5.	25.06.07	01.01.07 to 31.03.07	38,85,402	V/ 18-3/Ref/ Kadi/06, 11.01.08	05/S.Tax/ Ref/Kadi/ 07-08, 31.03.08	29,80,192	9,05,210
6.	16.10.07	01.04.07 to 30.06.07	21,21,818	V/ 18-12/Ref/ Kadi/06 , 04.06.09	06/S.Tax/ Ref/Kadi/ 07-08, 31.03.08	10,31,945	10,89,873
7.	21.01.08	01.07.07 to 30.09.07	19,45,979	V/18-6/Ref/ Kadi/06, 11.01.08	07/S.Tax/ Ref/Kadi/ 07-08, 31.03.08	9,70,983	9,74,996
						1,46,64,316	**80,10,725**

2.1. All the above mentioned refund claims were rejected vide the orders mentioned in table above on the following grounds:-

- The finished products of the appellant were falling under Chapter 15 of the CETA, 1985 and were exempted from payment of duty.
- The appellant had not mentioned in their Service Tax Returns about availing of cenvat credit of service tax paid on input services and accumulated balance.
- Notification No.05/2006-C.E.(NT), dated 14.03.2006 was prospective in nature and as such the claims for the period prior to the date of issuance of the Notification i.e. 14.03.2006 was not admissible under the said notification.
- The appellant had filed the refund claim application of input services which did not qualify as 'input services' under Rule 2(1) of the Cenvat Credit Rules, 2004.

2.2. The appellant preferred appeal against the said OIOs. The Commissioner (Appeals-II), Central Excise, Ahmedabad vide OIA No.91 to 97/2008(AHD-III)CE/KCG/ Commr.(A), dated 05.09.2008/26.09.2008 partially allowed the appeal, wherein it was held that refund claim application under Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No.05/2006-C.E.(N.T.), dated 14.03.2006 cannot be rejected, while upholding the rejection of refund claim on time bar. The Commissioner (Appeals) had upheld the rejection of refund application filed under Notification No.41/2007-ST, dated 06.10.2007.

2.3. The department had preferred appeals before the Hon'ble CESTAT, Ahmedabad against the OIA No.91 to 97/2008(AHD-III)CE/KCG/Commr.(A), dated 05.09.2008/ 26.09.2008 on the following grounds:-

- The cenvat credit was not admissible in as much as the final products were exempted from payment of duty of central excise. The appellate authority had erred in extending the benefit of Rule 6(6)(v) of the Cenvat Credit Rules, 2004 to hold that the assessee was eligible for taking cenvat credit, even if the finished goods were not dutiable.
- Notification No.05/2006 C.E.(NT), dated 14.03.2006 was prospective in nature. Hence, the claim prior to the period 14.03.2006 was not admissible.

2.4. In the absence of any stay order against the OIA No. 91 to 97/2008 (AHD-III)CE/KCG/Commr.(A), dated 05.09.2008, the Assistant Commissioner, Central Excise, Kadi had adjudicated the claim, rejecting a part of the claim on the ground that services such as Cargo Handling Services, C&F Services, Insurance Service, Godown Rent, GTA service, Maintenance & Repair, Telecommunication services had been availed beyond the place of removal and as such the appellant were not entitled for cenvat credit of the same. The details are as under:-

(Amount in Rs.)

Sl. No.	Amount of refund claim filed	OIO No.	Refund rejected for services not considered as input services	Amount rejected under Rule 5 of CCR 2004	Amount rejected as time barred	Refund Sanctioned
1.	75,78,840	08/ST/Ref/Kadi/09-10, dtd.04.06.09	34,13,570 + 3,885	59,894	13,94,123	27,07,368
2.	15,56,265	12/ST/Ref/Kadi/09-10, dtd.04.06.09	10,86,901	1797	0	4,67,567
3.	12,40,209	13/ST/Ref/Kadi/09-10, dtd.04.06.09	9,47,227	0	0	2,93,002
4.	43,46,538	09/ST/Ref/Kadi/09-10, dtd.04.06.09	28,35,497	7902	0	15,03,139
5.	38,85,402	10/ST/Ref/Kadi/09-10, dtd.04.06.09	29,80,192	0	0	9,05,210
6.	21,21,818	14/ST/Ref/Kadi/09-10, dtd.04.06.09	10,89,873	532527	0	4,99,418
7.	19,45,979	11/ST/Ref/Kadi/09-10, dtd.04.06.09	1,08,183	0	9,74,986	8,62,800
	2,26,75,051		**1,24,65,328**	**6,02,120**	**23,69,109**	**72,38,504**

2.5. The appellant thereafter preferred appeal against the above mentioned Orders-In-Original before the Commissioner (Appeals), Central Excise, Ahmedabad, which was decided vide OIA No. 329 to 335/2009(Ahd.III)CE/KCG/Commr(A), dated 14/17.09.2009, wherein it was held that place of removal in the case of export is the port. Therefore, the services like Cargo Handling Services, Clearing & Forwarding Services, Insurance Service, Storage and Warehousing alleged to have been performed beyond the place of removal but upto port would form part of the input service and therefore eligible for refund. However, rejected the refund in respect of maintenance & repair of vehicles service for non-production of documents. Accordingly, the appeal was allowed partially in favour of the appellant. In view of the said Order-In-Appeal, the appellant filed Refund Claim for an amount of Rs.1,19,07,975/-. Refund claim amounting to Rs.1,17,40,709/- was sanctioned and refund of Rs.1,67,266/- was rejected vide OIO No. 12/S.Tax/Ref/09-10, dated 17.03.2010 passed by the Deputy Commissioner, Central Excise, Division- Kadi.

2.6. The said OIO was challenged by the department before the Hon'ble CESTAT, Ahmedabad. In view of the appeal filed by the department, a protective demand vide Show Cause Notice No. VIII/ 18-22/Ref/09-10 Pt.II, dated 29.07.2010 was issued for recovery of erroneous sanction of refund amount of Rs.1,17,40,709/-. Subsequently, vide a Corrigendum dated 06.06.2012 issued under F.No.V.Misc/ 15-3/OA/2012, the Show Cause Notice was made answerable to the Commissioner, Central Excise, Ahmedabad-III.

2.7. The department has also filed an appeal on 15.12.2009 before the Hon'ble CESTAT, Ahmedabad against the Order-In-Appeal No. 329 to 335/ 2009 (Ahd.III) CE / KCG / Commr (A), dated 14/17.09.2009. The Hon'ble CESTAT vide Order No. A/21-34/WZB/AHD/2011, dated 16.12.2010 decided both the Departmental appeals i.e. those filed against Order-In-Appeal No. 91 to 97/2008 (Ahd-III) CE / KCG / Commr(A), dated 05.09.2008 and Order-In-Appeal No. 329 to 335/209 (Ahd-III) KCG / CE / Commr(A), dated 14/17.09.2009. It was held by the Hon'ble Tribunal that:-

- In the case of exports, place of removal would be the port of export and accordingly, the cenvat credit of services upto the port of export would qualify as input services.
- The stand of the department that if finished goods are exempted, credit itself cannot be taken and therefore no refund claim is admissible cannot be sustained.

As regards the claim for the period prior to the date of Notification No. 5/2006-

C.E.(N.T.), the matter was remanded to original adjudicating authority for consideration.

The said order of the CESTAT has been accepted by the department on 27.05.2011.

2.8. In pursuance of the Hon'ble Tribunal Order dated 16.12.2010, the Assistant Commissioner, Central Excise, Division-Kadi had vide Order-In-Original No.132/Ref/14-15, dated 25.03.2015 rejected the refund of Rs.55,88,489/-, which pertained to the period prior to 14.03.2006, filed by the appellant on 23.06.2006 and previously sanctioned vide OIO No.08/S.Tax/Ref/Kadi/09-10, dated 30.06.2009 and OIO No.12/S.Tax/Ref/09-10, dated 17.03.2010. The appellant had filed an appeal against the OIO No.132/Ref/14-15, dated 25.03.2015 before the Commissioner (Appeals), Central Excise, Ahmedabad, contending that their dispute is covered by the order of the Hon'ble Tribunal dated 18.01.2008 in the case of *M/s. WNS Global Services Pvt. Ltd.- [2008(10)STR 273(Tri-Mum)]* which has also been affirmed by the *Hon'ble Bombay High Court- [2011(22)STR 609(Bom)].*

2.9. The protective demand issued under SCN No. VIII/18-22/Ref/09-10 Pt.II, dated 29.07.2010 was adjudicated by the Commissioner, Central Excise, Ahmedabad-III vide Order-In-Original No. AHD-EXCUS-003-COM-004-15-16, dated 31.07.2015 wherein it was ordered to recover the erroneously sanctioned refund amount of Rs.55,88,459/- alongwith interest.

2.10. Further, the Commissioner (Appeal), Central Excise, Ahmedabad vide OIA No.AHM-EXCUS-003-APP-080-16-17, dated 29.07.2016/02.08.2016 remanded the matter back to the adjudicating authority to consider the order of the Hon'ble High Court of Mumbai dated 10.02.2011 in the case of M/s. WNS Global Service (P) Ltd. and to re-calculate the entire amount afresh as discussed in Para 18 of the OIA, which is reproduced below:-

> "18. Para 22 of the impugned order-in-original gives *detail of the amount that was sanctioned vide OIO Nos.08/ST/Ref/Kadi/ 09-10, dated 30.6.2009 and OIO Nos.12/ST/Ref/Kadi/09-10, dated 17.03.2010, wherein a certain portion of the refund sought, was rejected based on the formula given in para 5 of the Appendix to the notification No. 05/2006-CE(NT) dated 14.03.2006. OIO No.08/ST /Ref/Kadi/09-10 dated 30.06.2009, in para 23, depicts the calculation relating to the formula. It is, however, observed that the*

formula figuring in para 5 of the said appendix has been applied differently in OIO Nos.08/ST/Ref/Kadi/09-10 dated 30.6.2009 and OIO Nos.12/ST/Ref/.Kadi/09-10 dated 17.03.2010. Hence, it is felt that a re-calculation needs to be done, in detail in the order itself, rather than relying on the OIOs, which do not exist as a consequence of the remand dated 16.12.2010 by the Tribunal [reported at 2014(311)ELT 718(Tri.Ahmd)].

2.11. The adjudicating authority has, vide the impugned order passed in the remand proceedings, rejected the refund claim of Rs. 55,88,459/- and ordered for its recovery under Section 11A of the Central Excise Act, 1944 alongwith interest under Section 11AB of the Central Excise Act, 1944. The adjudicating authority has rejected the claim on the grounds that the Order dated 31.07.2015 passed by the Commissioner, Central Excise, Gandhinagar has not attained finality, as the appeal filed by the appellant before the CESTAT was pending.

3. Being aggrieved with the impugned order (O.I.O.No. AC/SR/06/C.EX./ Kadi/2021-22, dated 31.01.2022/01.02.2022), the appellant have preferred the present appeal on the following grounds:-

3.1. The impugned order is a non-speaking order and is passed in gross violation of principles of natural justice. The adjudicating authority has rejected the refund claim without considering the submissions of the appellant and without providing any reasons for not considering the said submissions.

3.2. The Hon'ble Tribunal in their order have clearly given finding that they are bound by the decision passed by the coordinate bench. Therefore, ratio laid down by the Tribunal in the case of M/s WNS Global Pvt. Ltd. is applicable in the appellant's case also. The Tribunal has held that where the refund claim filed satisfies all requirements of Rule 5 and the Notification issued thereunder, refund cannot be rejected.

3.3. In the impugned order, the Ld. Assistant commissioner has not discussed the decision of M/s WNS Global Pvt. Ltd. The impugned order has been passed by the Ld. Assistant Commissioner without application of mind and without

appreciating the facts. The impugned order does not deal with moot question for which the Hon'ble Tribunal has remanded matter back.

3.4. They submit that the submissions made by them have been blatantly ignored in the impugned order by the adjudicating authority without affording any reasons. Thus, the impugned order is a non-speaking order and has been passed in gross violation of principles of equity, fair play and natural justice. The impugned order is liable to be set aside on this ground alone.They rely on various case laws as under:

(i) Cyril Lasardo (Dead) V. Juliana Maria Lasarado-[2004 (7) SCC 431.]

(ii) Asst. Commissioner, Commercial Tax Department V. Shukla & Brothers- [2010 (254) ELT 6 (SC)].

3.5. The issue involved in the present case is squarely covered by the decision of *M/s WNS Global Pvt Ltd.- 2008(10) STR 273 (Tri-Mumbai),* affirmed by the Hon'ble Bombay High Court. The appellant submitted that the limited issue to be decided in the present case is whether refund of input service pertaining to export made prior 14.03.2006 can be filed under Notification No.5/2006-CE(NT), dated 14.03.2006 or otherwise.

3.6. The Hon'ble Tribunal, vide order dated 16.12.2010, had given a clear finding that the adjudicating authority has to follow the decision of *M/s WNS Global Pvt. Ltd., reported at 2008 (10) STR 273 (Tri-Mumbai)* in the present case. In the case of M/s WNS Global Pvt. Ltd. supra, the Hon'ble Tribunal has held that the substituted Rule 5, nowhere suggests or says that it will apply for exports made after 14.03.2006. Hence, any claim filed on or after 14.03.2006 which satisfies other requirements of the rules and notifications issued thereunder, cannot be turned down on a ground which is not a condition or requirement of the Rule 5 or Notification. A statue cannot be treated retrospective merely because it related to the past action. The same was affirmed by the Hon'ble Bombay High Court in case of *Commissioner of Service Tax, Mumbai vs WNS Global Services (P) Ltd reported at 2011(22)STR 609 (BOM).*

3.7. The aforementioned judgement clarifies that the refund claim can be filed under the amended Notification No. 05/2006-C.E. (N.T.) in respect of the exports made prior to the date of Notification i.e. 14.03.2006. Therefore, the appellant were entitled to claim refund claim of input services used for export made

during the period April 2005 to 22.06.2005 under Notification No. 5/2006-C.E. (N.T.), dated 14.03.2006.

3.8. The Ld. Assistant Commissioner in the impugned order has held that refund of Rs.55,88,459/- sanctioned under the provision of Rule 5 of the Cenvat Credit Rules,2004 read with Notification No.05/2006-CE(NT), dated 14.03.2006 is erroneously sanctioned and the same is liable to be rejected in as much as the same pertains to the period prior to the introduction of the Notification No.05/2006-CE(NT), dated 14.03.2006. In the impugned order, the Ld. Assistant Commissioner has not given any finding on the point that how the decision of WNS Global (Supra) would not be applicable to the facts of the present case. The Ld. Assistant Commissioner has rejected the refund claim on the ground that they have to follow the order passed by the jurisdictional Commissioner which has not been stayed without considering the order passed by the Hon'ble Bombay High Court. Therefore, the appellant would like to submit that the impugned order passed by the Ld. Assistant Commissioner is against the judicial discipline and against the settle position of law. Hence, it should be set aside on this ground alone.

3.9. It is an undisputed fact that appellant have exported the goods outside the territory of India. Thus, the appellant have acquired a right to obtain the refund of unutilized CENVAT Credit as per the CENVAT Credit Rules, 2004. It is a trite law that the refund cannot be denied when the core fact of export is not in dispute. For this, the appellant placed reliance on the following decisions:

- *Universal Enterprise Vs. GOI.-1991 (55) ELT 137*
- *Poulose Mathew Vs. CCE-1989 (43) ELT 424 (Tri.) affirmed by SC 2000 (120) ELT A64(SC).*
- *Barot Exports-2006 (203) ELT 321 (GOI)*

3.10. In the support of the above contention appellant also placed reliance on the following decisions:-

- *CCE Vs Binny Ltd.- 1987 (31) ELT722 (T)*
- *Krishna filaments Ltd. - 2001 (131) ELT 726 (GOI)*
- *Cotfab Exports- 2006 (205) ELT 1027 (GOI)*
- *Atma Tube Products Ltd. Vs. CCE- 1998 (103) ELT 270 (T)*

- *Synthetics and Chemicals Ltd. Vs. CCE- 1997 (93) ELT 92(T)*
- *Apha Garments Vs. CCE - 1996 (86) ELT 600 (T)*

3.11. The appellant further submitted that they have exported the goods to the foreign buyers. These facts are not in dispute. Further, the appellant have not passed on the incidence of duty burden to their customers or any other person this fact is also not in dispute. There is no contrary allegation on this aspect. Therefore, the appellant are entitled to refund of service tax paid on the input services used for export of goods.

3.12. The appellant further submitted that it is the policy of the Government of India to allow refund of central excise duty paid on final products exported. It has been the policy of the Government to not export taxes. Admittedly, the said final duty paid products have beenexported by the appellants. It is the policy of the Central Government to giverebate/refund of taxes paid locally on goods and services used in export of the final product. Refund of duty paid on inputs is allowed in terms of Rule 18 and 19 of the Central Excise Rules, 2002. Similarly, refund of service tax paid on services has been allowed under Rule 5 of the CENVAT Credit Rules, 2004 read with Notification No.05/2006-C.E.(N.T.), dated 14.03.2006. The intention of Government is not to export taxes but only to export goods. If refund of duty paid on exported goods is not allowed, the Indian Manufacturer will become internationally uncompetitive. This is contrary to the intention of the legislature. This view is fortified by decision of the Hon'ble Bombay High Court in the case of *Repro India Vs Union of India- 2009(235) ELT614.* Hence, the service tax paid on input services must be allowed to the appellants.

3.13. The impugned order dated 31.01.2022 is incorrect and unsustainable in law, as the same is issued on the ground that the Jurisdictional Commissioner of Central Excise already passed the order rejecting the refund claim of Rs.55,88,459/-. However, against the said order the appellant preferred the appeal before Hon'ble CESTAT, Ahmedabad vide Appeal No. ST/ 11936 of 2015 and the same is pending for decision. The impugned order is therefore, contrary to the doctrine of Res Sub-judice. The significance of 'doctrine of Res Sub-judice' is to avoid multiplicity of suit and conflict of decisions before the court of competent jurisdiction. Since, the appeal against the order passed by the Jurisdictional Commissioner is pending before Hon'ble CESTAT and the

impugned order is on the same subject matter for same time period, between the same parties and the Hon'ble CESTAT is competent to pass effective order or grant relief to the parties in the Appeal No. ST/11936 of 2015. Therefore, the impugned order shall be liable to be set aside on this ground alone. For this reliance placed in case of - *Guru Prasad v. Bijay Kumar- AIR 1984 Ori 209.*

3.14. The principles of this doctrine are enshrined under Section 10 of the Code of Civil Procedure, 1908 and the object of the said doctrine is now settled vide various judgments. Hon'ble Supreme Court in the case of *Pukhraj D. Jain Vs. G. Gopal Krishna-AIR 2004 SC 3504.* Although, the doctrine of res sub-judice under Section 10 of Code of Civil Procedure is rule of procedure, but the same is mandatory *(Manoharlal v. Heeralal, AIR1962SC527)*. Since the provision of Section 10, Code of Civil Procedure is mandatory; trial of a subsequently instituted suit is bound to be stayed if any party starts the trial in any court with the same suit, in which a previously instituted suit is pending either in the Trial Court, or appeal.

4. Personal Hearing in the case was held on 09.01.2023. Shri Sanket Gupta, Advocate, as authorized representative, appeared on behalf of the appellant. He re-iterated the submissions made in appeal memorandum. He also submitted a written submission during hearing.

5. First and foremost, while dealing with the issue of condonation of delay, it is observed that the impugned order was issued on 01.02.2022 and appellant had claimed its receipt/ date of communication on 10.02.2022. The appellant have filed the present appeal on 02.05.2022 and vide letter dated 01.06.2022 they have requested for condonation of delay stating the reason that as per Supreme Court order dt. 10.01.2022 in respect to extension of limitation, the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation and all persons shall have a limitation period of 90 days with effect from 01.03.2022. It is observed that the delay of 2 days on the part of the appellant occurred on account of the interpretation of the Hon'ble Supreme Court's Order and under the belief that 90 days was available to them. In terms of Supreme Court order their period of limitation of 60 days shall start from 01.03.2022, which got over on 30.04.2022 and appeal filed by the appellant on 02.05.2022. Thus, there is a delay of two (2) days in filing the present appeal beyond the prescribed time limit of two months as per the provisions of Section 85 of the Finance Act, 1994.

5.1 In terms of Section 85 of the Finance Act, 1994, an appeal before the Commissioner (Appeals) is to be filed within a period of two months from the receipt of the order being appealed. Further, the proviso to Section 85 (3A) of the Finance Act, 1994 allows the Commissioner (Appeals) to condone delay and allow a further period of one month, beyond the two month allowed for filing of appeal in terms of Section 85 (3A) of the Finance Act, 1994, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months.

5.2. On going through the submissions, I find that the appellant have claimed to have mis-interpreted the Supreme Court order dtd. 10.01.2022 in respect to extension of limitation and therefore delay of 2 days occurred in filing the present appeal. I find that the reason for the delay stated by the appellant is genuine and acceptable. Therefore, I am inclined to consider the request of the appellant and treat the appeal to be filed within time-limit.

6. I have carefully gone through the facts of the case, submissions made in the Appeal Memorandum, in the additional submissions and those made during personal hearing as well as materials available on record. The issue before me to decide is whether the impugned order issued by the adjudicating authority, rejecting the refund claim amounting to Rs.55,88,459/-, in the facts and circumstances of the case, is legal and proper or otherwise.

7. It is observed that the impugned order has been issued in the remand proceedings ordered by the Commissioner (Appeal–I), Central Excise, Ahmedabad vide Order-In-Appeal No.AHM-EXCUS-003-APP-080-16-17, dated 29.07.2016. The relevant Para 18 & 19 of the OIA are reproduced below:

> *"18. Para 22 of the impugned order-in-original gives detail of the amount that was sanctioned vide OIO Nos.08/ST/Ref/Kadi/09-10 dated 30.6.2009 and OIO Nos.12/ST/Ref/Kadi/09-10 dated 17.03.2010, wherein a certain portion of the refund sought, was rejected based on the formula given in para 5 of the Appendix to the notification No. 05/2006-CE(NT) dated 14.03.2006. OIO No.08/ST/ Ref/Kadi/09-10 dated 30.06.2009, in para 23, depicts the calculation relating to the formula. It is, however, observed that the formula figuring in para 5 of the said appendix has been applied differently in OIO Nos.08/ST/ Ref/Kadi/09-10, dated 30.6.2009 and OIO Nos.12/ST/ Ref/Kadi/09-10, dated 17.03.2010. Hence, it is felt that a re-calculation*

needs to be done, in detail in the order itself, rather than relying on the OIOs, which do not exist as a consequence of the remand dated 16.12.2010 by the Tribunal [reported at 2014(311)ELT718(Tri. Ahmd.)].

19. In view of the forgoing, I set aside the OIO No.132/Ref/14-15 dated 25.03.2015 *and remand the matter to the original adjudicating authority to : (a) consider the order of the Hon'ble High Court of Mumbai dated 10.02.2011 in case of M/s WNS Global Service (P) Ltd. and pass an order on merits taking due cognizance of the Tribunal order dated 16.12.2010; and (b) re-calculate the entire amount afresh as per the discussion in the para above. The appeal stands disposed of accordingly."*

8. In terms of the direction given by the Commissioner (Appeals) in the OIA supra, the adjudicating authority, in the remand proceedings, was required to consider the order of the Hon'ble High Court of Mumbai, dated 10.02.2011 passed in the case of M/s.WNS Global Service (P) Ltd. and to re-calculate the entire amount afresh as discussed and directed in Para 18 & 19 of the OIA. However, the adjudicating authority has, vide the impugned order, rejected the refund claim of Rs.55,88,459/- and ordered for its recovery under Section 11A of the Central Excise Act, 1944 alongwith interest under Section 11AB of the Central Excise Act, 1944. The adjudicating authority has rejected the claim on the grounds that the Order dated 31.07.2015 passed by the Commissioner, Central Excise, Gandhinagar has not attained finality, as the appeal filed by the appellant before the CESTAT was pending. I find that there is no evidence on record to show that the said OIA passed by the Commissioner (Appeals) was challenged by the department or was stayed. Hence, the matter has attained finality and the adjudicating authority was bound to follow the same. It is a settled legal principle that the order passed by the higher adjudicating authority is required to be followed by the lower adjudicating authority unreservedly. Hence, I am of the considered view that the adjudicating authority has committed judicial indiscipline in not following the directions of the Commissioner (Appeals) in the remand proceedings.

9. It is further observed that both the appeals filed by the department, in the matter, was rejected by the Hon'ble Tribunal, Ahmedabad vide Final Order

Nos. A/21-34/2011-WZB/AHD, dated 16-12-2010 in Appeal Nos. E/1634-1640/2008 and E/1816-1822/2009 [Reported at 2014 (311) ELT-718 (Tri.-Ahmd)]. The order of the tribunal has been accepted by the department, which has also been acknowledged by the adjudicating authority in the impugned order Hence, the adjudicating authority was bound to examine the matter in the light of judgement passed in the case of *M/s WNS Global Services (P) Ltd,* which was not done. Hence, the impugned order passed by the adjudicating authority becomes a non-speaking order and thereby has been passed in breach of the principles of natural justice.

10. It is further observed from the impugned order that the adjudicating authority has not considered the directions of the Commissioner (Appeals). Hence, the directions of the Commissioner (Appeals) given vide OIA dated 29.07.2016 supra remains to be complied. I find that the impugned order has been passed in violation of well-established principle of judicial discipline. My views are further strengthened by the following decisions wherein the Hon'ble CESTAT has held that the Adjudicating Authority is duty bound to comply with the directions of Commissioner (Appeals) and lower authorities cannot go beyond the directions of the remand order:

(i) Mukesh Appliances Pvt.Ltd. Vs Commissioner of Central Excise & S.T, Daman - 2016 (343) E.L.T. 246 (Tri. - Ahmd.)

(ii) Eon Polymers Versus Commissioner of Central Excise, Jaipur - 2005 (187) E.L.T. 474

(iii) Commissioner of Central Excise, Panchkula Vs Ish Rolling Mills-2004 (167) E.L.T. 126.

(iv) Intergloble Aviations Limited Versus Union of India, 2022 (379) E.L.T.200 (Del.) the Hon'ble Delhi High Court has specifically mentioned that -

"..... it is a settled principle of judicial discipline that the lower authorities must comply with the orders passed by the higher or Appellate authorities....."

(v) In Union of India v. Kamlakshi Finance Corporation Limited, 1992 Supp (1) SCC 443; 1991 (55) E.L.T. 433 (S.C.), the Hon'ble Supreme Court held and reiterated that :

"..... The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable

phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

11. In view of the discussions made above, I hold that the adjudicating authority has decided the matter in gross violation of judicial discipline in as much as she has failed to follow specific directions of the Appellate Authority i.e. Commissioner (Appeals) given vide OIA No. AHM-EXCUS-003-APP-080-16-17, dated 29.07.2016. I am left with no alternative than to set aside the impugned order and remand the matter back to the adjudicating authority with directions to decide the matter afresh following specific directions conveyed vide OIA No. AHM-EXCUS-003-APP-080-16-17, dated 29.07.2016.

12. It is further observed that the appellant have made submissions in their appeal memorandum, that their Appeal No. ST/11936/2015 filed before the Hon'ble CESTAT, Ahmedabad against the OIO No.AHM-EXCUS-003-COM-004-15-16, dated 31.07.2015 passed by the Commissioner, Central Excise, Ahmedabad-III is pending for decision. Therefore, the impugned order is also contrary to the doctrine of res sub judice. In view of the above, I am of the considered view that in the interest of the principles of natural justice, the matter is required to be remanded back for denovo adjudication in terms of directions contained in OIA dated 29.07.2016 supra after affording the appellant the opportunity of personal hearing.

13. In view of the above, the impugned order is set aside and the appeal filed by the appellant is allowed by way of remand.

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

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

28 February

(Akhilesh Kumar)
Commissioner (Appeals)

Date: 28.02.2023

Attested

20/3/23

(Ajay Kumar Agarwal)
Assistant Commissioner [In-situti] (Appeals)
Central Tax, Ahmedabad.

F No. GAPPL/COM/CExP/200/2022

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3. The Assistant Commissioner, CGST & C.Ex., Division-Kadi, Commissionerate: Gandhinagar.
4. The Superintendent (System), CGST, Appeals, Ahmedabad. (for uploading the OIA).
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