आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

DIN:20230264SW000000F142

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/2698/2022-APPEAL /8351-55

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-154/2022-23**
दिनाँक Date : **10-02-2023** जारी करने की तारीख Date of Issue 16.02.2023

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

ग Arising out of Order-in-Original No. **MP/23/Ref/AC/22-23/HNM** दिनाँक: **18.05.2022**, issued by Deputy/Assistant Commissioner, Division-II, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

   M/s SCC Infrastructure Private Limited,
   SCC house, Opp. Nirma University,
   Nr. Balaji Temple, S.G.Highway,
   Chharodi, Ahmedabad-382481

2. Respondent
   The Assistant Commissioner, CGST,Division-II, Ahmedabad North , 3rd Floor,Sahjanand Arcade,Opp. Helmet Circle,132 Feet Road, Memnagar, Ahmedabad –380052.

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 अतत् 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।

(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 हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की 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 भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष 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 हो तो रूपये 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 सेवाकर 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 :-

(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. 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 संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर 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.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (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 सेवा कर 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:

(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.

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. SCC Infrastructure Private Limited, SCC House, Opp. Nirma University, Nr. Balaji Temple, S. G. Highway, Chharodi, Ahmedabad – 382481 (hereinafter referred to as "the appellant") against Order-in-Original No. MP/23/Ref/ AC/22-23/HNM dated 18.05.2022 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division II, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant are engaged in providing taxable services under the category Commercial or Industrial Construction Service and was holding Service Tax Registration No. AAWCS1330ASD001. During the course of audit of the financial records of the appellant, for the period from FY 2015-16 to FY 2016-17, conducted by the officers of the Central GST, Audit Commissionerate, Ahmedabad, the following observation were raised in Revenue Para 3 of the Final Audit Report No. 1220/2017-18.

Revenue Para 3: Short payment of Service Tax by wrong availment of benefit of Notification No. 25/2012-ST: The appellant had provided services to M/s. NTPC and RITS for Civil Construction Work (as Works Contract Services) and not paid Service Tax on the same deeming the same as provided to Governmental Authority and exempted service under Sr. No. 12(a) of Notification No. 25/2012-ST dated 20.06.2012. On being pointed out, the appellant had agreed and paid Service Tax amount of Rs. 64,80,847/- along with interest of Rs. 11,00,267/- and penalty of Rs. 9,72,127/- vide Challan Nos. 85424, 85425, 85426 & 85427 all dated 08.01.2018.

2.1 Subsequently, the appellant have filed a refund claim for an amount of Rs. 68,89,166/- (paid towards Service Tax) on 11.01.2021 under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 read with Section 142(3) of the Central Goods and Services Tax Act, 2017 on the ground that they have paid Service Tax on account of wrong assessment made by Audit officer during the course of Audit.

2.2 The adjudicating authority has observed that (i) the appellant accepted the objection raised by the Audit department and have paid the Service Tax along with interests and penalty applicable and not paid the same "Under Protest"; (ii) the refund is arising only after the appellant has paid the amount on the date 08.01.2018, which is well beyond the prescribed time limit of 1 year in terms of Section 11B(1) of the Central Excise Act, 1944 read with Section 11B(b)(f) of the Central Excise Act, 1944; and (iii) the refund claim was hit by the provisions related to unjust enrichment as mentioned in Section 11B & Section 12B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

2.3 Therefore, a Show Cause Notice No. IV/19-03/Refund-SCC/2021-22 dated 17.11.2021 was issued to the appellant proposing rejection of Refund claim of Rs. 68,89,166/- as time barred

under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and even if the refund is allowed to them in future by any authority, why the same should not be credited to the Consumer Welfare Fund in terms of Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

2.4 The said SCN was adjudicated by the adjudicating authority ex-parte vide the impugned order and the refund claim was rejected by him on the ground that the appellant had accepted the audit objection and paid the Service Tax along with interests and penalty without making any protest and hence settled the Audit Para. Also that the refund is arising only after the appellant has paid the amount on the date 08.01.2018, which is well beyond the prescribed time limit of 1 year in terms of Section 11B of the Central Excise Act, 1944 read with Section 83of the Finance Act, 1994.

3. Being aggrieved with the impugned order, the appellant have preferred the present appeal on the following grounds:

- The limitation of time prescribed by Section 11B of the Central Excise Act, 1944 is not applicable since in the judgement by the Hon'ble Supreme Court of India in the case of M/s. Shiv Shankar Dal Mills etc. Vs. State of Haryana and others, the court stated that the refund cannot be denied on the ground of limitation.

- The appellant had not passed any duty, tax paid to the buyer and shown under the duty receivable account in the books of account, therefore without verifying the matter and facts of the appellant, it is deemed to pass on the full incidence of such duty to the buyer of such services under Section 12B of the Central Excise Act, 1944 is contrary to the provisions.

- The appellant had changed the office address and shifted to another place, which were intimated to the department in time, still correspondence have been made at old office address and no communication had been made at new address and passed the impugned order without providing the personal hearing in the matter and production of the documentary evidence.

- On the basis of above grounds, the appellants requested that the impugned order be quashed and set aside.

4. Personal hearing in the case was held on 08.02.2023. Shri Surendra Jindal, Chartered Accountant, appeared on behalf of the appellant for personal hearing. He submitted a written submission during hearing and reiterated submission made therein.

4.1 The appellant vide their additional submission dated 08.02.2023, inter alia, made following submissions:

- The appellant had registered under the Service Tax Act and had provided the services to the various Central Govt., State Govt. and local authority during the FY 2015-16, FY 2016-17 and FY 2017-18 and were also regular in payment and filing of the Service Tax Returns.

- In the FY 2017-18, the department had carried out the audit and demanded the service tax on the services rendered by the appellant company towards the RITES Limited, which falls under the clause 14 of the Mega Exemption Notification No. 25/2012-ST dated 20.06.2012.

- The audit officer had assessed the services rendered by the appellant to RITES will under clause 12 of the Notification No. 25/2012-ST dated 20.06.2012 and applied the provision of Notification No. 2/2014-ST and obtained the definition of Government authority as substituted by clause in paragraph 2, accordingly find out that since the Government is having less than 90% shareholding in RITES, therefore RITES is not falls under the category of Government authority, thus the appellant has wrongly availed the benefit of exemption Notification No. 25/2012-ST. Therefore, the appellant was required to pay the service tax on the income from services provided to RITES along with interest and penalty under Section 75, 76 and 78 of the Finance Act, 1944.

- The appellant had paid the service tax demanded by the audit, on affirmation that the said assessment of the audit officers was wrong the services rendered by the appellant falls under the clause 14 of the Notification No. 25/2012-ST dated 20.06.2012, which are exempted from the service tax, the appellant company made a refund application to the jurisdictional Assistant Commissioner, which were rejected by them vide the impugned order. The refund application has been rejected on the basis of time limit of filing of the application under Section 11B(1) of the Central Excise Act, 1944.

- The amount paid by the appellant would not take the character of tax but is simply an amount paid under a mistake of law. The provisions of Section 11B ibid would, therefore, not be applicable to an application seeking refund thereof. Moreover, since the retention of the amount in issue by the department is without authority of law, the question of applying the limitation prescribed under Section 11B ibid would not arise.

- In this regard, the appellant relied upon the following case laws:

(a) State of West Bengal & Ors. Vs. Calcutta Club Ltd. & Ors. – 2019-TIOL-449-SC-ST-LB

(b) The Joint Commercial Tax Officer Vs. The Yound Men's Indian Association – MANU/SC/0472/1970

(c) Ranchi Club Ltd. Vs. Chief Commr. – 2012 (26) STR 401 (Jhar)

(d) Sports Club of Gujarat Vs. Union of Inida – 2013 (32) STR 645 (Gujarat)

(e) Tanhee Heights Co-operative Housing Society Ltd. Vs. Commr.

(f) M/s. Bellatrix Consultancy Services V/s. The Commissioner of Central Tax Bangalore North Commissionerate in CEA No. 49 of 2019 dated 20.06.2022

(g) Cadila Healthcare Ltd. Vs. CST Service Tax, Ahmedabad in Service Tax Appeal No. 445 of 2011.

(h) M/s. Ishwar Metal Industries Vs. Commissioner, Central Excise and CGST in Service Tax Appeal No. 51834 of 2018-SM dated 28.01.2022

(i) Techno Power Enterprises Private Ltd. Vs. Commissioner of CGST & Excise

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, rejecting the refund claim filed by the appellant on the ground of limitation, in the facts and circumstance of the case is legal and proper or otherwise.

6. On verification of the relevant Final Audit Report No. 1220/2017-18 dated 23.02.2018, I find that the Revenue Para 3 has been settled on the basis of the facts that the appellant had agreed and paid Service Tax of Rs. 64,80,847/- along with interest of Rs. 11,00,267/- and penalty of Rs. 9,72,127/- vide Challan Nos. 85424, 85425, 85426 and 85427 all dated 08.01.2018 and the appellant also requested for waiver of SCN vide their letter dated 08.01.2018. I also find that the appellant in their appeal memorandum have also not questioned the facts that they have paid the service tax during the audit without any protest. Therefore, the limited question is required to be decide in the present case is whether the refund claim filed by the appellant is hit by limitation as provided under Section 11B of the Central Excise Act, 1944 or otherwise.

7. I also find that main contention of the appellant is that the limitation of time prescribed by Section 11B of the Central Excise Act, 1944 is not applicable in view of the judgement by the Hon'ble Supreme Court of India in the case of M/s. Shiv Shankar Dal Mills etc. Vs. State of Haryana and various other judgments.

8. For ease of reference, I reproduce the relevant provision of Section 11B of the Central Excise Act, 1944 as made applicable for Service Tax matter vide Section 83 of the Finance Act, 1994, which reads as under:

*"**Section 11B. Claim for refund of duty and interest, if any, paid on such duty** . - (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise **before the expiry of one year from the relevant date** in such form and manner as*

may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

***Provided** that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act;*

***Provided** further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.*

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

***Provided** that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to –*

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

***Provided** further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.*

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution

moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

***Explanation.** - For the purposes of this section, -*

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;

(f) in any other case, the date of payment of duty."

8.1 In view of the above provisions of Section 11B of the Central Excise Act, 1944, I find that the appellant have filed the refund claim on 11.01.2021 for the Service Tax along with interests and penalty paid on 08.01.2018, which is beyond the prescribed time limit of 1 year in terms of Section 11B(1) of the Central Excise Act, 1944 read with Explanation (B)(f) given under the said Section.

8.2 I also find that, in the present case, the appellant have paid the service tax along with interest and penalty during the course of audit and also given letter for waiver of SCN and audit para has been settled on the said basis, as enumerated above.

9. I also find that the CBEC vide Instruction dated 18.08.2015 issued from F.No. 137/46/15-ST also clarified that if the assessee is waiving the requirement of written SCN, then a written SCN need not be issued. I find that in the present case also the appellant have given letter for waiver of SCN and audit para has been settled on the said basis. As per the said instruction of CBEC, upon concluding the proceeding, no grievance can be raised in the said matter by the appellant or the department. Hence, the matter has reached finality, which cannot be opened.

10. Further, I refer to the order of Hon'ble CESTAT, WZB, Ahmedabad in case of M/s. Amar Engineering Co. Vs. Commissioner of C. Ex. & S. Tax, Vadodara-I reported in 2019 (29) GSTL 116 (Tri.-Ahmd.). The issue involved in the said case is mentioned as under:

> *"The issue involved in the present case is that whether the appellant is entitled for refund of duty, interest and penalty paid during the course of audit and with request that the payment was made voluntarily and for not issuing the SCN, the matter should be closed, an undertaking was also given that no refund claim shall be made in future. Thereafter, the appellant is of the view that the amount paid by them is not payable and accordingly, the refund was filed."*

10.1 The Hon'ble CESTAT has held that once the assessee has paid Service Tax & interest voluntarily and requested department for closure of matter and coming for refund at later stage is absolutely contrary to the provisions. The para 5 of the said order is reproduce verbatim:

> ***"5.*** *As per the above Section, once the appellant opted for voluntary payment of service tax and interest and intimate to the department, the matter shall stand closed and the department has no liberty to issue any SCN, that means the issue stand closed. Neither the assessee can dispute the same nor the department has opportunity to issue any SCN. Therefore, at a later period coming with the refund is absolutely contrary to the provision of Section 73(3) of the Finance Act, 1994. Therefore, I do not find any substance in the refund issue of the appellant. Accordingly, the impugned order is upheld and the appeal is dismissed."*

11. Further, I also refer to the order of Hon'ble CESTAT, WZB, Mumbai in case of M/s. Sharp Engineer Vs. Commissioner of C. Ex., Pune-II reported in 2019 (370) ELT 539 (Tri.-Mumbai). The Hon'ble CESTAT has held that once the appellant has, before issue of of show cause notice, paid the duty along with interest and penalty and informed the central excise officer of such payment in writing in terms of Section 11A(6), the central excise officer shall not issue any notice and the proceedings in respect of the said duty shall be deemed to be concluded and no grievance can be raised on behalf of either side. The order of the CESTAT is reproduced hereinbelow:

"The facts of the case are that during the audit of the appellant's excise unit, objection was raised on availment of credit in respect of certain input services on the ground that service of renting of immovable property, insurance service, outward octroi, Customs House Agent charges, Xerox machine and printing machine are not admissible input services. On the audit objection, the appellant admittedly paid the entire amount of Cenvat credit availed on such services and also paid interest and penalty. They have intimated regarding this payment to the department vide their letter dated 3-3-2014 and also mentioned for waiver of show cause notice. On this, the audit para was closed and no show cause notice was issued. Later on, the appellant filed a refund claim on the ground that they are eligible for Cenvat credit in respect of the aforesaid services. Both the authorities below have rejected their claim on the ground that once the appellant admittedly paid the amount and waived the show cause notice, thereafter they cannot change their stand.

2. None appeared on behalf of the appellant. Shri H.M. Dixit, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue, reiterates the findings of the impugned order. He submits that whether the issue raised by the department is correct and legal or otherwise, but once the appellant paid the duty admittedly along with interest and penalty and waived the show cause notice, the department is not in a position to issue any show cause notice. Hence the issue attained finality with the stand taken by the appellant. Therefore, the refund rejected by the lower authorities is correct and legal.

3. On careful consideration of the submissions made by Learned AR and on perusal of the records, I find that there is no dispute with regard to the audit objection. The appellant accepted the liability and paid the entire amount of Cenvat credit availed on various services as mentioned above. They have also paid the interest and penalty and requested for waiver of show cause notice. This act of the appellant closed the entire proceedings. Thereafter, neither the department can issue any show cause notice nor the assessee can change their stand for the reason that the department has no opportunity to issue any further show cause notice. In this regard, I refer to Section 11A(6) & (7) of the Central Excise Act, which reads as under :-

"11A(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 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 payments in writing".

"11A(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."

3.1 From the above statutory provision, it is clear that since the appellant has before issue of show cause notice, paid the duty along with interest and penalty and informed the central excise officer of such payment in writing in terms of Section 11A(6), the central excise officer shall not issue any notice and the proceedings in respect of the said duty shall be deemed to be concluded. In the present case, the appellant has opted for the provision of Section 11A(6) & (7). Therefore the proceedings stand concluded and no grievance can be raised on behalf of either side. I, therefore, do not find any infirmity in the impugned order.

4. Accordingly, the impugned order is upheld and the appeal is dismissed."

12. I also find that Hon'ble CESTAT, Principal Bench, New Delhi in case of M. S. Metal Co. Vs. Commissioner of C. Ex., New Delhi reported in 2018 (15) GSTL 68 (Tri.-Del) has passed similar order. The Hon'ble CESTAT has held as under:

"3. The facts of the case are not in dispute. Admittedly, the appellant waived the show cause notice and deposited the entire dues as envisaged by the provisions of Section 11AC(1)(d) of Central Excise Act. On such deposits made by the appellant, the case was held to be concluded. It is not open to the assessee to re-start the proceedings by way of filing an appeal there against. The entire purpose of the said section is to reduce litigation and wherever the assessee admits the duty liability and deposited the same along with interest, the said provision further grants him relief in terms of quantum of penalty. The appellant having adopted the said course, cannot be allowed to take U-turn and challenge the order before the Higher appellate forum. Learned Advocate has fairly agreed that there was no protest while depositing the said amount and no right to file appeal there against was reserved. In fact the matter was not contested on merits and no show cause notice was issued to the appellant on their own request.

Accordingly, the impugned order is upheld and the appeal is dismissed."

13. In view of the aforesaid case laws, I find that in the present case the audit has observed the wrong availment of exemption and the same has been admitted by the appellant and paid the tax, interest and applicable penalty. Also, I find that the appellant, themselves have requested for closure of inquiry without SCN vide their letter dated 08.01.2018. Now, later on filing refund and that too after 1 year period from payment of the voluntarily payment of tax, interest and applicable penalty and when the said audit para concluded on their own request is absolutely contrary to the legal provisions. Accordingly, the ratio of aforesaid cases is squarely applicable to the present case.

14. I also find that the appellant have relied upon the judgment of Hon'ble Tribunal in the case of Bird Audio Electronics Vs. Commissioner, CGST – reported in 2022 TAXSCAN (CESTAT). I find that in the said case ,it is held that the amount deposited at the time of audit cannot be said to be the payment against demand raised by the department and the amount deposited at the instant of audit team is liable to be refunded in absence of SCN under Section 11A. However, in the present case, the appellant have themselves requested for waiver of SCN vide their letter dated 08.01.2018. Thus, the present case is on different footing and case law relied upon by the appellant is not relevant in the present case.

14.1 I find that the appellant relied upon the below mentioned case laws. However, in the present case, the appellant requested for waiver of SCN vide their letter dated 08.01.2018 and audit para has been settled on the said basis. It is also pertinent to note that the appellant in their appeal memorandum have also not questioned the facts that they have paid the service tax during the audit without any protest. Thus, I find that the present case is on different footing and case law relied upon by the appellant not relevant in the present case.

(a) M/s. Shiv Shankar Dal Mills etc. Vs. State of Haryana
(b) M/s. Bellatrix Consultancy Services V/s. The Commissioner of Central Tax Bangalore North Commissionerate in CEA No. 49 of 2019 dated 20.06.2022
(c) Cadila Healthcare Ltd. Vs. CST Service Tax, Ahmedabad in Service Tax Appeal No. 445 of 2011.
(d) M/s. Ishwar Metal Industries Vs. Commissioner, Central Excise and CGST in Service Tax Appeal No. 51834 of 2018-SM dated 28.01.2022
(e) Techno Power Enterprises Private Ltd. Vs. Commissioner of CGST & Excise

14.2 I find that the appellant relied upon the below mentioned case laws. It is observed that said judgments the authorities having the view that there is no taxable services have been rendered by the club towards the member, therefore no event of taxable services have been occourred, hence no service tax should be payable on such services. However, in the present case, the services provided by the appellant falls under the definition of "services" and "taxable services" as defined under Section 65B(44) and Section 65B(51) of the Finance Act, 1994, also it is pertinent to note that the appellant requested for waiver of SCN vide their letter dated

08.01.2018, thus, the present case is on different footing and case law relied upon by the appellant not relevant in the present case.

(f) State of West Bengal & Ors. Vs. Calcutta Club Ltd. & Ors. – 2019-TIOL-449-SC-ST-LB

(g) The Joint Commercial Tax Officer Vs. The Yound Men's Indian Association – MANU/SC/0472/1970

(h) Ranchi Club Ltd. Vs. Chief Commr. – 2012 (26) STR 401 (Jhar)

(i) Sports Club of Gujarat Vs. Union of Inida – 2013 (32) STR 645 (Gujarat)

(j) Tanhee Heights Co-operative Housing Society Ltd. Vs. Commr.

15. Thus, in my considered view the impugned order issued by the adjudicating authority rejecting the refund claim filed by the appellant as time barred is correct, proper and legal.

16. In view of the above discussion, I uphold the impugned order passed by the adjudicating authority and reject the appeal filed by the appellant.

17. अपील कर्ता 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.

(Akhilesh Kumar) 10th February, 2023..
Commissioner (Appeals)

Attested

(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad

Date : 10.02.2023

By RPAD / SPEED POST

To,

M/s. SCC Infrastructure Private Limited,
SCC House, Opp. Nirma University,
Nr. Balaji Temple, S. G. Highway,
Chharodi, Ahmedabad – 382481

Appellant

The Assistant Commissioner,
CGST, Division-II,
Ahmedabad North

Respondent

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad North
3) The Assistant Commissioner, CGST, Division II, Ahmedabad North
4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North

(for uploading the OIA)

5) Guard File
6) PA file