



सत्यमेव जयते

**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- टेलिफैक्स 07926305136



DIN:20230364SW000000EF0A

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/3303/2022-APPEAL / 19075-28
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-177/2022-23  
 दिनांक Date : 28-02-2023 जारी करने की तारीख Date of Issue 02.03.2023  
 आयुक्त (अपील) द्वारा पारित  
 Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. 27/Refund/2022/AC/AM दिनांक: 03.10.2022, issued by Assistant Commissioner, Division-IV, CGST, Ahmedabad-North
- घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Esdee paints Limited,  
 Plot No. 106 to 108,  
 Mahagujarat Industrial Estate,  
 Sarkhej Bavla Road, Moraiya,  
 Ahmedabad-382213

2. Respondent

The Assistant/ Deputy, CGST, Division-IV, Ahmedabad North , 2<sup>nd</sup> Floor,  
 Gokuldham Arcade, Sarkhej-Sanand, Ahmedabad - 382210

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, 4<sup>th</sup> 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 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 दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का 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 रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

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

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर 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 2<sup>nd</sup> माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> 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 पढी 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 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 रु.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 is 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 अपील 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. Esdee Paints Limited, Plot No. 106 to 108, Mahagujarat Industrial Estate, Sarkhej Bavla Road, Moraiya, Ahmedabad – 382213 (hereinafter referred to as “the appellant”) against Order-in-Original No. 27/Refund/2022/AC/AM dated 03.10.2022 (hereinafter referred to as “the impugned order”) passed by the Assistant Commissioner, Central GST, Division IV, Ahmedabad North (hereinafter referred to as “the adjudicating authority”).

2. Briefly stated, the facts of the case are that the appellant were engaged in manufacturing of excisable goods viz. Paints and Varnishes; Glazier Putty, Grafting Putty, Resin Cements, etc., and holding Central Excise Registration No. AAACE1378AEM006 and Service Tax Registration No. AAACE1378ASD006. The appellant have filed a refund claim of Rs. 4,33,669/- on 14.03.2022 for Service Tax paid under RCM on Ocean Freight during the period April-2017 to June-2017 on the basis of decision of Hon’ble High Court of Gujarat in case of M/s. SAL Steel Ltd.

2.1 During the course of audit of the records of the appellant, for the period from April-2016 to June-2017, conducted by the officers of Central GST, Audit Commissionerate, Ahmedabad, it was observed that the claimant had imported goods on CIF and FOB basis but have not paid Service Tax amount of Rs. 2,31,909/- under RCM on Ocean Freight, as per Notification No. 16/2017-ST dated 13.04.2017. On being pointed out, the appellant agreed with the objection and paid the Service Tax amount of Rs. 2,31,909/- along with applicable interest of Rs. 1,66,974/- and penalty of Rs. 34,786/- through DRC-03 dated 15.07.2021. Accordingly, audit para was settled and a Final Audit Report No. ST/CE-59/2021-22(Excise/ST) dated 23.08.2021 has been issued. As the appellant had not contested the Audit Para raised vide FAR dated 23.08.2021 before any legal forum or appellate authority and non-submission of the evidence with regard to passing of tax burden, the claim under reference was found liable to be rejected. Further, the said refund claim filed by the appellant, on the basis of the decision of Hon’ble High Court of Gujarat in case of M/s. SAL Steel Limited, has been challenged by the department before Hon’ble Supreme Court of India vide SLP having Diary No. 27023 of 2020, which was pending for decision. Hence, it appeared premature to process the said refund claim. Therefore, a Show Cause Notice No. V/27-17/Refund/Es Dee/2022-23 dated 09.09.2022 was issued to the appellant

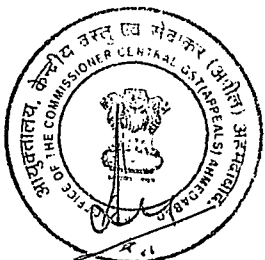
2.2 The adjudicating authority has, vide the impugned order, rejected the refund claim of Rs. 4,33,669/- filed by the appellant, giving findings that the disputed service tax was paid in compliance to Audit Para and the appellant had not contested the audit para before any legal authority and the appellant also having not submitted the evidence with regard to not passing



of tax burden. It was also observed that the said refund claim filed by the appellant on the basis of the decision of Hon'ble High Court of Gujarat in case of M/s. SAL Steel Limited, the said order of Hon'ble High Court has been challenged by the department before Hon'ble Supreme Court of India vide SLP having Diary No. 27023 of 2020, which was pending for decision, therefore, he find refund claim as premature.

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

- o The judgment passed by higher courts is bound on lower courts. Hon'ble Gujarat High Court's in the case of M/s. SAL Steel Ltd. has struck down the levy on Ocean freight by declaring Section 64, 66B, 67 and 94 of the Finance Act, 1994 as ultra vires. There is no provision to retain and restrict the claim of excess service tax paid. They relied on following case laws and requested to set-aside the impugned order;
  - a) Nizam Sugars Ltd.- 2008(9) STE 604
  - b) Pals Micro Systems Ltd – 2007 (6) STR
  - c) CPC (P) Ltd.- 2007 (7) STR 191
- o In relation to audit para not challenged by them, the appellant submitted that when any tax is not required to be paid but paid by taxpayer is nothing but to be considered as excess payment of tax. Based on the pronouncement of decision by the Hon'ble High Court of Gujarat in case of SAL Steel Limited, it is settled that service tax on ocean freight under reverse charge mechanism is ultra-virus and as a result service tax is not liable to be paid by the appellant. Accordingly, if any taxpayer has paid such tax which is legally not required to be paid then the same is to be considered as excess payment of tax. In the present case, the appellant has paid such service tax and filed DRC-03 on 15.07.2021 and claimed for refund in Form-R filed on 14.03.2022, i.e. well within time limit of 1 year available under Section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. Further, there is no provision in Finance Act, 1994 or rules made thereunder which impose a condition that a letter on audit objection is to be filed then only refund is admissible. In this regard, they relied upon the Order-in-Appeal No. AHM-EXCUS-002-APP-15/2022-23 dated 11.07.2022 passed by the Commissioner (Appeals), Central GST, Ahmedabad in case of M/s. Esdee Paints Ltd. (in case of other unit of appellant).
- o With regard to non-submission of evidence regarding passing of tax burden to another person, the appellant submitted that they have paid the Service Tax under RCM, as this tax is paid under RCM and not on supply, it is not possible to recover said amount



from any other person. Also, there is no statutory provision under CGST Act, 2017 which allows appellant to take the credit of the same under GST regime. Accordingly, the tax paid along with interest and penalty is exclusively born by the appellant and burden of said amount has not been passed on to another person. They also submitted CA certificate dated 24.08.2022 stating that burden of such tax amount along with interest and penalty has not been passed on to another person.

- o The SCN has been issued on 09.09.2022 and the same has been received by the appellant on 15.09.2022 and the impugned order has been issued on 03.10.2022. Thus, the impugned order passed by the adjudicating within 18 days of receipt of SCN by the appellant and without offering any personal hearing to the appellant. Thus, the adjudicating authority has clearly violated the instruction issued by CBIC vide Master Circular No. 1053/02/2017-CX dated 10.03.2017.

4. Personal hearing in the case was held on 15.02.2023 through virtual mode. Shri Meet Jadawala, Chartered Accountant, appeared on behalf of the appellant for personal hearing. He reiterated submission made in appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as the submissions made at the time of personal hearing and the copies of documents submitted in support of their submissions. The issue to be decided under the present appeal is whether the refund claim filed by the appellant seeking refund of service tax paid on ocean freight, is admissible or not?

6. On going through the facts of the case, it is noticed that the payment of Rs. 4,33,669/- (Service Tax of Rs. 2,31,909/- + Interest of Rs. 1,66,974/- + Penalty of Rs. 34,786/-) was made by the appellant voluntarily vide DRC-03 dated 15.07.2021 at the time of audit by the department, towards the arrears of service tax on the ocean freight, a liability placed on the importer under RCM. Accordingly, audit para was settled and a Final Audit Report No. ST/CE-59/2021-22(Excise/ST) dated 23.08.2021 has been issued.

6.1 However, the levy on ocean freight has been struck down by Hon'ble Gujarat High Court in the case of M/s. SAL Steel Ltd, by declaring Section 64, 66B, 67 and 94 of the Finance Act, 1994 as ultra vires to the constitution. Consequently, the appellant had filed the present refund claim on 14.03.2022, claiming refund of service tax paid on ocean freight. On the first instance the department had returned back the claim, as in an identical case of M/s. Mosaic India Pvt. Ltd., the department has filed an SLP bearing No. 3760 of 2021 before the



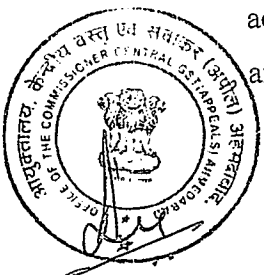
Hon'ble Supreme Court, which is pending for decision. In response, the appellant vide letter dated 14.07.2022, again requested for the said refund, which is the present claim.

7. As regard, the contention of the appellant that the impugned order was issued without conducting personal hearing, I find that the adjudicating authority in the impugned order has discussed as under:

*"14. No reply has been filed by the Noticee within the time specified in the Show Cause Notice. As per the SCN dated 09.09.2022, the claimant has been directed to indicate in writing whether they desire to be heard in person before the case is adjudicated and if no mention is made about this in their written explanation, it would be presumed that they do not desire a personal hearing and the case will be decided ex-parte on the basis of documents / records available with the adjudicating authority. The claimant neither submitted the documents nor appeared before Adjudicating Authority."*

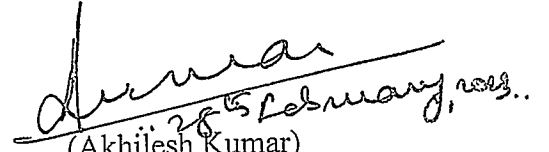
7.1 It is observed that the adjudicating authority has not given any personal hearing. The appellant have contended that no communication for personal hearing was received by them and impugned order was passed within 18 days from receipt of the show cause notice by the appellant, without giving any opportunity for personal hearing. In this regard, I find that as per Section 33A(2) of the Central Excise Act, 1944, as made applicable to Service Tax vide Section 83 of the Finance Act, 1994, when a personal hearing is fixed, it is open to a party to seek time by showing sufficient cause and in such case, the adjudicating authority may grant time and adjourn the personal hearing by recording the reason in writing. Not more than three such adjournments can be granted. Since such adjournments are limited to three, the hearing would be required to be fixed on each such occasion and on every occasion when time is sought and sufficient cause is made out, the case would be adjourned to another date. However, the adjudicating authority is required to give one date a time and record his reasons for granting adjournment on each occasion. However, I find that in the present case, the adjudicating authority has not given any opportunity of personal hearing to the appellant. The adjudicating authority was required to give adequate and ample opportunity to the appellant for personal hearing and it is only thereafter, the impugned order was required to be passed. Thus, it is held that the impugned order passed by the adjudicating authority is clearly in breach of the principles of natural justice.

7.2 In view of the above discussion, I hold that the impugned order passed by the adjudicating authority, without following principles of natural justice, is not legal and correct and I am of the considered view that the same is required to be decided a fresh.




8. In view of the above discussion, without expressing any opinion on the merits of the case, keeping all the issues open, I remand the matter back to the adjudicating authority to reconsider the issue afresh and pass a speaking order after following the principles of natural justice.

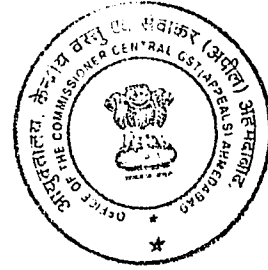
9. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।  
The appeal filed by the appellant stands disposed of in above terms.

  
(Akhilesh Kumar)  
Commissioner (Appeals)

Date : 28.02.2023

Attested

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



**By RPAD / SPEED POST**

To,  
M/s. Esdee Paints Limited,  
Plot No. 106 to 108, Mahagujarat Industrial Estate,  
Sarkhej Bavla Road, Moraiya,  
Ahmedabad – 382213

Appellant

The Assistant Commissioner,  
CGST, Division-IV,  
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 IV, Ahmedabad North
- 4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North  
(for uploading the OIA)

- ~~5) Guard File~~
- 6) PA file