



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: 20221064SW0000621976

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/2514/2021-APPEAL / 3954-58
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-45/2022-23**
 दिनांक Date : **06-10-2022** जारी करने की तारीख Date of Issue 12.10.2022
 आयुक्त (अपील) द्वारा पारित
 Passed by **Shri Akhilesh Kumar, Commissioner (Appeals)**
- ग Arising out of Order-in-Original No. **03/REF/II/2021-22** दिनांक: **09.07.2021**, issued by
 Joint Commissioner(In-situ),Division-III, CGST, Ahmedabad-North
- घ अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Meghmani Organics Ltd,
Plot No.402-3-3 & 452-53-54,
Chharodi, Sanand,
Ahmedabad

2. Respondent

The Joint Commissioner(In-Situ), CGST,Division-III, Ahmedabad North , 2nd
Floor, Gokuldham Arcade, Sarkhej-Sanand Road,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, 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 मामले 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.

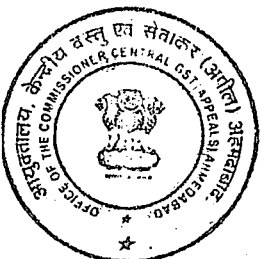
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

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



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा 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 अनुसूची-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."



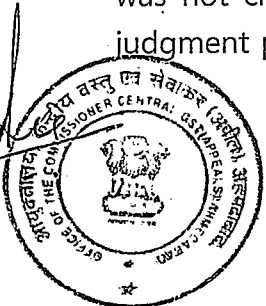
ORDER-IN-APPEAL

This appeal has been filed by M/s. Meghmani Organics Ltd, Plot No.402-3-3 & 452-53-54, Charrodi, Sanand, Ahmedabad (hereinafter referred to as '*the appellant*') against the OIO No. 03/REF/II/2021-22 dated 09.07.2021 (in short '*impugned order*') passed by the Joint Commissioner(in-situ), Central GST, & Central Excise, Division-III, Ahmedabad North (in short '*the adjudicating authority*').

2. During the audit of the appellant's statutory records and the audited books of accounts by the Central Excise & Service tax Auditors, it was noticed that the appellant had made expenses towards Sales Commission in foreign currency on which service tax liability was not discharged. In terms of Notification No.36/2004-ST dated 31.12.2004 (effective from 01.01.2005), the sales commission paid to non-resident customers in foreign currency were chargeable to service tax under BAS. The appellant was therefore asked to submit the actual amount paid towards Sales commission in foreign currency from 01.01.2005 and to discharge the service tax liability on the actual amount. The appellant agreed with the audit objection and willingly paid Rs.32,00,267/- on 05.12.2006. However, the appellant subsequently realized that they were not covered under the purview of the definition of "Commission Agent" which was taxable upto 08.07.2004, and in terms of Notification No.12/2003-ST dated 20.06.2003, the said service was exempted w.e.f 09.07.2004, and that no service tax was applicable upto 16.06.2005, in terms of Notification No.19/2005-ST dated 07.06.2005. They, therefore, filed a claim under Section 11B of the Central Excise Act, 1944 on 12.02.2007, seeking refund of Rs.32,00,267/- mistakenly paid by them.

2.1 As the appellant had taken CENVAT credit of the claimed amount, a SCN was issued on 11.07.2007, proposing rejection of the claim. The said SCN was adjudicated vide OIO No. SD-02/Ref-38/07-08 dated 13.03.2008, rejecting the refund claim. Being aggrieved, the appellant filed an appeal and the Commissioner (A) vide OIA No.157/2008(STC) LMR/Commr(A)/Ahd dated 10.12.2008, observed that in terms of Section 68(2), the recipient of service was made liable to pay tax vide Notification No.36/2004-ST dated 31.12.2004 effective from 01.01.2005, and therefore, the appellant were liable to pay service tax only from 01.01.2005. The matter was, therefore, remanded to the adjudicating authority for computing the quantum of service tax required to be worked out w.e.f. 01.01.2005.

2.2 Against the said OIA, the department filed an appeal before Hon'ble CESTAT, Ahmedabad alongwith stay application. As the stay was not obtained against the operation of said OIA, the matter was adjudicated in de-novo proceedings vide OIO No.SD-02/Ref-04/2010-11 dated 08.4.2010, wherein the amount of Rs.8,91,085/- was ordered to be credited into Consumer Welfare Fund(CWF) as the appellant failed to prove that the incidence of tax had not been passed on to any other person and the remaining amount of Rs.23,09,179/- was rejected. Meanwhile, Hon'ble CESTAT vide Stay Order No.S/684/WZB/AHD/2009 dated 01.06.2009, rejected the stay and decided the matter vide Final Order No.A/11310/2018 dated 22.06.2018 (05.07.2018) and held that service tax was not chargeable during 16.08.2002 to 01.01.2005, in light of Hon'ble Apex Court's judgment passed in the case of Indian National Ship Owners Association. Tribunal also



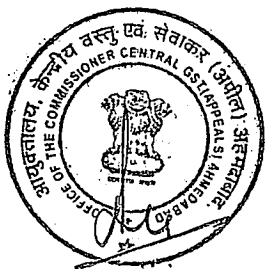
held that the appellant is entitled for refund for the period upto 01.01.2005, subject to verification. Revenue's appeal was thus rejected on merits.

2.3 Meanwhile, the appellant aggrieved by the OIO dated 08.4.2010, filed an appeal before Commissioner (A). The Commissioner (A) vide OIA No.396/ 2010 (STC) MM/ Commr(A)/ Ahd dated 21.10.2010, upheld the impugned order. Against this OIA, the appellant filed appeal before Hon'ble CESTAT, which was decided vide Final Order No. A/11756/2018 dated 17.08.2018 (20.08.2018). Hon'ble CESTAT in the said order held that even though service tax was paid under RCM, there is no escape from the provisions of Section 11B, wherein the test of unjust enrichment is applicable. The matter was remanded with the direction to the appellant to produce their books of accounts to the original adjudicating authority, who shall after verification of the books establish whether the incidence of service tax refund has been passed or otherwise and thereafter process the refund.

2.4 In the denovo proceedings as directed by Hon'ble CESTAT vide Order dated 17.08.2018, the adjudicating authority vide the impugned order dated 09.07.2021, sanctioned the refund of Rs.8,91,085/- to the appellant, which was previously credited to the Consumer Welfare Fund and rejected the remaining amount of Rs.23,09,179/-, being not admissible.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant has preferred the present appeal wherein they contested the impugned order on following grounds:-

- Liability of recipient of any taxable service under RCM has been brought into force only with effect from 18.04.2006 vide Section 66A of the F.A. and the issue is also settled by virtue of judgment passed by Hon'ble Apex as well Bombay High Court in the case of Indian National Ship Owners Association Vs/ UOI-2009(13) STR 235 (Bom) & 2010 (17) STR (J57). But the Jt.Commissioner has allowed the refund only upto 01.01.2005, therefore, the order disallowing the refund from 02.02.2005 to 17.04.2010, aggregating to Rs.23,09,179/- is illegal and without any jurisdiction. As service tax of said amount was deposited, the same should be refunded.
- For the period from 18.04.2006 to 1.09.2006, the services received and used in foreign territories was exempted vide various notification, hence there is no liability to pay service tax. In support of their argument they placed reliance on following case laws:-
 - 2009(16) STR 748-(Tri-) Intas Pharmaceuticals
 - 2014-TIOL 409-CESTAT-Banġ- Infosys Ltd.
 - 2014 (36) STR 1098-KPIT Technologies Ltd.
 - Board's Circular No.36/4/2001 dated 08.10.2001
- They also relied on Board's Circular No.36/4/2001 dated 08.10.2001 & Cir. No. 351/11/2011-TRU dated 22.03.2011. As the services of overseas sales commission agents had been rendered in foreign countries only hence shall remain outside the purview of Finance Act, 1994. The services were received in foreign countries after the goods were exported by them to such foreign countries and the payment of commission was made in foreign currency



- Sale commission agent's services were taxable under BAS but exemption was granted vide Notification No.13/2003-ST dated 20.06.2003 from 09.7.2004 and subsequently by virtue of another notification No.19/2004-ST dated 07.06.2005 the service tax was exempted on commission charged upto 16.06.2005.
- Refund claim was filed on 12.02.2007 and partial refund amount of Rs.8,91,085/- was sanctioned without interest on such delayed payment. Therefore, in terms of Section 11BB of the CEA, 1944, interest on such delayed refund should also be ordered from 13.05.2007 to till actual payment. The refund which has been rejected, if sanctioned should also granted with interest, because revenue has no authority to levy and recover the service tax from the recipient of service in the absence of any charging provisions like Section 66A of the Finance Act. They relied on following case laws:-
 - 2011 (273) ELT 3 (SC)-Ranbaxy Laboratories
 - 2004 (61) RLT 726- Afrique Tradelinks
 - 2004(170) ELT 4 (Raj)- J.K.Cements upheld by Apex Court-2005(179) ELT A150 (SC)-

4. Personal hearing in the matter was held on 26.09.2022. Mr. Sudhanshu Bissa, Advocate, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum.

5. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, earlier OIOs, OIAs, CESTAT Orders, the submissions made by the appellant in their appeal memorandum and the evidences available on records. The limited issue to be decided under the present appeal is whether the appellant is eligible for refund of service tax amount of Rs.32,00,266/- paid by them under reverse charge mechanism, to foreign based commission agent? The period of dispute involved is from 16.08.2002 to 01.09.2006.

6. On going through the facts of the case, it is observed that the appellant had filed the claim for Rs.32,00,267/- on 12.02.2007, seeking refund on the grounds that they had mistakenly paid the service tax on commission paid to the person who did not have any office or permanent establishment in India and being recipient of said service, they were not covered under the purview of the definition of Commission Agent. They contended that the Business Auxiliary Service (BAS) provided by the commission agent has been exempted w.e.f 09.07.2004 and subsequently, vide Notification No.19/2005-ST dated 07.06.2005, no service tax was applicable upto 16.06.2005, on commission charges. Further, they also stated that up to 18.04.2006, there was no liability on the service recipient as, the liability on recipient of any taxable service under RCM has been brought into force only with effect from 18.04.2006 vide Section 66A of the F.A.1994. The issue also stands settled by Hon'ble Apex as well as by Bombay High Court in the case of Indian National Ship Owners Association Vs/ UOI-2009(13) STR 235 (Bom) & 2010 (17) STR (J57). They, therefore, claim that the order disallowing the refund from 02.02.2005 to 17.04.2006, aggregating to Rs.23,09,179/- is illegal, hence the service tax of said service should be refunded alongwith interest. They have also claimed interest on the sanctioned claim of Rs.8,91,085/- by the impugned order.

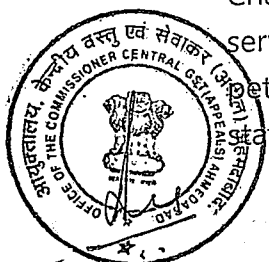


6.1 It is observed that the Commissioner (A) vide OIA, No. 157/2008(STC) LMR/Commr.(A)/Ahd dated **10.12.2008**, by relying on the Larger Bench decision passed in the case of Hindustan Zinc Ltd- 2008 TIOI 1149 CESTAT-DEL, on the taxability of the services received from foreign commission agent, held that in terms of Notification No.36/2004-ST dated 31.12.2004, the liability to pay tax on the recipient of the services received from outside India, was made effective from 01.01.2005. Therefore, the matter was remanded to the adjudicating authority for quantifying the service tax w.e.f 01.01.2005. In the departmental appeal filed against the said OIA, similar view was taken by Hon'ble CESTAT, Ahmedabad vide Final Order No.A/11310/2018 dated **22.06.2018** (05.07.2018), by relying on Hon'ble Apex Court judgment passed in the case of Indian National Ship Owners Association, wherein Hon'ble Tribunal held that service tax was not chargeable during 16.08.2002 to 01.01.2005, hence the appellant were entitled for refund for the period upto 01.01.2005, subject to the verification of records. Accordingly, departmental appeal was dismissed. However, no appeal was preferred by the appellant against the said OIA dated 10.12.2008.

6.2 Based on the remand directives issued, vide OIA dated 10.12.2008, the refund sanctioning authority sanctioned the refund of Rs.8,91,085/- (pertaining to service tax paid upto 01.01.2005) vide OIO No.SD-02.Ref-04/2010-11 dated **08.04.2010**. However, the said amount was credited to Consumer Welfare Fund as the appellant could not produce the balance sheet for the year 2006-07 to prove that the incidence of service tax was not passed on to others. The remaining service tax amount of Rs.23,09,179/- paid from 01.01.2005 to 01.09.2006 was held being inadmissible and rejected in light of the decision passed vide aforesaid OIA.

6.3 This OIO was challenged by the appellant but was upheld vide OIA dated **26.10.2010**. The appellant went in appeal against said OIA challenging the issue of invoking unjust enrichment. Hon'ble Tribunal vide Final Order No. A/11756/2018 dated **17.08.2018**, held that the provisions of unjust enrichment is applicable and observed that even though the service tax was paid under RCM, there is no escape from the provisions of Section 11B wherein the test of unjust-enrichment is necessary before sanction of refund. Hon'ble Tribunal, therefore, remanded the matter with the direction to the appellant to produce the book of accounts before the adjudicating authority who after verification of the books establish whether the incidence of service tax refund has been passed or otherwise and thereafter process the refund. The impugned order dated **09.07.2021** was passed in consequence to the above CESTAT Order.

6.4 It is observed that Hon'ble Bombay High Court, in the judgment passed in Writ Petition No. 1449/2006 dated 11-12-2008 in the case of *Indian National Shipowners Association v. Union of India* [2009 (13) S.T.R. 235 (Bom.)] had held that service recipient in India is liable to Service tax for service received from abroad only from 18-4-2006 after enactment of Section 66A of Finance Act, 1994. It was further held that person providing service alone regarded as an assessee as per Chapter V of Finance Act, 1994 and Rule 2(1)(d)(iv) of Service Tax Rules, 1994 cannot be framed as not to carry the purpose of the Chapter V *ibid*. Further, services provided to petitioners outside India became taxable service as per Explanation to Section 65(105) *ibid* but charge being on service provider, petitioners being service recipients were not liable. The Hon'ble High Court noted that statutory provision was absent to charge Service tax from recipient before enactment of



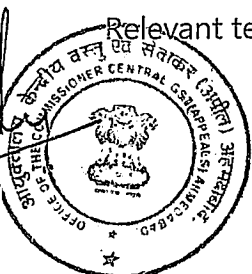
Section 66A of Finance Act, 1994. This decision was upheld by the Apex Court -2010 (17) S.T.R. 157 (S.C.)).

6.5 Hon'ble CESTAT in the present case, while dismissing the departmental appeal has relied on the above judgment. However, vide Final Order No. A/11310/2018 dated **22.06.2018**, Tribunal held that service tax was not chargeable during 16.08.2002 to 01.01.2005 and the appellant is eligible for refund upto 01.01.2005. Similar stand was taken by the Commissioner (A) in OIA dated 10.12.2008, which I find was never challenged then by the appellant before Hon'ble Tribunal. Therefore, claiming eligibility of refund upto 17.04.2006 in terms of Hon'ble Bombay High Court above judgment (*instead of period upto 01.01.2005 as held admissible by Commissioner (A)*), at this juncture, appears to be unlawful and unsustainable. Moreover, Hon'ble Bombay High Court's abovementioned judgment in the case of *Indian National Shipowners Association* was passed on 11-12-2008, they could have very well challenged the decision of Commissioner(A)'s OIA dated 10.12.2008, which they failed to do so. Hence, now they cannot take a plea seeking refund of remaining service tax amount of Rs.23,09,179/-, on the argument that their liability as service recipient for said service arises only from 18-4-2006.

6.6 Further, I also find that the appellant, in the second round of litigation before CESTAT, challenged the limited issue of refund of Rs.8,91,085/- sanctioned but credited to Consumer Welfare Fund (CWF). Hon'ble CESTAT vide Final Order No.A/11756/2018 dated **17.08.2018**, remanded the matter with the direction to the appellant to produce the book of accounts before the adjudicating authority, who on verification of the books establish whether the incidence of service tax refund has been passed or otherwise and thereafter process the refund. Thus, the issue before adjudicating authority was limited to verify the books of accounts and examine whether incidence of tax has been passed on or otherwise. In the impugned order dated **09.07.2021**, the adjudicating authority after taking into consideration the Certificate dated 07.05.2021, issued by their Chartered Accountant, Shri C.C.K. Khandwala & Associates, Ahmedabad (*mentioning that the service tax paid for which refund is claimed is shown as receivables in books of accounts of the Company and that the appellant has not taken any benefit which falls under the un-just enrichment*), brought back the amount of Rs.8,91,085/- from CWF and sanctioned the same to appellant. So, I find that the adjudicating authority has properly followed the directives passed by the Hon'ble CESTAT, Ahmedabad vide order dated 17.08.2018.

7. Coming to the applicability of Section 11BB on the amount refunded, I find that in terms of provisions of Section 11BB of Central Excise Act, 1944, wherever the refund claim is sanctioned beyond the prescribed period of three months of filing of the claim, the interest thereon shall be paid to the applicant at the notified rate. As per explanation to Section 11BB, where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or any court against an order of the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise], under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.

Relevant text of Section 11BB is reproduced below:-



SECTION [11BB. Interest on delayed refunds. — If any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, [not below five per cent] and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by Notification in the Official Gazette], on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty :

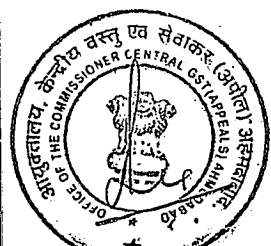
Provided that where any duty ordered to be refunded under sub-section (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation. - Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal [, National Tax Tribunal] or any court against an order of the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise], under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.]

7.1 In the present case, the services received from foreign commission agent was held to be taxable with effect from 01.01.2005 by the Commissioner (A) vide OIA dated 10.12.2008. Once the admissibility of the refund is decided, I find that the appellant is eligible for refund and interest in terms of Section 11BB which shall accrue if refund is not granted within three months from the date of application.

7.2 Hon'ble Apex Court in the case of Ranbaxy Laboratories Ltd -2012 (27) S.T.R. 193 (S.C.), held that;

"9. It is manifest from the afore-extracted provisions that Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below Proviso to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under sub-section (1) of Section 11B of the Act and that the said Explanation does not



have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable."

The above decision was followed by Hon'ble High Court of Gujarat in the case of Kamakshi Tradexim (India) Pvt. Ltd. - 2017 (351) E.L.T. 102 (Guj.). Further, even CBIC vide Circular No. 670/61/2002-CX, dated 1-10-2002, has clarified that the relevant date in this regard is the expiry of three months from the date of receipt of the application under Section 11B(1) of the Act.

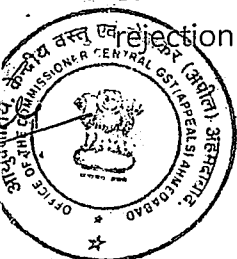
7.3 In the remand proceedings, the refund of Rs.8,91,085/- was held admissible, but the amount was sanctioned and credited to CWF. The refund of Rs.8,91,085/- was subsequently sanctioned to the appellant, vide the impugned order dated 09.07.2021, only after examining the principles of unjust enrichment. Though the original refund application was filed on 12.02.2007, the refund was finally sanctioned by the adjudicating authority on 09.07.2021, only after the appellant produced the Chartered Accountant's certificate on 07.05.2021 to prove that that the burden of tax was borne by them. Thus, it is clear that the refund was sanctioned beyond the time limit prescribed under Section 11B. I, therefore, find that in terms of Section 11BB, interest shall automatically accrue on expiry of three months from the date of application if not granted within the prescribed time. I place my reliance on Hon'ble Rajasthan High Court decision passed in the case of *J.K. Cement Works v. Assistant Commissioner of Central Excise & Customs* reported in 2004 (170) E.L.T. 4 wherein vide Para 33, the court had observed that;

*"A close reading of Section 11BB, which now governs the question relating to payment of interest on belated payment of interest, makes it clear that relevant date for the purpose of determining the liability to pay interest is not the determination under sub-section (2) of Section 11B to refund the amount to the applicant and not to be transferred to the Consumer Welfare Fund but the relevant date is to be determined with reference to date of application laying claim to refund. **The non-payment of refund to the applicant claimant within three months from the date of such application or in the case governed by proviso to Section 11BB, non-payment within three months from the date of the commencement of Section 11BB brings in the starting point of liability to pay interest, notwithstanding the date on which decision has been rendered by the competent authority as to whether the amount is to be transferred to Welfare Fund or to be paid to the applicant needs no interference.**"*

The above judgment was also maintained by Hon'ble Apex Court as reported at - 2005 (179) E.L.T. A150 (S.C.)]

7.4 Following the ratio of above judgments, I find that the liability to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made or ordered to be made. I, therefore, find that the appellant is eligible for interest on the refund of Rs.8,91,085/-.

8. In view of above discussion, I uphold the impugned OIO, to the extent it relates to rejection of refund claim of Rs.23,09,179/- and disallowing the interest on the said



amount. However, I allow appellant's appeal to the extent it relates to interest claimed on sanctioned refund of Rs.8,91,085/-.

9. Accordingly, the impugned order is upheld and the appeal filed by the appellant is allowed / rejected to the above extent.

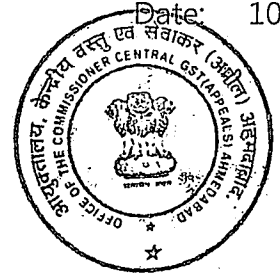
अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

Akhil Kumar
6 October, 2022
(Akhil Kumar)

Commissioner (Appeals)

Attested

Rekha Nair
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad



By RPAD/SPEED POST

To,
M/s. Meghmani Organics Ltd,
Plot No.402-3-3 & 452-53-54,
Charrodi, Sanand
Ahmedabad

Appellant

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

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North.
(For uploading the OIA)
4. Guard File.
5. The Superintendent (System), CGST, Appeals, Ahmedabad, for uploading the OIA on the website.

