



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



स्पीड पोस्ट

क फाइल संख्या : File No : V2(18)12/EA-2/North/Appeals/2019-20 / 13934 70 13138

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-117-2019-20
दिनांक Date : 22-01-2020 जारी करने की तारीख Date of Issue 14/02/2020

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

ग Arising out of Order-in-Original No. 383/AC/10-11-refund दिनांक: 25.05.2010 , issued by Asst. Commissioner, Div-I, Ahmedabad-II

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
MSN Intermediates Ltd
Ahmedabad

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) केंद्रीय 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 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 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 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 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.

- (6) 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 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 order is arising out of Hon'ble CESTAT, Ahmedabad's Final Order No.A/11362/2018 dated 09.07.2018 passed against Order-in-Appeal No.218/2010/AHD-II/CE/CMC/COMMR-A/AHD dated 06.10.2010 in the case of M/s MSN Intermediates Ltd V/s CCE-Ahmedabad-II.

2. Facts of the case, in brief, are that the "department" has filed an appeal on 09.08.2010 against Order-in-Original NO.383/AC/10-11-Refund dated 25.05.2010 [hereinafter referred to as "impugned order"] passed by the Assistant Commissioner of erstwhile Central Excise, Division-I, Ahmedabad-II [hereinafter referred to as "adjudicating authority"], as per Review Order dated 29.07.2010 of the then Commissioner of Central Excise, Ahmedabad-II, in the case of M/s MSN Intermediates Ltd, Plot No.205-206/4, Phase-1, GIDC, Naroda, Ahmedabad [hereinafter referred to as "respondent"].

2.1 The respondent was working as 100% EOU and had converted into DTA unit from 12.05.2008. They had filed a refund claim amounting to Rs.43,39,078/- before the department on 12.03.2010 under the provisions of Rule 5 of Cenvat Credit Rules, 2004 [for short-CCR], in respect of unutilized accumulated Cenvat Credit lying in balance as on 12.05.2008, as they could not utilize the same till the date of conversion into DTA unit. The department has sanctioned the said refund claim in cash vide impugned order.

2.2 The appeal was filed by the department on the grounds that [i] the respondent was not eligible for refund under the provisions of Rule 5 of CCR read with Notification No.5/2006-CE (NT) dated 14.03.2006 as there was no export during the relevant period under which the refund is preferred and [ii] the entire claim is time barred as time limit of one year prescribed under the said notification is applicable. The departmental appeal was upheld by the Commissioner (Appeals) vide OIA No. No.218/2010/AHD-II/CE/CMC/COMMR-A/AHD dated 06.10.2010 and directed the respondent to pay back the refund amount with interest.

2.3 Being aggrieved, the respondent filed an appeal before the Hon'ble CETAT, Ahmedabad. The Hon'ble CESTAT, vide order dated 09.07.2018 supra, has remanded the case to the Commissioner (Appeals) for reconsidering the case on the limited issue that whether the refund sanctioned by the adjudicating authority was erroneous or otherwise, so as to invoke the provisions of Section 11 A of the Central Excise Act, 1944 (CEA) for the recovery of refund sanctioned.



3. Personal Hearing in the matter was held on 08.01.2020. Shri Amal Dave, Advocate, appeared on behalf of the respondent and reiterated the submissions made in Appeal Memorandum. He submitted copies of Hon'ble Gujarat High Court's order in case of Commissioner of Customs (Preventive), Jamnagar V/s Shree Ram Steel & Rolling India [2006 (205) ELT 82 (Guj) and order of CESTAT, Ahmedabad in case of Dupen Laboratories Pvt Ltd V/s Commissioner of Central Excise and Service Tax, Daman reported in 2014 (301) ELT 344 (Tri-Ahmd) alongwith clarification issued by the Board. He further submitted a written submission along with judgment dated 11.02.2019 of Hon'ble High Court of Gujarat in the case of M/s Thermax Ltd V/s Union of India.

4. In the written submission dated 08.01.2020, the Ld Advocate submitted that for recovery of erroneous refund amount, a Show Cause Notice is compulsory under Section 11 A of the CEA. He relied on decisions of Tribunal, Ahmedabad [2014 (301) ELT 344]; Hon'ble High Court of Gujarat [2006 (25) ELT 82; Madras High Court [2015 (32) ELT 703 and CBEC's Supplementary Instruction [chapter 13 para 3.1]. He further submitted that without prejudice to the above, as per Section 142 of CGST Act, 2017, if any credit arises out of any proceedings, then the same is to be refunded in cash and not re-credited to the Cenvat account; since the claim was of unutilized Cenvat credit under Rule 5 of CCR, the amount of Cenvat credit has to be given back in cash as per CGST Act.

5. I have carefully gone through the facts of the case, submissions made by the department as well by the respondent and Hon'ble Tribunal's order dated 09.07.2018 supra. The instant appeal is taken as a remand proceeding on the basis of Hon'ble Tribunal's order dated 09.07.2018. The relevant para of the said order is reproduced below:

4. On careful consideration of the submission made by both the sides and perusal of the records, I find that judgment passed by the Hon'ble Gujarat High court and various other High Courts on the issue that whether for recovery, of refund already sanctioned, the SCN under Section 11A is necessary in each and every case. From the observation of the Hon'ble High Court judgment particularly in the jurisdictional High Court judgment of Gujarat State Fertilizers & Chemicals Ltd. Vs. CCE (Supra), I find that Hon'ble court has made distinction that only in case of erroneous refund provision of section 11A shall apply but in case refund is not erroneous, the process of issuance of SCN and adjudication thereof for recovery of the refund is not required. The Ld. Commissioner has directed the appellant to pay back, the refund with applicable interest while allowing the Revenue's appeal. However, the vital aspects that whether the refund was erroneous or otherwise was not examined by the Ld. Commissioner (Appeals), therefore, in order to the recovery of refund, this aspects has to be examined then only it can be decided that whether by order of Commissioner (Appeals) itself recovery can be made or the entire process of Section 11A such as issuance of SCN, adjudication is required. Therefore, I am of the view that the matter on this aspect should be reconsidered by the Ld. Commissioner (Appeals).



5. The appeal is allowed by way of remanding the matter to the Commissioner (Appeals) only on the limited issue relates to the direction given by the Ld. Commissioner for recovery of refund along with interest.

From the above referred order, it is observed that the limited issue to be decided in the matter is as to whether the refund sanctioned by the adjudicating authority, vide his impugned order, is erroneous or otherwise.

6. In the above decision, I find that the Hon'ble Tribunal has firmly discussed, by relying Hon'ble High Court of Gujarat's decision in the case of M/s Gujarat State Fertilizers & Chemical [2017 (352) ELT 308] that only in case of erroneous refund, provision of section 11A shall apply but in case refund is not erroneous, the process of issuance of SCN and adjudication thereof for recovery of the refund is not required.

7. In the instant case, I find that the respondent submitted refund claim under Section 11 B of CEA in respect of unutilized Cenvat credit as per procedure prescribed under Rule 5 of CCR. The refund claim allowed by the adjudicating authority was set aside by the Commissioner (Appeals) and hold that the refund claim hits by limitation of one year, as contended by the department in their appeal. He also ordered for recovery of the refund amount with interest. Therefore, the recovery of the said refund amount already sanctioned to the respondent arisen on account of Commissioner (Appeals) order only. The Hon'ble High Court of Gujarat in the case of M/s Gujarat State Fertilizers & Chemical supra has held that in such situation, it cannot be said to be on the grounds of erroneous refund. The relevant portion of the decision is reproduced below:

"In the present case, the appellant-assessee submitted six refund claims under Section 11B of the Act. The adjudicating authority allowed the said claims and ordered to refund the amount paid in excess. The first appellate authority dismissed the appeal preferred by the Revenue. However, in appeal, the learned Tribunal set aside the order of refund, and therefore, necessity of recovery of the amount already paid, pursuant to the order-in-original passed in the refund application had arisen, and therefore, it cannot be said to be recovery of the duty on the ground of erroneous refund. Therefore, in the facts and circumstances of the case, Section 11A of the Act shall not be applicable as recovery of the duty cannot be said to be on the ground of erroneous refund. As observed hereinabove, as such, the order-in-original passed by the adjudicating authority in the refund applications submitted by the appellant-assessee came to be set aside by the appellate authority and before the appellate authority decided the appeal, the amount as per the order-in-original was already refunded/returned. Therefore, on the appeal being allowed the order-in-original passed in refund applications came to be set aside and necessary consequences of the return of the said amount, which was paid earlier pursuant to the order-in-original was required to be returned and/or the cause for recovery of the said amount has arisen. Under the circumstances, Section 11A of the Act shall not be applicable as it was not the case of recovery of duty on erroneous refund."



I find that in the instant case, the refund was sanctioned by an order of Assistant Commissioner and it cannot be considered as erroneous. The facts and circumstances of the instant case, in relation to the recovery of the refund claim sanctioned by the original adjudicating authority, is similar to the facts mentioned in the case of M/s Gujarat State Fertilizers & Chemical. Accordingly, it is held that this case is also not falling under the category of erroneous refund. Under the circumstances, necessity of Show Cause Notice under Section 11A of the CEA, as contend by the respondent, is not required for the recovery of refund along with interest.

8. As regards the plea of revenue neutrality taken by Learned Advocate, I find that the same is not relevant for this remand proceeding.

9. The appeal remanded back by the Hon'ble Tribunal on the limited issue stands disposed of in above terms.

Akhilesh Kumar
 (Akhilesh Kumar)
 Commissioner (Appeals)
 /01/2020
 22nd January 2020

ATTESTED

Mohan V.V.
 (Mohan V.V)
 Superintendent
 CGST (Appeals) Ahmedabad



By R.P.A.D/Speed Post.

To,
 M/s MSN Intermediates Ltd,
 Plot No.205-206/4, Phase-1,
 GIDC, Naroda, Ahmedabad

Copy to:

- 1) The Principal Chief Commissioner, CGST, Ahmedabad Zone.
- 2) The Commissioner, CGST, Ahmedabad North.
- 3) The Dy./Asst. Commissioner, CGST, Div-I, Ahmedabad North
- 4) The Asst. Commissioner (System), CGST, Ahmedabad North.
- 5) Guard File.
- 6) P. A. File.

