



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: 20220364SW0000777CD9

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/CEXP/496/2021-APPEAL *1885-69*
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-79-2021-22**
दिनांक Date : **17-03-2022** जारी करने की तारीख Date of Issue 17.03.2022
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar, Commissioner (Appeals)**
- ग Arising out of Order-in-Original No. **06/Refund/2020-21** दिनांक: **31.03.2021**, issued by Joint Commissioner, CGST, Division-IV, Ahmedabad-North
- ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

**M/s Ashutosh Metal Private Limited
255, Mahagujarat Industrial Estate, Village Moraiya,
Ta: Sanand, Changodhar, Dist: Ahmedabad-382213**

2. Respondent

The Joint Commissioner, CGST & Central Excise, Division-IV, Ahmedabad North

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।

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.

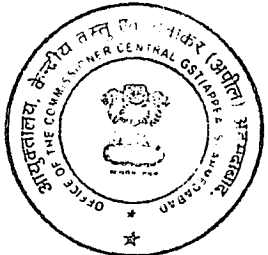
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 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.

- (8) 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।

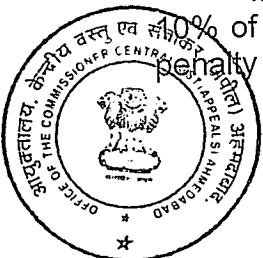
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (vii) amount determined under Section 11 D;
- (viii) amount of erroneous Cenvat Credit taken;
- (ix) 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

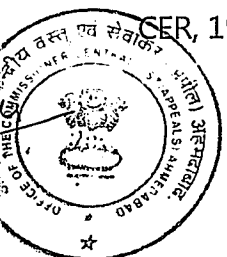
M/s. Ashutosh Metal Pvt. Ltd, 225, Phase-III, Mahagujarat Industrial Estate, Sarkhej-Bavla Highway, Moraiya, Ahmedabad-382113 (hereinafter referred to as '*the appellant*') have filed the instant appeal against the OIO No.06/Refund/2020-21 dated 31.03.2021 (in short '*impugned order*') passed by the Joint Commissioner, Central GST, Division-IV, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

2. The facts of the case, in brief, are that during the course of audit of the records of the appellant by the departmental officers, it was observed that during April, 2017 to June, 2017 (F.Y. 2017-18), they had not paid service tax on Ocean Freight, paid in respect of the goods imported and expenses incurred by them for 'Transportation of Goods by vessel' from outside India to Customs Station in India, which was payable by them under Reverse Charge Mechanism (RCM). On being pointed out, the appellant, in compliance of the audit objection, voluntarily paid the amount of Rs.5,22,663/- alongwith interest and penalty vide Challan CPIN No.18122400500354 dated 28.12.2018.

3. As they had not availed Input Tax Credit (ITC) of the above service tax payment undertaken in GST regime, they, therefore, filed a claim, seeking refund of service tax amount of Rs.5,22,663/- paid under RCM in terms of Notification No.12/2013-ST, dated 01.07.2013. The jurisdictional Deputy Commissioner had rejected the claim and issued FORM-RFD-06 dated 04.06.2020 with the remarks that the "*claim pertains to Service Tax for the period prior to implementation of GST therefore does not attract Refund under the provisions of CGST, Act. The amount paid voluntarily on Audit objection and issue was settled. Refund claim has no merits.*" Aggrieved by the order, the appellant filed appeal before the Joint Commissioner (Appeals), Ahmedabad, who vide OIA No.AHM-EXCUS-002-APP-JC-021/20-21 dated 14.08.2020, rejected the appeal on the ground that the issue pertains to service tax refund and falls under the purview of the erstwhile Finance Act, 1994. He also observed that the refund claim in the present case was to be preferred under the existing law and not under the provisions of CGST as laid down under Section 142(3) of the CGST Act.

3.1 The refund claim of the appellant is on the ground that the Hon'ble High Court of Gujarat in the case of M/s. SAL Steel Ltd (Civil Application No.20785 of 2018), vide Order dated 06.09.2019, struck down the levy of service tax on ocean freight by declaring Notification No.15/2017-ST and Notification No.16/2017-ST (inserting Explanation V to Reverse Charge Notification No. 30/2012-S.T.) and making Rules 2(1)(d)(EEC) & 6(7CA) of Service Tax Rules, 1994 and the provisions of Sections 64, 66B, 67 and 94 of the Finance Act, 1994, as *ultra vires*. Further, in similar GST matter, in case of M/s. Mohit Minerals Pvt. Ltd. (Civil Appeallication No. 726 of 2018), the entry in IGST RCM Notification, levying IGST on ocean freight was struck down considering it as *ultra vires*. The appellant, therefore, again filed a claim for Rs.5,22,663/- of service tax paid on ocean freight, seeking refund under Section 11B of the CEA, 1944 read with Section 83 of the Finance Act, 1994 and Rule 173 S of the

CEA, 1944.



3.2 The jurisdictional Joint Commissioner of the Division observed that neither the payment was made under protest nor was the refund in consequence of any judgment, decree, order in assessee favor. Considering the fact that the service tax amount of Rs.5,22,663/- was deposited on 28.12.2018, whereas the claim was filed on 04.01.2021, he vide the impugned order, rejected the claim being time barred, without issuing any show cause notice.

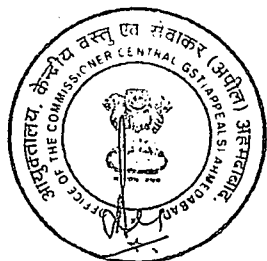
4. Aggrieved by the impugned order, the appellant has preferred this appeal on following grounds;

- Hon'ble High Court has struck down the levy of service tax on ocean freight under reverse charge mechanism by declaring Notification No. 30/2012-S.T. dated 30.6.2012 and the IGST Notification No.08/2017-IGST and Notification No. 10/2017-IGST, as ultra vires. As there is no statutory sanction for levy and collection of such tax hence refund of such tax is fundamental right and it has nothing to do whether the payment was made under protest or not. Reliance placed on decision passed in the case of State of Jharkhand Vs Ambay Cement, 2005.
- In case where 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, order, decree or direction shall be the relevant date in terms of Section 11B(5)(B)(ec) of the CEA, 1944. In the present refund case, Section 11B(5)(B)(ec) shall apply and not Section 11B(5)(B)(f). Therefore, the relevant date should be counted from the date of order i.e. 06.09.2019 and not from date of payment (28.12.2018) as held by the J.C. , hence the claim is well within time limit.
- Principles of natural justice were not followed as without granting an opportunity of personal hearing, the order was passed against them.

5. Personal hearing in the matter was held on 17.01.2021 through virtual mode. Shri Chitrang Atul Shah, Chartered Accountant, appeared on behalf of the appellant for hearing. He reiterated the submissions made in the appeal memorandum.

6. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum and the evidences available on records. The limited issue to be decided under the present appeal is whether rejection of refund of service tax paid on ocean freight under RCM, under Section 11B of the CEA, 1944, is legally correct or not?

7. I find that the adjudicating authority has at para-14 of the impugned order, observed that the aforesaid judgment of Hon'ble High Court of Gujarat has been challenged by the department as a SLP alongwith stay application bearing No. SLC(C)/3760/2021 has been proposed to be filed before Hon'ble Supreme Court, however, till date no stay has been granted. He further observed that no protest was lodged by the appellant to prove that the payment was not made voluntarily and the fact that the present refund is not in consequence of judgment, decree, order or direction of appellate authority, in favour of the appellant. However, he, without giving any finding on the eligibility of refund on merits, rejected the claim as time



barred, for the reason that service tax amount was deposited on 28.01.2018, whereas the claim was filed on 04.01.2021.

7.1 It is further observed that apart from challenging the issue of time bar, the appellant has also argued that natural justice was denied to them by the adjudicating authority as they were not given opportunity to represent their side of facts in the matter before rejecting their claim for refund in the case.

7.2 On examining the impugned order, I find that the contention raised by the appellant regarding non-adhering to the principles of natural justice is correct as the adjudicating authority at para-16 of the impugned order has stated that;

"Since, I am under no ambiguity as far as time barred issue; I do not intend to seek any clarification in this regard and subsequently do not incline towards issuing Show Cause Notice."

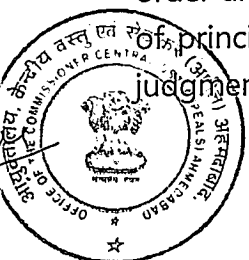
Thus, in the instant case, the notice proposing rejection of the claim was not issued to the appellant and the claim was rejected without giving any opportunity to the appellant to defend their case. It is settled legal position that rejection of refund claim without issuance of SCN cannot sustain in law. A SCN offers the noticee an opportunity to submit his oral or written submission before the adjudicating authority on the charges alleged in the SCN. The issuance of show cause notice is therefore mandatory requirement according to the principles of natural justice which are commonly known as *audi alteram partem* which means that no one should be condemned unheard.

7.3 The Hon'ble Tribunal, Chennai in the case of M/s ITC Ltd – [2018(9) TMI 1590-Cestat Chennai] held that;

"a notice is a right of the party to enable him to know the grounds for rejection of the refund claim so as to arm himself to defend the case. It is the foundation of any lis in taxation proceedings."

Apart from that, before rejecting the refund claim in question, no fair or proper opportunity of hearing was granted to the appellant. It is a settled law that every assessee/appellant should have been granted to represent their case, as it is incumbent on a *quasi judicial* authority to grant him an opportunity of being heard. This is the rule of *audi alteram partem* which requires to be strictly followed by all *quasi judicial* authorities. This lapse on the part of the adjudicating authority brings to the fore a legal infirmity in the impugned order.

7.4 The Hon'ble Apex Court in the case of *Uma Nath Pandey v. State of U.P.* reported in 2009 (237) E.L.T. 241 (S.C.) held that violation of principles of natural justice is opposed to the fair adjudication and conscience. The appellant should be made aware of the allegations made against them which may result into a penal order and any infraction shall entail the action liable to be struck down for violation of principles of natural justice. It would be apt to quote paragraph 19 of the said judgment:-



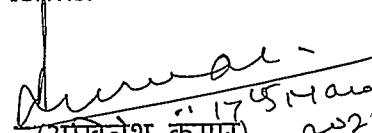
"19. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice."

7.5 In given circumstances, the impugned order calls for interference for violation of principles of natural justice and is required to be set-aside without going into the merit of the case.

8. In view thereof, I set-aside the impugned order and remand the matter to the adjudicating authority with a direction to decide the case afresh after following the principles of natural justice and considering the submissions of the appellant. Needless to say, the adjudicating authority shall give notice and a reasonable opportunity of person hearing before passing the order. The appellant is at liberty to file all documentary evidences before the adjudicating authority.

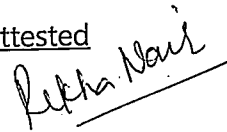
9. In view of the above discussions and findings, the impugned order is set-aside by way of remand.

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


(अखिलेश कुमार) 17/5/22
आयुक्त(अपील्स)

Date: 03.2022

Attested


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

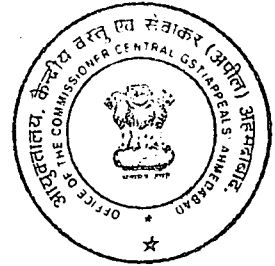
By RPAD/SPEED POST

To,
M/s. Ashutosh Metal Pvt. Ltd,
225, Phase-III, Mahagujarat Industrial Estate,
Sarkhej-Bavla Highway, Moraiya,
Ahmedabad-382113

The Joint Commissioner
CGST, Ahmedabad North
Ahmedabad

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.



- **Appellant**

- **Respondent**

