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

DIN: 20230864SW0000999EBB

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/ 3810 /2023-APPEAL/5062 -66

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-85/2023-24**
दिनाँक Date : 25-**08-2023** जारी करने की तारीख Date of Issue 28.08.2023

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Shiv Pratap Singh**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **CGST/A'bad North/Div-VII/REF/DC/907/P.C./2022-23** दिनाँक: **20.2.2023**, issued by The Deputy Commissioner, CGST Division-VII, Ahmedabad North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant
P C Snehal Construction Co.,9th Floor, City Center,Near Swastik Char Rasta, C.G. Road,Navrangpura, Ahmedabad - 380009

2. Respondent
The Deputy Commissioner, CGST Division-VII, Ahmedabad North,4th Floor, Shajanand Arcade, Nr. Helmet Circle, Memnagar, Ahmedabad-380052

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा 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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

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

कार्यालय, केन्द्रीय वस्तु एवं सेवाकर (अपील) आयुक्त, अहमदाबाद
OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS), AHMEDABAD

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

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER IN APPEAL

M/s. P.C. Snehal Construction Co., 9th Floor, City Centre, Near Swastik Char Rasta, C.G.Road, Navrangpura, Ahmedabad-380009 (hereinafter referred to as '*the appellant*') have filed the present appeal against the Order-in-Original No. VII/Ref/DC/907/P.C./ 2022-23 dated 20.02.2023, (in short '*impugned order*') passed by the Deputy Commissioner, Central GST, Division-VII, Ahmedabad North (hereinafter referred to as '*the refund sanctioning authority*'). The appellant were engaged in providing taxable services and were registered under Service Tax Registration No. AACFP6233AST001.

2. The facts of the case, in brief, are that the appellant were engaged in providing Construction service to M/s. Torrent Power Ltd. Based on the intelligence a case was booked by the DGCEI, AZU, as it appeared that the appellant had wrongly availed the benefit of exemption Notification No.15/2004-ST as amended vide Notification No.01/2006-ST dated 01.03.2006 by incorrectly availing 67% abatement from the value of the "Commercial and Industrial Construction Service" provided, without satisfying the conditions of the notification. A notice was therefore issued proposing service tax recovery of Rs.38,53,888/- which was adjudicated vide O-I-O No. 36/STC-AHD/ADC(MKR)/2011-12 dated 14.10.2011. Aggrieved, the appellant filed an appeal and Commissioner (A) vide OIA dated 10.02.2012, rejected the appeal and upheld the O-I-O. The appellant challenged the said OIA before Hon'ble CESTAT. Hon'ble CESTAT vide Order No. A/11094/2022 dated 06.09.2022, set-aside the impugned O-I-A and held the demand of service tax raised as not sustainable. Consequently, the appellant filed a refund claim amounting to Rs.36,13,476/- along with interest of Rs.62,68,819/-. The refund sanctioning authority vide impugned order allowed the refund of Rs.9,04,000/- and rejected the remaining claim of Rs. 27,09,333/- and interest.

3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant preferred the present appeal on the grounds elaborated below:-

- Hon'ble CESTAT Ahmedabad has vide order CESTAT A/11094/2022 dtd 6th September, 2022 held that before 1" June, 2007, service tax cannot be leviable on Commercial and Industrial Construction services ("CICS"). Hence, service tax amounting to Rs. 27,09,333/- deposited to the credit of the Central government before 1st June, 2007 is paid under mistake of the law.

- Refund claim has been filed following the Hon'ble CESTAT Ahmedabad order CESTAT A/11094/2022 and hence validity of the said refund cannot be questioned. They placed reliance on the judgment pronounced in case of M/s. Raheja Regency Co- operative Housing Society Ltd. [2022 (12) TMI 601] CESTAT Mumbai has held that where it is clear that the appellant cannot be said to be liable to pay service tax in any manner whatsoever in as much as what was paid by the appellant was not tax as envisaged under the Finance Act, 1994. Thus, the amount paid by the Appellant in the given case would not take the character of tax as service tax levy on "CICS" held as out of the scope of service tax and is simply an amount paid under mistake of law and hence limitation period prescribed u/s 11B of the Central Excise Act, 1944 is just not applicable. The, amount of service tax deposited under "CICS" while filing periodical service tax

returns is liable to be refunded along with Interest@ 12% from the date of deposit till date of actual refund to the appellant and impugned OIO needs to be set aside.

- The refund application filed in given case is for the amount paid under mistake of law and not for the refund of the duty paid and hence, the principle of unjust enrichment is not applicable. The certificate of the Chartered Accountant mentioning that the above amount has been paid by the appellant from its own pocket is submitted.

- The refund granted was of service tax amounting to Rs. 9,04,143/- was paid on 9" August, 2010 i.e. during the investigation proceedings initiated against the appellant. Copy of the challans are submitted. The said refund has been received on 20" February, 2023. The appellant is eligible for interest on the said refund @ 12% for the period from 9" August, 2010 till 20 February, 2023 as per below submission: they placed reliance in the case of M/s. Parle Agro Ltd [2021 (5) TMI 870 - CESTAT ALLAHABAD] wherein it was held that interest is payable on the amount paid during investigation/audit as well as the amount of pre-deposit and further such interest is payable @ of 12% per annum, following the ruling of Hon'ble Supreme Court in the case of SANDVIK.ASIA LIMITED VERSUS COMMISSIONER OF INCOME-TAX AND OTHERS [2006 (I) TMI 55 - SUPREME COURT].

4. Personal hearing in the matter was held on 28.07.2023. Ms. Labdhi Shah, Chartered Accountant, appeared for personal hearing and reiterated the submissions made in the appeal. She submitted that the levy of Service tax confirmed by the department was set-aside by the Tribunal. Therefore, they had filed an application for consequential refund of the amount paid during the investigation. The refund sanctioning authority has rejected part refund and also has not granted interest on the amount paid during the investigation. In this regard, she handed over a compilation of case laws relating to this issue. In view of the same, she requested to set-aside the impugned order and grant refund to the appellant with interest.

5. I have carefully gone through the facts of the case, the impugned order passed by the refund sanctioning authority, submissions made in the appeal memorandum as well as the submissions made during personal hearing. The issue to be decided in the present case is as to whether the refund of Rs.27,09,333/- rejected by the refund sanctioning authority, in the facts and circumstances of the case, is legal and proper or otherwise?

6. It is observed that the present refund is outcome of the CESTAT Order No. A/11094/2022 dated 06.09.2022 wherein the demand of service tax raised against the appellant was held as not sustainable. Consequently, the appellant filed a refund claim amounting to Rs.36,13,476/- along with interest of Rs.62,68,819/-. The refund sanctioning authority vide impugned order allowed the refund of Rs.9,04,000/- and rejected the remaining claim of Rs. 27,09,333/- and interest. He observed that the claim of Rs.36,13,476/- is summation of (Rs. 27,09,333/- paid prior to 01.06.2007 through Service Tax Returns and the amount of Rs.5,84,736/- appropriated against the confirmed

demand plus Rs.3,19,407/- paid during pendency of appeal before Hon'ble Tribunal.) . He further observed that;

a) Hon'ble CESTAT only set-aside the demand under Works Contract as the said service came into existence from 01.06.2007. But does not speak about the voluntary payment of Rs.27,09,333/- made by the appellant prior to 01.06.2007 under Commercial and Industrial Construction Service hence question of refund does not arise. He held that that said claim amount is hit by limitation as the payment was made during 05.10.2005 to 03.05.2008, whereas the claim has been filed on 24.11.2022. He also held that the claim is also hit by unjust enrichment as the appellant failed to produce the documents like ledgers or C.A. certificate justifying that the amount was shown as "receivable".

b) The total amount of Rs.9,04,000/-(i.e. Rs.5,84,736/- paid and appropriated against the confirmed demand and the amount of Rs.3,19,407/- paid during pendency of appeal before Hon'ble Tribunal) was considered as pre-deposit by the Tribunal hence is eligible for refund.

6.1 The appellant is seeking refund of Rs.27,09,333/- alongwith interest as well as interest on the amount of Rs.9,04,000/- sanctioned. On the findings at Sr. No (a) above, the appellant have claimed that the payment of said amount made prior to 1st June, 2007 was under mistake. They claim that they are therefore eligible for entire refund as the entire demand has been set-aside by the Tribunal vide Order dated 06.09.2022. On the findings at Sr. No (b), the appellant claim that they are eligible for interest as the said refund has been received on 20" February, 2023, hence are eligible for interest on the said refund @ 12% for the period from 9" August, 2010 till 20 February, 2023, in terms of the decision passed in the case of M/s. Parle Agro Ltd [2021 (5) TMI 870 - CESTAT ALLAHABAD.

6.2 To examine the issue, relevant portion of Hon'ble CESTAT's Order No. A/11094/2022 dated 06.09.2022 is reproduced below;

4. .....The first issue to be decided is whether the services provided by the appellant are of Works contract service or Commercial or Industrial Construction Service. As submitted by the-Learned counsel and revealed from the SCN itself, no doubt that they had provided the services along with material therefore, the services are clearly falling under WCS. As regard the issue that 'whether the free supply material needs to be included in the services of Commercial or Industrial Construction Service, the issue is no longer res- integra as held by the Hon'ble Supreme court in the case of Bhayana Builder Pvt Ltd (Supra) that the value of free supply material need not to be included in the gross value service in order to avail the benefit of abatement. Therefore, as per the fact since the appellant has provided the service along with material their services are clearly classified, as works contract service. The appellant subsequently started paying service tax on works contract service which is not disputed by the department. ***The Works contract service was not taxable prior to 01.06.2007 in the light of the Hon'ble Supreme Court judgment in the case of L&T Ltd (Supra) therefore, the demand prior to 01.06.2007 is clearly unsustainable as held by the Apex Court.***

4.1 As regard the demand under Commercial or Industrial Construction Service post 01.06.2207 we find that the SCN as well as the adjudication order was passed classifying the service under Commercial or Industrial Construction Service whereas the service of the appellant is classified under works contract service. On this fact the

demand raised under Commercial or Industrial Construction Service will not sustain being proposed and confirmed under the wrong classification whereas the services are correctly classifiable under works contract service. *On the issue where duty demand raised under the wrong classification this tribunal in the case of Real Value Promoters Limited (Supra) held that the composite contract can be subjected to service tax only under works contract service post 01.06.2007 and any demand raised under CICS/CCS on such composite contracts post 01.06.2007 is not sustainable . In the said decision the Chennai bench of this Tribunal also relied upon the judgment in the identical cases as under:-*

XXX

XXX

XXX

4.2 As per the above settled position when no demand was raised under Works Contract Service post 01.06.2007, the demand raised under CICS/CCS will not be sustained. Since we have decided the issue on merit of this case, we are not addressing other issues raised by the appellant such as abatement valuation, limitation etc.

5. As per our above discussion and finding the demand of service tax raised by the lower authorities is not sustainable, Hence the impugned order is set aside. Appeal is allowed with consequential relief. "

6.3 From the above text, it is clear that Hon'ble Tribunal has set-aside the demand under Commercial or Industrial Construction Service (CICS in short) as the service rendered was Works Contract. Since the Works Contract Service came into effect from 01.06.2007 and as no demand was raised post 01.06.2007 under Works Contract, the entire service tax demand raised by the lower authorities under the impugned order classifying the same under CICS was set aside by the Tribunal. Thus, I find that any voluntarily payment made by the appellant under CICS through ST-3 return has to be considered as a tax liability discharged wrongly under CICS when the same was subsequently set-aside by tribunal.

6.4 Further, it is observed that the payment of claimed amount was made during 05.10.2005 to 03.05.2008, whereas the claim has been filed on 24.11.2022. The refund sanctioning authority hence gave a finding that the claim amount is hit by limitation. I find that in terms of Section 11B, a person can claim refund of duty and interest before the expiry of one year from the relevant date. The relevant date for each case is specified in Explanation-B to Section 11B. Relevant text of Section 11B is reproduced below:-

SECTION [11B. Claim for refund of [duty and interest, if any, paid on such duty]. *— (1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person :*

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

same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :]

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

*[* * * *]*

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

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

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
(b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Principal Commissioner of Central Excise or Commissioner of Central Excise];
(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
(d) the [duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;
(e) the [duty of excise and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

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

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

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

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

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

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

Thus, in terms of clause (ec) where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Tribunal or any court the

date of such judgment, decree, order or direction shall be the relevant date. In the instant case, the refund has arisen consequent to the CESTAT Final Order dated 06.09.2022 and the refund claim was filed on 24.11.2022, which I find is well within the period of limitation. Hence, the findings of the refund sanctioning authority that the refund is time barred is not tenable in law, hence set-aside.

6.5 On the issue of unjust enrichment, refund sanctioning authority has held that the appellant failed to produce the documents like ledgers or C.A. certificate justifying that the amount was shown as "receivable". However, the appellant before the appellate authority submitted a Certificate dated 10.10.2022, issued by Hardik Kalkar & Associates, Chartered Accountant wherein it is certified that the appellant has paid the Service Tax of Rs.36,13,476/- under CICS from their own pocket and not recovered separately from service recipient. Based on the Books of Accounts and other relevant documents, it is also certified that the incidence of tax has not been passed on to any other person. I find that such certificate is sufficient to justify that the amount claimed as refund is not hit by unjust enrichment.

6.6. In view of the above discussion and findings, I, therefore, find that the appellant is eligible for the refund of Rs.27,09,333/-.

7. Another contention raised by the appellant in the appeal is that they are also eligible for the interest on the amount of Rs.9,04,143/- sanctioned as well as on the amount of Rs.27,09,333/- paid mistakenly.

7.1 On the amount of Rs.27,09,333/- they claim they are eligible for interest @12% from the date of deposit (i.e. 9th August, 2010). They placed reliance on the decision passed in the case of M/s. Parle Agro Ltd.-**2022 (380) E.L.T. 219 (Tri. - All.)**

7.2 Interest is governed by the provisions of Section 11BB of the CEA, 1944.

> ***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.]*

7.3 In terms of above provisions, interest shall accrue if the refund is not granted immediately within three months from the date of receipt of application till the date of refund of such duty. Further, the explanation to the said section also stipulates that where any order of refund is made by the Commissioner (A) or the Tribunal, then the order passed by them shall be deemed to the order passed under sub-section (2) of Section 11B.

7.4 It is observed that hon'ble High Court of Judicature at Allahabad in the case of **EBIZ.COM PVT. LTD- 2017 (49) S.T.R. 389 (All.)** held that;

> *34. We may also refer here on a Division Bench's judgment of Karnataka High Court in Commissioner of Central Excise v. KVR Construction - 2012 (50) VST 469 = 2012 (26) S.T.R. 195 (Kar.), wherein construing Section 11B, Court said that it refers to claim for refund of duty of excise only and does not refer to any other amount collected without authority of law. That was a case of 'Service Tax' and Court said as under :-*
>
> *"Though under Finance Act, 1994 such service tax was payable by virtue of notification, they were not liable to pay, as there was exemption to pay such tax because of the nature of the institution for which they have made construction and rendered services. In other words, if the respondent had not paid those amounts, the authority could not have demanded the petitioner to make such payment. In other words, authority lacked authority to leavey and collect such service tax. In case, the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. If we look at the converse, we find mere payment of amount, would not authorize the department to regularize such payment. When once the department had no authority to demand service tax from the respondent because of its circular dated 17-9-2004, the payment made by the respondent company would not partake the character of "service tax" liable to be paid by them. Therefore, mere payment made by the respondent will neither validate the nature of payment nor the nature of transaction. In other words, mere payment of amount would not make it a "service tax" payable by them. When once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount.* ***When once there is lack of authority to collect such service tax by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion."***
>
> ***35. The consensus of the authorities of various High Courts as well as Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorizedly or under mistaken notion, etc., cannot be retained by Revenue since it has no authority in law to retain such amount and it must be refunded with interest.***
>
> *36. In view of above, we allow the writ petition directing the respondents to refund the entire amount refundable to the petitioner as a result of Commissioner's order dated 29-8-2012 with interest at the rate of 12% per annum, which shall be computed from the date, after three months of passing of order by Commissioner, till the amount is actually paid.*

In light of the above decision, I find that interest is payable on the amount mistakenly paid by the appellant from the date of payment as Tribunal in the instant case has held that the appellant was not liable to pay tax as there was no levy under Works Contract prior to 01.06.2007. I therefore find that any amount paid mistakenly by the appellant cannot be retained by the department and is to be refunded to the

appellant alongwith interest. Further, such interest is payable @ of 12% per annum from the date of such tax payment made.

8. Coming to the contention of the appellant that they are also eligible for interest @12% on Rs. 9,04,000/- sanctioned, I find that the adjudicating authority at Para-11.3 has considered the payment of Rs.9,04,000/- as pre-deposit made towards Section 35F of the CEA, 1944. The said amount was sanctioned to the appellant on 20.02.2023.

8.1 Hon'ble CESTAT, PRINCIPAL BENCH, NEW DELHI in the case of Allied Chemicals & Pharmaceuticals Pvt. Ltd- **2022 (382) E.L.T. 371 (Tri. - Del.)** held that Division Bench of this Tribunal in the case of *Parle Agro Pvt. Limited* v. *CCE, CGST, Noida* -2021 (5) TMI 870-CESTAT Allahabad = 2022 (380) E.L.T. 219 (Tri. - All.) held that an assessee is entitled to interest on such pre-deposit on being successful in appeal, from the date of deposit till the date of refund @ 12% p.a., following the ruling of Hon'ble Supreme Court in the case of *Sandvik Asia Ltd.* v. *CIT-I, Pune* - 2006 (196) E.L.T. 257 (S.C.).

8.2 Considering the above decisions, I find that the appellant is liable for interest @ 12% p.a. on the amount of Rs.9,04,000/- made as pre-deposit as well on Rs.27,09,333/- paid mistakenly; from the date of deposit till the date of refund.

9. In light of above discussion and findings, I set-aside the impugned order and allow the appeal filed by the appellant.

10. 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.

(शिव प्रताप सिंह)
आयुक्त (अपील्स)

Date: 25.08.2023

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

By RPAD/SPEED POST

To,
M/s. P.C. Snehal Construction Co., - **Appellant**
9th Floor, City Centre, Near Swastik Char Rasta,
C.G.Road, Navrangpura,
Ahmedabad-380009

The Deputy Commissioner, - **Respondent**
CGST, Division-VII,
Ahmedabad North
Ahmedabad

Copy to:

1. The Principal 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.