

	<b>केंद्रीय कर आयुक्त (अपील)</b>	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर शुल्क भवन, सातवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	7 <sup>th</sup> Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
☎ : 079-26305065		टेलिफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(32)/18&19/Ahd-I/2017-18 / 8095 to 8099  
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-139&140-2017-18  
दिनांक Date : 20.10.2017 जारी करने की तारीख Date of Issue 22-11-17

श्री उमा शंकर आयुक्त (अपील-I) द्वारा पारित  
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Assistant Commissioner, केन्द्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं MP/67&68/AC/2016-17 दिनांक: 24/3/2017, से सृजित

Arising out of Order-in-Original No. MP/67&68/AC/2016-17 दिनांक: 24/3/2017 issued by Assistant Commissioner, Central Excise, Ahmedabad-I

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
M/s Choksi pigment  
Ahmedabad

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

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया 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.

(b) 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.

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



... 2 ...

(ख) 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 हैं।

(b) 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.

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

(c) 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।

(d) 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, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. 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 हैं। (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।

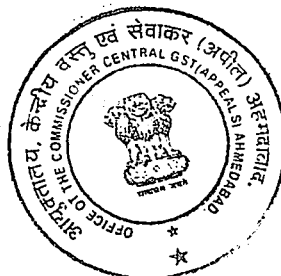
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

Following two appeals have been filed By M/s Choksi Pigments, Plot No.402, Panchwati, 1<sup>st</sup> Lane, Ambawadi, Ahmedabad [hereinafter referred to as "the appellant"] against Orders in original passed by the Assistant Commissioner, Central Excise Division-III, Ahmedbad-1 [adjudicating authority].

S No	Appeal No	Order-in-original	Amount involved
1.	18/Ahd-1/16-17	MP/67/AC/2016-17 dated 24.03.2017	Rs.38,011/-
2	19/Ahd-1/16-17	MP/68/AC/2016-17 dated 24.03.2017	Rs.20,480/-

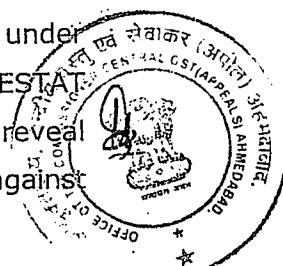
2. Briefly stated, the appellant has filed two refund claims mentioned above before the adjudicating authority which was deposited as a pre-deposit amount under Section 35 F of the Central Excise Act, 1944 (CEA) towards filing of appeal before CESTAT against Orders-in-Appeal. Vide orders-in-original mentioned above, the adjudicating authority has rejected the refund claims on the grounds that the appeals filed by the appellant before CESTAT are still pending and as such refund of such pre-deposited amount is premature.

3. Being aggrieved, the appellant has filed the instant appeals on the grounds that the appellant has availed Cenvat credit on services of Commission paid to commissioner agent for sale of final products; that the matter is present lying before CESTAT for decision; that as per explanation inserted vide Notification No.02/2016 CE (NT) dated 03.02.2016, services by way of sale of dutiable goods on commission basis is now covered in the definition of "input service"; that in case of M/s Essar India Steel Ltd.'s case, the Hon'ble CESTAT has given retrospectively effect; that though their case is pending before Hon'ble CESTAT, the refund claim is required to be treated as separate matter. Interest is also payable for delayed refund.

4. Personal hearing in the matter was held on 11.10.2017. Shri Bishan R Shah, Chartered Accountant appeared for the same on behalf of the appellant and reiterated the grounds of appeal.

5. I have carefully gone through the facts of the case and the submissions made by the appellant in the appeal memorandum and at the time of personal hearing.

6. At the outset, I observe that the case is relating to refund of amount deposited by the appellant as a pre-deposit amount as required under Section 35 F of CEA in connection with filing of appeal before Hon'ble CESTAT against order passed by the Commissioner (Appeals). Undisputed facts reveal that the appeals filed by the appellant before the Hon'ble CESTAT, against



which the pre-deposits have been made, are still pending. When an appeal allowed in favour of the appellant with consequential relief, it is incumbent upon the department to refund the amount pre-deposited. In the appellant's case, the Hon'ble CESTAT has not decided the appeal filed by the appellant. Though similar issue has been decided by the Hon'ble Court in favour of an assessee, refund of amount deposited by the appellant before CESTAT under Section 35 F of CEA is pre-mature, when the appeals are still pending for final decision. In the circumstances, there is no merit in the argument of the appellant that though their case is still pending before CESTAT, refund of such pre-deposit amount is eligible to them. Further, I observe the case of M/s Essar India Steel Ltd.'s case is challenged by the department and admitted before the Hon'ble High Court of Gujarat.

7. In this regard, I rely on the decision of Hon'ble High Court of Gujarat's decision in case of M/s Indu Nissan Oxo Chemical Industries Ltd [2015 (319) E.L.T. 678 (Guj.)]. In the decision, the Hon'ble Court has held that even the decision of Tribunal is in favour of an assessee, department need not to return the pre-deposited amount if Revenue has preferred an appeal at high forum and admitted. The relevant order is as under:

*"2. At the outset, it is required to be noted that the present Special Civil Application has been preferred to get back an amount Rs. 2,20,00,000/- (rupees two crores twenty lacs only), which the petitioner had deposited as pre-deposit while preferring the appeal before the Tribunal, by submitting that now the decision in the appeal is in their favour and therefore, they are entitled to get back the aforesaid amount.*

*3. However, it is required to be noted that against the decision of the Tribunal, the Revenue has preferred Tax Appeal No. 583 of 2013 along with OJCA No. 374 of 2013 and the said Tax Appeal has been admitted and OJCA 374 of 2013 is disposed of and this Court has passed the following order in the said OJCA :*

*"Heard Shri R.J. Oza, learned advocate appearing on behalf of the applicant and Shri Kamal Trivedi, learned senior advocate appearing on behalf of the respondent.*

*As the main appeal is admitted on the questions of law framed and to see that the main appeal does not become infructuous, the impugned judgment and order passed by the Tribunal is stayed. However, it is clarified that by staying the impugned judgment and order, it will not be open for the Department to take further coercive steps to recover the adjudged penalty amount and at the same time the Department need not return the amount of pre-deposit, deposited by the assessee at the time of preferring the appeal before Tribunal.*

*With this, present application is disposed of."*

*4. In view of the above, the prayer of the petitioner to return the aforesaid amount of Rs. 2,20,00,000/- (rupees two crores twenty lacs only) as prayed for, cannot be granted at this stage.*

*5. It goes without saying that in case, the aforesaid Tax Appeal is dismissed and the order passed by the Tribunal is confirmed, Court will always pass a consequential order and at this stage it will be open for the petitioner herein to request to pass an order of return of the amount of pre-deposit, which can be considered.*

*6. With this, present Special Civil Application is disposed of."*

8. In the instant case, it is fact that the appellant's case is not decided by the Hon'ble Tribunal and also the decision taken by the Hon'ble Tribunal has



been challenged by the department and admitted the same before Hon'ble High Court. In the circumstances, there is no merit in the contention of the appeal for granting refund of pre-deposited amount. Therefore, I am of the considered opinion that the adjudicating authority has correctly rejected the refunds claims as pre-mature.

9. In view of above discussion and the Hon'ble High Court of Gujarat's decision *supra*, I reject both the appeals filed by the appellant. The appeals stand disposed of accordingly.

*Uma Shankar*

(उमा शंकर)

आयुक्त (अपील्स )

Date: 20/10/2017.

Attested

*Mohan V.V.*  
(Mohan V.V)  
Superintendent (Appeal)

By RPAD

To  
M/s Choksi Pigments,  
Plot No.402, Panchwati, 1<sup>st</sup> Lane, Ambawadi,  
Ahmedabad

Copy to:-

1. The Chief Commissioner, CGST Zone, Ahmedabad.
2. The Commissioner, CGST, Gandhinagar
3. The Addl./Joint Commissioner, (Systems), CGST, Gandhinagar
4. The Dy. / Asstt. Commissioner, CGST Kalol Division
5. Guard file.
6. P.A

