

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

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)/122/Ahd-I/2016-17 / 10630 to 10634  
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-187-2017-18  
दिनांक 23.11.2017 जारी करने की तारीख Date of Issue 11-12-17

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

ग Deputy Comm., Div-III केन्द्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं MP/02/DC/2016-17-  
Ref. दिनांक: 15/4/2016, से सृजित

Arising out of Order-in-Original No. MP/02/DC/2016-17-Ref. दिनांक: 15/4/2016 issued by  
Deputy Comm. Div-III Central Excise, Ahmedabad-I

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

**Safeselectromech Pvt 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) 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 है।

(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.

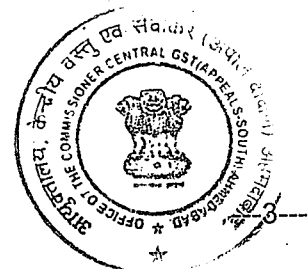
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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, अपीलो 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 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।

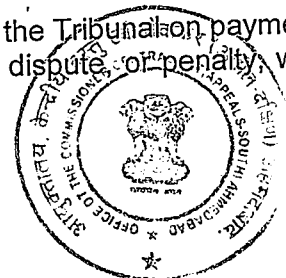
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

M/s Safex Electromech, Plot No 7608, Phase-IV GIDC, Near Vatva, Ahmedabad, Gujarat (hereinafter referred to as "the Appellant"), has filed the present appeal against the Order-in-Original No MP/02/DC/2016-17-Ref dated 15.04.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Deputy Commissioner of Central Excise, Division-III, Ahmedabad-I, (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief, the appellant are registered with the Central Excise Department having registration no AABCS 5535NXM001 and engaged in manufacturing of goods falling under chapter 84 of Central Excise Traiff Act, 1985. During the course of Audit it is observed that the appellant has wrongly availed the Service Tax Credit on the invoice of labour service bill used in erection & commission of crane outside factory. Accordingly the appellant was asked to reverse the Service Tax Credit. The appellant reversed the Service Tax Credit along with the interest and penalty on 20.01.2015. However on 16.06.2015 the appellant filed a refund claim on the ground that they have paid the duty on audit objection due to insistence of the Audit Party. The adjudicating authority vide impugned orders rejected the refund claim as non maintainable.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal on the ground that they have availed such credit as per scope of their work and interpretation of definition of Input services. They further informed that they have not submitted any letter to the department regarding acceptance of payment of duty full or part under the sub-section (6) of Section 11 A. The said duty is chargeable under sub section (5) of Section 11 A. Further they have not given in the writing for not to issue the notice under sub section 11A (7) (i) as payment has been done for the duty demanded. The appellant further submitted that filing of refund claim proves that its grievance against the audit objection. They have paid the duty on the direction of the audit party but filing of refund is kind of challenging of audit objection. It's not voluntary but it is under protest. Whenever the amount is paid for disputed issue it is deemed to be considering as "Duty paid under protest". Therefore deniable of refund is not sustainable in the Law. In the Excise Law, there is no such provision that once the disputed amount is paid, the same cannot be challenged by way of filling refund or appeal, except submission of letter of waiver of SCN under Section 11A(7) (i) of CEA,1944. But in this case no such type of letter is submitted by the appellant, so the refund claim is rightly filled by them. The appellant further submitted that once the audit objection is approved in MCM, it cannot become final as no order is passed under the section 11 A. Therefore it can be challenged by way of writing letter for not accepting the audit objection.



4. Personal hearing in the case was granted on 18.08.2017 which was attended by Appellant representatives, Shri N.K.Oza Advocate and Shri Manoj Barot, Excise In charge. He reiterated their written submission and Grounds of appeal, at the time of personal hearing also stated to submit the contract and invoice of sale within seven days. Which were submitted on 28.08.2017. I have carefully gone through the facts of the case on records, grounds of the appeal, put forth by the appellant. Looking to the facts of the case, I proceed to decide the case on merits.

5. In the instant case, the core issue to be addressed by me is whether the refund is maintainable under Section 11B or otherwise. As the appellant has paid duty, interest and penalty on being pointed out by the audit without any protest coercion or duress, and not challenged the audit report. There are situation when the refund can be filed under Section 11B.

i.e. in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

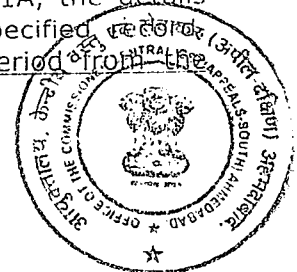
(eb) in case where duty of excise is paid provisionally under this Act or the rules made there under, the date of adjustment of duty after the final assessment thereof;

**(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;**

6.1. In the present case there is no such incidence occurred when the appellant can file the refund, as they voluntarily paid the duty interest and penalty which proves that the appellant were agreed with the audit objection. If such refunds are allowed then the very purpose for reducing litigations and concluding the proceedings in audit on payment of duty and interest along with penalty, under Section 11 A will be redundant. At the one hand the appellant has bought the peace by paying the dues during audit and subsequently after issuance of audit report they claim refund, and contesting the eligibility of input service tax credit. If they were of the views that they are entitled for input service tax credit then they should have paid the dues under protest. In this case the appellant has not lodged any protest note, disagreement with the audit para/objection. It is felt necessary to discuss the provisions of Section 11 A which are as under;

**DEMAND OF EXCISE DUTY - INTERNAL AUDIT, INVESTIGATION & VERIFICATION. -BY INVOKING 5 YEAR PERIOD. WITH 50% PENALTY EQUIVALENT TO EXCISE DUTY.**

Under Section 11A(5) during the course of internal audit, investigation and verification, if it is found that any duty of excise has not been levied or paid or has been short levied or short-paid or erroneously refunded for the reason mentioned in clause (a) or (b) or (c) or (d) or (e) of sub-section (4) of Section 11A, the details relating to the transaction are available in the specified records then, the central excise officer, within five year period from the



relevant date, issued show cause notice for demand of excise duty on the person chargeable with the duty along with interest under section 11AA with penalty equivalent to 50% of such duty demanded.

**(C) (i) Demand of Excise Duty – Before Issue of Show Cause Notice- Section 11A (6) – PENALTY EQUAL TO 1% OF SUCH DUTY PER MONTH BUT NOT EXCEEDING A MAXIMUM OF 25% OF THE DUTY.-**

**INTIMATION TO CENTRAL EXCISE OFFICER IN WRITING FOR DUTY PAYMENT.**

Under Section 11A (6) if any person chargeable with duty under Section 11A (5), **before issue of show cause notice on him, pay the duty in full or in part, as may be accepted by him along with interest payable thereon under section 11AA and penalty equal to 1% percent of such duty per month to be calculated from the month following the month in which such duty was payable, but not exceeding a maximum of 25% of the duty and inform the central excise officer of such payment in writing.**

**(C) (ii) AFTER RECEIPT OF INTIMATION LETTER FROM THE PERSON FOR PAYMENT OF DUTY , NO SHOW CAUSE NOTICE WILL BE ISSUED:SECTION 11A(7)**

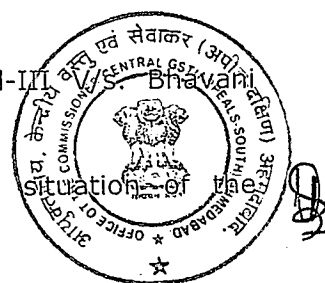
Under Section 11A (7) the central excise officer, on receipt of information/ intimation under Section 11A(6) shall, **(i) not issue any show cause notice in respect of the amount so paid and all proceedings in respect of the said duty shall be deemed to be concluded** where it is found by the central excise officer that the amount of duty, interest and penalty as provided under section 11A (6) has been fully paid; (ii) the excise officer shall proceed for recovery of such amount if found to be short-paid in the manner specified under Section 11A (1) and the period of one year shall be computed from the date of receipt of such information.

6.2. The appellants followed the option under sub-section 11A (6) also they submitted the details of payment of duty, challans for payment of interest and penalty. The submission of challans evidencing payment of interest and penalty as per Section 11A (6) proves that the appellant has intimated to the department under Section 11A (7) (i) of CEA, 1944. Thus their argument that they have not filed letter under Section 11A (7) (i) of CEA, 1944, does not hold any water. Action which was required to be taken under the framework of law laid down under Section 11A cannot be circuitously taken under Section 11B.

The relied upon the following judicial pronouncements;

- i). 2009 (013) STR 0086 (Raj.) in the case of Commissioner Versus Sun city Alloys Pvt. Ltd
- ii). in 2016 (042) STR 0299 in the case of M/s. Veena Industries V/s. CCE, Vapi
- iii). In case of M/s. Radhe Renewable Energy Development (P) Ltd. V/s. CCE & ST.Rajkot reported at 2015 (37) STR 388.
- iv). 2017(351) ELT 326 in case of CCE & ST.,A'bad-III Ceramics Pvt.Ltd.

The judgements relied upon are not identical to the



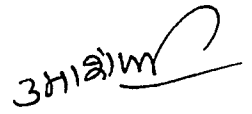
appellants, hence not warranted to be discussed.

7. Now issue for maintainability of refund claim, as discussed above the objection was raised in audit and the appellant has paid the amount without any protest. They followed the option vide sub-section 11A (6) also they submitted the details of payment of duty, challans for payment of interest and penalty. The submission of challans evidencing payment of interest and penalty as per Section 11A (6) proves that the appellant has intimated to the department under Section 11A (7) (i) of CEA, 1944 resulting in settlement of the audit para.

8. In view of above discussed facts, It is concluded that the refund is not maintainable under Section 11B of Central Excise Act, 1944, at this stage. I reject the appeal of the appellants and up-hold the OIO.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

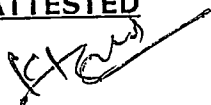
9. The appeals filed by the appellant stand disposed off in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

**ATTESTED**

  
( K.H.Singhal)

SUPERINTENDENT (APPEAL),  
CENTRAL TAX, AHMEDABAD.  
BY R.P.A.D.

To,

M/s Safex Electromech,  
Plot No 7608, Phase-IV GIDC,  
Near Vatva, Ahmedabad-382445.

Copy To:

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner Central Tax, GST South,, Ahmedabad-
- 3) The Additional Commissioner, Central Tax , GST South, Ahmedabad
- 4) The Asst. Commissionner, Central Tax GST South, Div-III, Ahmedabad South.
- 5) The Asst. Commissioner (System), GST South, Hq, Ahmedabad.
- 6) Guard File.

