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

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/129/Ahd-I/2017-18  
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-315-2017-18  
दिनांक Date : 12-02-2018 जारी करने की तारीख Date of Issue 12/02/2018

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

ग Arising out of Order-in-Original No. CGST-VI/Ref-28/Umbrella/17-18 दिनांक: 13.10.2017 issued  
by Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
Umbrella India Staffing Solution  
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथारिथति 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 :

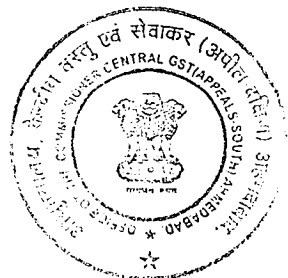
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(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.

(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 मामले 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 दिनोंक 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 हों 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.

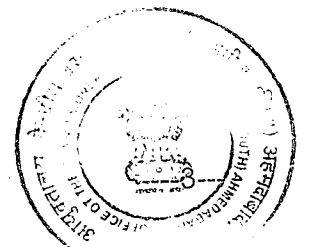
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 मेटल हॉस्पिटल कम्पाउण्ड, मेघानी 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 पढ़ी 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 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 दण्ड (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) 11 D 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।

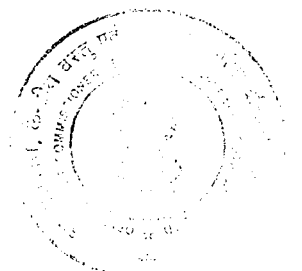
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 Umbrella India Staffing Solutions, 12 FF, National Chambers, Near City Gold Cinema, Ashram Road, Ahmedabad- 380 009 (STR AAUP W3127G SD001) (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number No.CGST-VI/REF-28/Umbrella/17-18 -dated 13.10.2017 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, CGST, Div-VI (Vastrapur), APM Mall, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief are that appellant, the proprietorship firm, had provided manpower recruitment/supply service to M/s RMP Bearing Ltd and had collected service tax of Rs. 78,679/- which was deposited to Government vide challan No. 0193/26.04.2015. M/s RMP Bearing Ltd, the recipient, being body corporate was required under Notification No. 30/2012-ST (under Reverse Charge Mechanism ) to discharge 100% service tax liability of Rs. 78,679/-, therefore recipient paid service tax of Rs. 78,679/- vide e-receipt No. 193/24.06.2015.

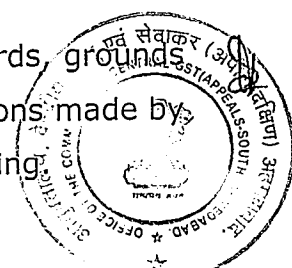
3. Appellant filed refund claim u/s 11B of CEA, 1944, of Rs.78,679/- on 27.06.2017 stating that it was mistakenly collected and paid to Government. Claim was rejected by adjudicating authority by resorting to 11B, as it was filled after expiry of one year from date of payment of duty.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 01.12.2017 before the Commissioner (Appeals-II), Ahmadabad wherein it is contended that since the amount paid by appellant was not amount of service tax hence, Section 11B of CEA, 1944 was not applicable as there was no duty cast on them. Appellant relied upon Hon`ble HC decision in case of KVR Construction 2012(26) STR 195 (Kar. HC), M/s Giriraj Construction [2017-TIOL-2170-HC-MUM]

5. Personal hearing in the case was granted on 31.1.2018. Shree Sanket Gupta, Advocate appeared before me and reiterated the grounds of appeal. On being asked whether Service receiver has paid or not, Advocate is unable to reply.

#### DISUSSION AND FINDINGS

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral/written submissions made by the appellants, evidences produced at the time of personal hearing



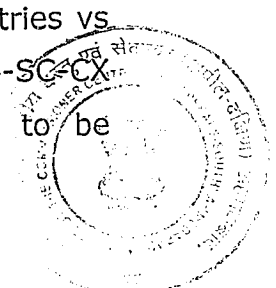
7. The issue for decision before me is whether or not the refund claim filed by the appellant is hit by the limitation period of one year as envisaged under Section 11B of the Central Excise Act, 1944, as made applicable to service tax matter vide Section 83 of the Finance Act, 1994. Appellant is contesting that as legally they were not required to pay the duty but paid mistakenly, so whatever is paid is in nature of deposit, therefore limitation of time period of one year from duty payment u/s 11B is not applicable to this case.

8.1 I find that that duty was paid by appellant on service Manpower supply rendered which was not payable in terms of Notification No. 30/2012-ST, as recipient being Body corporate. The applications for refund were filed beyond prescribed statutory period prescribed u/s 11B. I find the appellants paid the service tax unquestioningly. No protest was lodged. They were regularly filing the Service Tax Returns, which were being assessed by the proper officer. Therefore, what has been paid by then during the material period was service tax only.

8.2 Since the service rendered by appellant to recipient body corporate is appropriately classifiable under the category of Manpower supply service, it does not mean that what was paid by them earlier did not constitute service tax but was only a deposit. The character cannot change from tax to deposit. It can at best be said that the service tax was paid by them for the impugned period account of mis-construction, mis-application or wrong interpretation of a provision of law. It is to be noted that the provisions of Section 11B of the Central Excise Act, 1944, which have been made applicable to service tax matters vide Section 83 of Chapter V of the Finance Act, 1994, constitute "law" within the meaning of Article 265 of the Constitution of India and in the face of the said provisions, which is exclusive in its nature, no claim for refund is maintainable except under and in accordance therewith

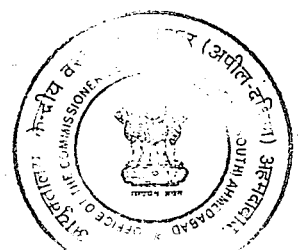
9. In present case the provisions of levy of duty under Notification No. 30/2012-ST has not been held to be unconstitutional. I am of considered view that the refund is not grantable in view of judgment of Supreme Court in Mafatlal Industries Ltd. (1997) 5 SCC 536/ [1997 (89) E.L.T. 247 (S.C.)] holding that refund application beyond period specified under Section 11B of Central Excise Act, 1944 could not be entertained unless refund was as a consequence of declaration of a provision as unconstitutional.

10. The Hon'ble Supreme Court in the case of M/s Mafatlal Industries vs Union of India reported in 1997 (89) ELT 247 (SC) = 2002-TIOL-54-SC-CX has held that all claims for refund except where levy is held to be



unconstitutional are to be preferred and adjudicated upon under Section 11B of the Central Excise Act. It is held as under:

*".....Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order [whether it is an order of assessment, adjudication or any other order under which the duty is paid] is set aside according to law. So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. It is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. Therefore, the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11-B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. [see the pertinent observations of Hidayatullah, CJ. in Tilokchand Motichand extracted in Para 37]. The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."..... [AIR 1959 SC 135 and 1968 (3) SCR 662 over-ruled; 1969 (2) SCR 824 followed]*



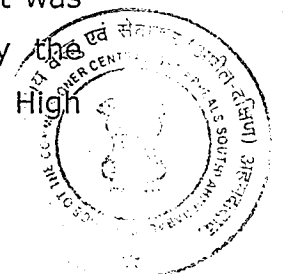
11. The judgment of the Supreme Court in the case of M/s Mafatlal Industries Ltd cited supra [reported in 1997 (89) ELT 247 (SC) = 2002-TIOL-54-SC-CX] has been again affirmed by the Supreme Court in the case of Assistant Commissioner of Customs vs Anam Electrical Manufacturing Co reported in 1997 (90) ELT 260 (SC) while dealing with the issue of limitation prescribed under Section 11B of the Central Excise Act, 1944/Section 27 of the Customs Act, 1962. The Hon'ble Supreme Court has observed as under:

*"Such petitions must be held to be untenable in law, regardless of any direction to the contrary contained in the order in any appeal, suit or writ jurisdiction. Statutory time limit is not extendable by any authority or court in case of illegal levy."*

12. Since tax was paid in the name of service tax, the refund shall also be of service tax itself and accordingly the provisions of section 11B applies. The provisions for refund under the Central Excise Act/Finance Act have been provided only under Section 11B and since there is no other provisions in the law to allow refund, the provisions of section 11B should be followed. In case, it is held that the tax is collected without the authority of law, then in all cases where tax is wrongly paid, the provisions of section 11B becomes redundant. My view is supported by decisions in case of Giriraj Construction & Parijat Construction Versus CCE, Cus & ST, NASIK 2016-TIOL-1391-CESTAT-MUM where in duty was paid wrongly

13. I find that the judgments of the Madras High Court in case of KVR Construction [2012 (26) STR 195 (Kar.)] relied by the appellant in their appeal memo for claiming refund beyond the limitation period of 11B of CEA, 1944, were passed in the writ petition filed by the party under article 226 of the Constitution. If appellant wish to have refund beyond limitation period for said "mistake of law" then it is open to file writ in HC/SC exercising writ jurisdiction under article 226 of the Constitution of India.

14. Adjudicating Authority or Commissioner (Appeal) authority or CESTAT authority has no authority to sanction refund of excise duty beyond time limitation prescribed under 11B of CEA, 1944, even though duty paid is held to be unconstitutional levy or illegally levy as all these authorities are governed by statutory provisions under the Central Excise Act, 1944 . My view is supported by decisions in case of MGM International Exports Ltd. v. CCE (S. T.) reported in [2010] 20 STR 663 (Trib.-Chennai) wherein it was held by the honorable Tribunal that the Tribunal is governed by the statutory provisions under the Central Excise Act, 1944 and only the High



Court have the powers in exercising writ jurisdiction under article 226 of the Constitution of India.

15. The normal statutory time limit under 11B applies if the goods or services are taxable i.e. within purview of CEA 1944 or within purview of Service tax Act. Tax on transaction related to service rendered by appellant is levied under service tax category introduced by FA 1994. There is no dispute with regard to the fact that Service tax is not leviable for service rendered by appellant. The law does cover the transaction for payment of service tax hence whatever is paid, by ignoring the exemption notification no 30/2012- ST, is in nature of duty only. Payment made is by mistake of facts and not by mistake of law. Tax was paid on own violation but under authority of law, hence the time limit under Section 11B of the Act, is applicable. I hold that the appellant are not eligible for the refund claimed as refund is hit by limitation.

16. In view of above, appeal filed by the appellants is rejected and impugned OIO is upheld.

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

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

*उमा शंकर*  
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

*R.R. Patel*  
(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD

To,

M/s Umbrella India Staffing Solutions,  
12 FF, National Chambers,  
Near City Gold Cinema,  
Ashram Road,  
Ahmedabad- 380 009





**Copy to:**

- 1) The Chief Commissioner, Central Tax, Ahmedabad South .
- 2) The Commissioner Central Tax, CGST,Ahmedabad South.
- 3) The Asst. Commissioner, Central Tax, Div-VI, Ahmedabad South
- 4) The Asst. Commissioner(System), Hq, Ahmedabad South.
- 5) ~~Guard File.~~
- 6) P.A. File.



