

 सत्यमेव जयते	केन्द्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केन्द्रीय कर भवन, सातवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	 7 th Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(52)/48/Ahd-II/2017-18 **11785-1789**
 Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-369-2017-18**
 दिनांक Date : **27-02-2018** जारी करने की तारीख Date of Issue **22.03.18**

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

ग Arising out of Order-in-Original No. **01/AC/17-18-REF** दिनांक: **17/5/2017** issued by Assistant Commissioner; Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. Chmariya Fashions 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 a 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 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।



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पन्न 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 हारस्पिटल 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 .

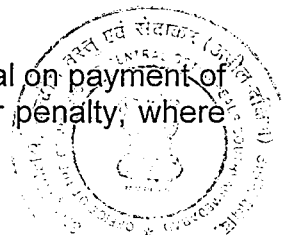
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

This appeal has been filed by M/s. Chamaria Fashions Limited, 177/B, Near Shahwadi Octroi Naka, Ahmedabad – 382 405 [for short – ‘appellant’] against OIO No. 01/AC/17-18-Ref dated 17.5.2017 passed by the Assistant Commissioner, Central Excise, Division IV, Ahmedabad-I Commissionerate [for short ‘adjudicating authority’].

2. Briefly, the facts are that the aforementioned impugned OIO is based on Hon’ble CESTAT’s direction vide its order no. A/11654-11659/2015 dated 30.10.2015, wherein after summarizing the three issues involved as [i] refund claims cannot be accepted without challenging APC order; [ii] the refund claims are barred by limitation and [iii] the appellant failed to fulfill the principle of unjust enrichment, the Tribunal ordered as follows:

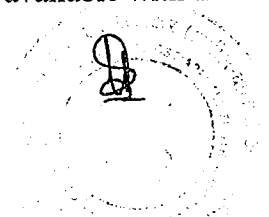
“5. In view of the above discussions, I hold that the refund claims cannot be rejected on the first issue as the ACP order was not appealable. The other two issues, the matter are remanded to the adjudicating authority to decide afresh in the light of the decision of the Hon’ble High Court. The impugned order is modified accordingly. The appellants are at liberty to submit the documents to substantiate on other issues. Needless to say that, the adjudication authority shall give proper hearing before decision. All the appeals are allowed as per above observation.”

The adjudicating authority vide his impugned OIO rejected the refund on the grounds that the refund of Rs. 5,13,979/- for the period from 16.12.1998 to 28.2.2000, was filed on 21.2.2003; that the refund claim is barred by limitation of time under section 11B of the Central Excise Act, 1944, in as much as the claim has been filed beyond the period stipulated therein; that they have not produced copy of invoices and RT 12 for the relevant period which shows that the duty has not been collected from the buyers.

3. Feeling aggrieved, the appellant has filed this appeal raising the following contentions:

- that the refund claim was filed on 21.2.2003 while the letter of protest under the erstwhile Rule 233 B of the Central Excise Rules, 1944 was filed on 15.3.1999 by lodging a general protest for all future payments of duty on galleries;
- that the question of limitation does not arise in the present case;
- that they would like to rely on the case of Mohinder Steels Limited which states that general provisions of excise laws are not applicable to Compounded Levy Scheme which is a comprehensive scheme; that the ratio of the judgement would also be equally applicable to the provisions of unjust enrichment;
- that they would like to rely on the case of Kothi Steel Limited, wherein it was held that the bar of unjust enrichment was not applicable to the duty paid at fixed rate under Compounded Levy Scheme;

4. Personal hearing in the case was held on 22.1.2018 wherein Shri C.J.Chauhan, authorized representative, appeared on behalf of the appellant and reiterated the grounds of appeal. Shri Chauhan during the course of personal hearing further contended that the documents are already with the department. Accordingly a reference was made to the adjudicating authority, who vide his letter no. V.52/10-17/15-Ref dated 15.2.2018 informed that the said documents viz duty paying documents, RT 12s and invoices were not available with their office.



5. I have gone through the facts of the case, the impugned OIO, the order of the Hon'ble Tribunal and the grounds of appeal. I find that the limited question to be decided in the matter is whether the appellant is eligible for refund or otherwise. At the cost of repetition, the adjudicating authority vide his impugned OIO has rejected the refund on the grounds of limitation and unjust enrichment.

6. Before moving any further, the appellant has relied upon two case laws [i] Mohinder Steels Limited and [ii] Kothi Steel Limited, to substantiate their argument that in cases covering refunds under Compounded Levy Scheme, the question of limitation and unjust enrichment would not apply. Let me first discuss the case of M/s. Mohinder Steels Limited. Since the citation is not given, on searching in EXCUS it is observed that the case law relied upon is reported at [2002 (145) E.L.T. 290 (Tri. - LB)]. The Larger Bench of the Tribunal while holding that Compounded Levy Scheme for collection of duty based Annual Capacity of Production under Section 3 of the Central Excise Act, 1944 and Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997, is a comprehensive scheme, held as follows:

9. The importing of elements of one scheme of tax administration to a different scheme of tax administration would be wholly inappropriate as it would disturb the smooth functioning of that unique scheme. A time limit prescribed for one scheme could be wholly inappropriate for an other scheme and time limit under Section 11A is no exception. Therefore, in the light of the judgment of the Apex Court in the cases of Venus Casting and Raghavar (India) Ltd., we hold that recoveries of amounts under the compounded levy scheme for re-rollers is not covered by the general time limit prescribed under Section 11A of the Central Excise Act.

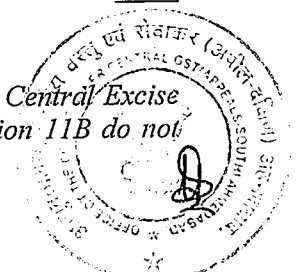
10. The contrary view taken by a Division Bench of two Members of this Tribunal in its Final Order Nos. 718-722/2001-NB(DB), dated 27-8-2001 is over-ruled. The appellants shall discharge the duty liability under the scheme according to the capacity determined by the Commissioner. In the event of non-payment the revenue shall be at liberty to recover such amounts in terms of the provisions of Section 11 of the Central Excise Act.

However, the import that the appellant is trying to make by relying on the aforementioned judgement to substantiate his argument that the limitation under Section 11B would not be applicable to his refund, is not a correct interpretation. In-fact the Hon'ble Supreme Court of India, in the case of Hans Steel Rolling Mill [2011(265) ELT 321(SC)], held as follows:

15. We are in agreement with the finding and decision arrived at by the Tribunal that the importing of elements of one scheme of tax administration to a different scheme of tax administration would be wholly inappropriate as it would disturb the smooth functioning of that unique scheme. The time limit prescribed for one scheme could be completely unwarranted for another scheme and time limit prescribed under Section 11A of the Act is no exception.

However, as I have already held this only relates to time limit under Section 11A of the Central Excise Act, 1944 and by no stretch of imagination can it be applied to refunds under Section 11B, which governs refunds of Central Excise duty. Even otherwise, I find that the Hon'ble Bombay High Court in the case of Shree Ram Textiles & Processing Mills (I) P. Ltd. - 2011 (263) E.L.T. A140 (Bom.)] has held as follows :

"In view of the fact that Rules regarding compounded levy are framed under the Central Excise Act, 1944, whether CESTAT was justified in holding that the provisions of section 11B do not apply to the scheme of compounded levy?"

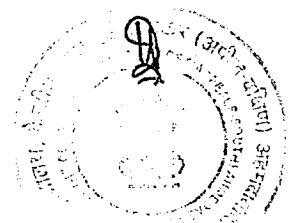


2. *The larger Bench of the Tribunal in its judgment dated 10-4-2006 in the case of Shivagrigo Implements Ltd. v. Commissioner of Central Excise, Jaipur reported in 2006 (199) E.L.T. 55 (Tri.-LB) has held that the provisions of Section 11B applies to the scheme of compounded levy. In this view of the matter, the decision of the Tribunal dated 30-9-2005 in Appeal No. E/2331/03 is quashed and set aside and the matter is restored to the file of the adjudicating authority to decide the question afresh and in accordance with law. The appeal is disposed off accordingly with no order as to costs."*

Therefore, I hold that the averment of the appellant that the limitation prescribed under Section 11B is not applicable to their case is not tenable argument.

6.1 The appellant has relied upon the case of Kothi Steel Limited, to substantiate their argument that in cases covering refund under Compounded Levy Scheme, unjust enrichment would not apply. Since the citation is not given, on searching in EXCUS it is observed that the case law relied upon is reported at [2004(167)ELT 545 (Tri. -Mum)]. However, I find that this judgement of the Tribunal was overruled by the Larger Bench of the Hon'ble Tribunal in the case of Shivagrigo Implements Limited[2006(199) ELT 44(Tri LB). Therefore, the averment that unjust enrichment is not applicable to their case is not tenable argument and is therefore, rejected.

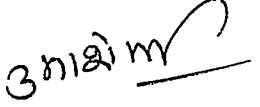
7. Now in view of the foregoing, since it has already been held that in such cases of refund both limitation under Section 11B of the Central Excise Act, 1944, and the principles of unjust enrichment would apply, I wish to examine the claim filed by the appellant. It is not in dispute that the refund in respect of the duty paid for the period from 6.12.1998 to 28.2.2000, was filed on 21.2.2003, thereby being hit by the bar of limitation. However, the appellant has argued that they had filed a letter dated 15.3.1999 in terms of Rule 233 B of the Central Excise Rule, 1944 informing that they would be paying the monthly duty under protest. The further argument is that since they had filed this general protest, the question of limitation of time would not apply in their case. The appellant has enclosed a copy of the said letter with the appeal papers. However, I find that Rule 233B is a very exhaustive rule, which encompasses under its sub-section 4 that an endorsement 'duty paid under protest' shall be made on all copies of the invoices, form RT 12, etc. as the case may be. The appellant could not produce the copy of invoices, RT 12 during the adjudication proceedings. However, he has relied upon the earlier OIO dated 714/2003-R/IV Narol dated 31.7.2003, a copy of which is enclosed with the appeal papers to contend that the invoices, RT 12 etc were already submitted to the department. However, the appellant seems to have ignored the findings of the then adjudicating authority who had clearly stated that the appellant had not mentioned on the PLA, TR 6 challan or invoices that duty was paid under protest a mandatory declaration which was to be made in terms of Rule 233 B of the Central Excise Rules, 1944. However, the documents supplied to the department are presently not available. In all possibility when the appellant has the letter of protest dated 1999 with them, which is enclosed, they surely would be having a copy of the invoices and TR 6 challan etc. with them. They could very well have submitted their office copy to substantiate their claim. However, it is felt that since there is a finding against them, they failed to supply the same before the current adjudicating authority.



8. As far unjust enrichment goes, there is a finding in the earlier OIA dated 12.10.2004, wherein my predecessor on having a look at the invoices found that [para 8] the appellant had not shown the duty break up; that they had shown the aggregate duty and therefore it does not prove conclusively that the incidence of duty has not been passed on. The appellant could have produced documents to substantiate his point that no incidence of duty has been passed on. Despite the onus being on the appellant, he failed to provide any documents to prove that the incidence of duty was not passed on and on the contrary argued that the question of unjust enrichment, does not arise in such refunds.


9. In view of the foregoing after having held that the refund of the appellant has to clear the bar of limitation and unjust enrichment, I find that the appellant has not produced any document which forces me to interfere with the order of the adjudicating authority. Hence, the impugned OIO is upheld and the appeal stands rejected.

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


(उमा शंकर)
आयुक्त (अपील्स)

Date : 27.2.2018

Attested


(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,
M/s. Chamaria Fashions Limited, 177/B,
Near Shahwadi Octroi Naka,
Ahmedabad – 382 405
Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Tax, Division-IV, Ahmedabad South.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad South.
- ✓ 5. Guard File.
6. P.A.

