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

स्पीड पोस्ट

क फाइल संख्या : File No : V2(ST)174 to 179/Ahd-South/2019-20/14533 TO 14538

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-130 to 135-2019-20**
दिनाँक Date : **23-03-2020** जारी करने की तारीख Date of Issue 05/06/2020

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **SD-02/Ref-181 to 185/DRM/2015-16** दिनाँक**: 30.11.2015 , SD-02/Ref-241/DRM/2015-16** दिनाँक**: 29.01.2016,** issued by Asst. Commissioner, Div-II,STC, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Ellisbridge Gymkhana
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 पूवोक्त 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.

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 not withstanding 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.

(6) 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) -

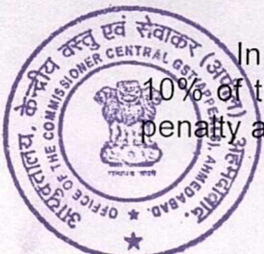
(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

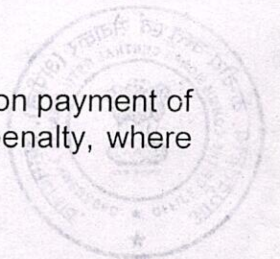
⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है .**

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 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

Six Appeals have been filed by M/s. Ellisbridge Gymkhana, Netaji Marg, Ellisbridge, Ahmedabad-380006 (here-in-after referred to as the "appellant') before this authority, against the Order-in-Originals (here-in-after referred to as the "impugned orders") issued by the Assistant Commissioner of Service Tax, Division-II, Ahmedabad (here-in-after referred to as the "adjudicating authority"). Hereinafter in this order Show Cause Notice will be referred as "SCN". The details in respect of the appeals are as under :

Srl. No.	Order-in-Original No. and Date	Period	Ref. Claim filed on	Amount (in Rs.)	Appeal No.
1	SD-02/Ref-181/DRM/2015-16 Dated : 30.11.2015	01.04.2010 to 31.03.2011	20.05.2015	1778928	V2(ST)174/Ahd-South/2019-20
2	SD-02/Ref-182/DRM/2015-16 Dated : 30.11.2015	01.04.2009 to 31.03.2010	20.05.2015	1814018	V2(ST)175/Ahd-South/2019-20
3	SD-02/Ref-183/DRM/2015-16 Dated : 30.11.2015	01.04.2008 to 31.03.2009	20.05.2015	1977234	V2(ST)176/Ahd-South/2019-20
4	SD-02/Ref-184/DRM/2015-16 Dated : 30.11.2015	01.04.2007 to 31.03.2008	20.05.2015	1802884	V2(ST)177/Ahd-South/2019-20
5	SD-02/Ref-185/DRM/2015-16 Dated : 30.11.2015	01.04.2005 to 31.03.2006	20.05.2015	643140	V2(ST)178/Ahd-South/2019-20
6	SD-02/Ref-241/DRM/2015-16 Dated : 29.01.2016	01.04.2006 to 31.03.2007	15.09.2015	2023765	V2(ST)179/Ahd-South/2019-20
		TOTAL		10039969	

2. The facts of the cases, in brief, are that on 25.03.2013, the Hon'ble Gujarat High Court in the case of Sports Club of Gujarat Ltd., Rajpath Club Ltd. and Karnavati Club Ltd. v/s. Union of India (S.C.A. No. 13654, 13655 and 13656 of 2005 respectively) declared the Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance (No.2) Act, 1994 as incorporated/amended by the Finance Act, 2005 to be ultra vires to the extent that the said provisions purport to levy service tax in respect of services purportedly provided by the petitioner club to its members. Pursuant to the said decision of Gujarat High Court, the appellant filed six refund claims for the service tax paid by them in the relevant years the details of which have been shown in the table hereinabove. On verification of the refund claims, it was found that all the claims are liable for rejection and therefore Show Cause Notice was issued in all the claims separately. The said Show Cause Notices were adjudicated by the adjudicating authority separately and all the claims were rejected vide the impugned orders, after discussing the issue at length by relying upon the judgement of Hon'ble Supreme Court of India, in case of M/s. Mafatlal Industries Ltd. v/s. Union of India [1997(89)ELT 247(SC)] and in view of the provisions contained in Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994.

3(i). Being aggrieved with these impugned orders, the appellant preferred the appeals before this authority on the grounds that **(a)** the limitation as prescribed under the provisions of Section 11B of the Central Excise Act, 1944 would not be applicable since the Gujarat High Court has held the said levy of duty as unconstitutional and beyond legislative competence of Parliament and thus such claims can not be governed by the provisions in Section 11B of the Central Excise Act, 1944; **(b)** the 'relevant date' as referred in Section 11B of Central Excise Act, 1944, in their case, would be the date on which the said judgement came into the knowledge of them and not the date on which the judgement was passed by the High Court; **(c)** it is difficult to produce the original invoices pertaining to the refund claim for entire period as the number of documents involved would be very huge in number; **(d)** unjust enrichment would not be applicable in their case as the service provided to its members can not be termed as service provided to others .

3(ii). It was noticed that an appeal in respect of M/s. Calcutta Club Ltd. on the validity of Section 65(25a) and Section 65(105)(zzze) was pending before the Hon'ble Supreme Court, and accordingly these appeals were kept in Call-Book pending the decision from the Hon'ble Supreme Court. The case of M/s. Calcutta Club Ltd., before the Hon'ble Supreme Court, attained finality vide order dated 03.10.2019 passed under Civil Appeal No.4184 of 2009 and 7497 of 2012 [2019(29)GSTL 545(SC)], and thus these cases were retrieved from the Call-Book.

4. Personal hearing in these cases was accorded to the appellant. Shri C.N.Shah from M/s. Shreekant S. Shah & Co. (Chartered Accountants), on behalf of the appellant, attended the hearing on 26.02.2020. He reiterated the submissions made in the Appeal Memorandum. He stated that the Hon'ble Supreme Court in the case of M/s. Calcutta Club Ltd. has decided the issue and their cases are squarely covered by the judgement. He requested to drop the demand in view of the said judgement of the Supreme Court.

5. I have carefully gone through the facts of the case available on records and submissions made by the appellant in the Appeal Memorandum and during the course of personal hearing. All the appeals pertain to the same appellant and the issue involved in all the appeals is common or same. The issue involved in all these appeals is that whether the refund is admissible to the appellant considering the judgement dated 25.03.2013 of Gujarat High Court in SCA No.13654, 13655 and 13656 of 2005 in case of Sports Club of Gujarat Ltd. and others, which was challenged before the Hon'ble Supreme Court by the Department and whether it is hit by bar of limitation as prescribed under Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994.

6(i). It is noticed that the appellant filed the refund claims on the basis of the judgement of Hon'ble Gujarat High Court who declared the Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance (No.2) Act, 1994 as incorporated/amended by the Finance Act, 2005 to be ultra vires to the extent that the said provisions purport to levy

service tax in respect of services purportedly provided by the petitioner club to its members. It is pertinent to mention here a few things viz., **(i)** the appellant was not the party in the said judgement of Gujarat High Court; **(ii)** the Gujarat High Court stayed the said judgment for six weeks so as to enable the Department to carry the matter further. The result is the judgement of Hon'ble Supreme Court in M/s. Calcutta Club Ltd. case reported under 2019(29)GSTL 545(SC) upon which reliance has been placed by the appellant also; **(iii)** The judgement of Hon'ble Supreme Court reveal that the Section 65(25a), Section 65(105)(zzze) and Section 66 of the Finance Act, 1994 in respect of 'club or association' service were interpreted and explained by the Apex Court in detail. In result, under para 84, the Apex Court said as under

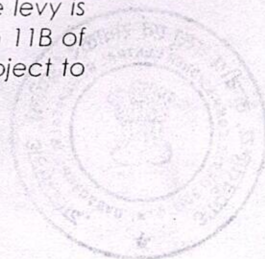
"We are also of the view that from 2005 onwards, the Finance Act, 1994 does not purport to levy service tax on the members' clubs in the incorporated form".

In view of above, it can be inferred that the said sections of the Finance Act, 1994 have not been declared as unconstitutional or ultra vires by the Apex Court and they still hold their place in the said Act. Thus, first contention of the appellant that the service tax paid by them was unconstitutional and beyond legislative competence of Parliament does not hold any ground after taking into consideration of the judgement of the Apex Court in case of M/s. Calcutta Club Ltd. supra. It is necessary to mention here that where, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition only {held by the Apex Court in case of M/s. Mafatlal Industries Ltd. [1997(89)ELT 247(SC)]}. Hence, the contention of the appellant is liable for rejection.

6(ii). Since the issue in these appeals pertains to the refund of service tax, it is very much necessary to look into the judgement pronounced by the Hon'ble Supreme Court (comprising nine justice) in case of M/s. Mafatlal Industries Ltd. [1997(89)ELT 247(SC)]. The said judgement of the Apex Court deals with the provisions of the Refund under Central Excise Act, 1944 and continues to hold ground. It is necessary to mention here that the adjudicating authority has discussed the issue in great length on the basis of this Judgement of the Apex Court in its impugned orders. Even the appellant in its para (b) in ground of appeal has relied upon the judgement of Apex Court in case of M/s. Mafatlal Industries Ltd. Since the said judgement of the Apex Court comprised of 9 Justice and deals with the Refund under the Excise Law (as made applicable to service tax law also), it becomes necessary that the said judgement should be taken into consideration while deciding the present issue (which is also pertaining to Refund), more particularly when both the parties i.e. appellant and respondent have referred the said judgement.

6(iii). Since the said judgement of Apex Court in case of M/s. Mafatlal Industries Ltd. is lengthy enough, it would not be proper to put the whole judgement here when the parties herein are well aware of it as both of them have referred it. However it would be proper to put some important relevant points of the said judgement here under :

(a) *Refunds of Central Excise and Customs Duties – All claims for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962 and subject to*



claimant establishing that burden of duty has not been passed on to third party – no civil suit for refund of duty maintainable – Writ jurisdiction of High Courts under Article 226 and of Supreme Court under Article 32 unaffected by said Section 11B or Section 27 but writ court to have due regard to the provisions of Central Excise and Customs Act and to refuse grant of relief where burden of duty passed on to third party – Favourable order not to result in automatic refund and claimant to prove burden of duty not passed on to third party.

(b) *Refund – Bar of unjust enrichment – Incidence of duty – Refund of duty either under Central Excise Act, Customs Act, in a civil suit or a writ petition grantable only when it is established that burden of duty has not been passed on to others – Person ultimately bearing the burden of duty can legitimately claim its refund otherwise amount to be retained by the State – Section 11B of the Central Excise Act, 1994 – Section 27 of the Customs Act, 1962 – Section 72 of the Contract Act and Articles 32 and 226 of the Constitution of India.*

(c) *Section 11B of the Central Excise Act, 1944 and Section 27 of the Customs Act, 1962 both before and after 1991 amendments are valid and constitutional as per proposition initiated by Supreme Court in Kamala Mills' case – 1966(1)SCR 64.*

(d) *99(i) Where a refund of tax duty is claimed on the ground that it has been collected from the petitioner/plaintiff - whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter - by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf.*

....

***The said enactments including Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law.** Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and give effect to. ....*

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition.

This principle is, however, subject to an exception : where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. in Tilokchand Motichand and we respectfully agree with it.

....

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

.....

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

.....

(e) *Central Excise and Customs Law (Amendment) Act, 1991 – Amendments made and provisions inserted thereby in the Central Excise Act and Customs Act are constitutionally valid and are unexceptionable.*

(f) *Where a duty has been collected under a particular order which has become final, the refund of that duty can not 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 can not 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 3 years from the date of discovery of such mistaken of law can not be invoked by an assessee taking advantage of the decision in another assessee's case. All claims of refund ought to be and ought to have been, filed only under and in accordance with Rule 11/Section 11B 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 can not 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/assesee.

(g) *If a levy or imposition is held to be unconstitutional or illegal or not exigible in law, i.e. without jurisdiction, it is open to the assessee to take advantage of the declaration of the law so made, and pray for appropriate relief inclusive of refund on the ground that tax was paid due to mistake of law, provided he initiates action within the period of limitation prescribed under the Limitation Act. .... If the levy or imposition was held to be unconstitutional or illegal or not exigible in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim can not, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law.*

(h) *As regards to time limit, the second proviso to Section 11B (as amended in 1991) expressly provides that "the limitation of six months shall not apply where any duty has been paid under protest". Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, wherever he does, under protest hence time limit would have no application to such cases.*

(i) *Refund of "unconstitutional levy" i.e. where the provisions of the Act under which duty/tax is levied is struck down as unconstitutional – Person paying such tax entitled to refund – Claim for such refund not governed by Rule 11/Section 11B of the Central Excise Act, 1944 – Right for refund do arise under Article 265 of the Constitution but there is no automatic or unconditional right of refund – Such refund claimable either by filing civil suit under Section 72 of the Contract Act or by filing writ petition under Artcile 32 or 226 of the Constitution of India – Such refunds subject to claimant establishing that burden of duty not pass on to third party – Social and economic justice – Article 38, 39 and Preamble to the Constitution of India.*

(j) *Where the petitioner-plaintiff has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes........ The preamble of Constitution and the Article 38 and 39 do demand that where a duty can not be refunded to the real persons who have bore the burden, for one or other reason, it is but appropriate that the said amounts are retained by the State for being used for public good. Accordingly even looked at from the constitutional angle, the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right.*

(k) *Refund of "unconstitutional levy" – where assessee unsuccessfully challenging, constitutional validity of levy, he can not take advantage of the declaration of unconstitutionability obtained by another person on another ground – Right to refund or restitution neither automatic nor unconditional – Civil suit to be filed subject to time limit of Section 17(1)(c) of the Limitation Act – Section 11B of the Central Excise Act, 1994.*

(l) *Protest – Duty paid under order of the court whether by way of order granting stay, suspension, injunction or otherwise is to be treated as a payment under protest – Protest under Rule 233B of the Central Excise Rules, 1944 need not to be lodged – Section 11B of the Central Excise Act, 1944.*

(m) *Jurisdiction – Decision of an authority exercising powers under the statute not to be treated without jurisdiction even if such decision may be erroneous – Such erroneous adjudication/assessment not treatable as without jurisdiction – Section 11A, 11B and 33 of the Central Excise Act, 1944 and Sections 27, 28 and 122 of the Customs Act, 1962.*

7. The relevant part of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994 reads as under :

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** ......*

***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 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 ....

Provided further ....

(3) Notwithstanding anything to the contrary contained in any judgement, 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).

(4)......

(5)....

***Explanation** – For the purpose of this section, -*

(A) ......

(B) "relevant date" means –

(a) ....

(b) ....

(c) ....

(d) ....

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) ....

(eb) ....

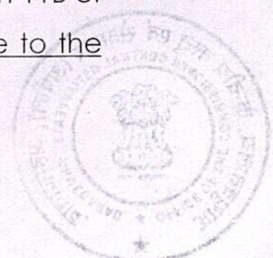
(ec) in case where the duty becomes refundable as a consequence of judgement, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgement, decree, order or direction;

(f) in any other case, the date of payment of duty.

8. Now perusal of the relevant points of the judgement of the Apex Court as shown in para 6(iii) here-in-above, reveal that **(i)** the Section 11B is constitutionally valid and any refund claim is required to be dealt with under provisions of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994; **(ii)** where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff by mis-interpreting or mis-applying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein (*which herein the present case is Section 11B of the Central Excise Act, 1944*); **(iii)** where, a refund of tax/duty is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. However it was further clarified that this principle is, subject to an exception that where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another

person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-opened on the basis of a decision on another person's case; **(iv)** It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case; **(v)** Where a duty has been collected under a particular order which has become final, the refund of that duty can not 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 can not be recovered back nor can any claim for its refund be entertained; **(vi)** If the levy or imposition was held to be unconstitutional or illegal or not exigible in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim can not, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law **(vii)** the second proviso to Section 11B expressly provides that the limitation shall not apply where any duty has been paid under protest. *However if an assessee opts to pay the duty/tax under protest it will be mandatory on part of him to approach the proper authority for contesting such levy. It would be unacceptable that the said assessee files the protest and then sit idle and does not contest/oppose the said levy before proper authority and wait for the others to do so. In short whenever an assessee opts to pay the duty/tax under protest, he will have to contest/challenge such levy before the proper authority and then and then only the duty/tax paid by the said assessee would be considered to be paid under protest during the pendency of such litigation initiated by the said assessee*. **(viii)** where assessee fails challenging, constitutional validity of levy, he can not take advantage of the declaration of unconstitutionability obtained by another person on another ground – Right to refund or restitution neither automatic nor unconditional – Civil suit to be filed subject to time limit of Section 17(1)(c) of the Limitation Act – Section 11B of the Central Excise Act, 1994. **(ix)** Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law.

9. In view of the discussion already held in para-6 and para-8 above and in view of the judgement of Apex Court in case of M/s. Mafatlal Industries Ltd., it can be said that the appellant has paid the tax under the provisions of the Finance Act, 1994 and therefore the Refund is required to be considered under the provisions of said Act only. Section 11B of the Central Excise Act, 1944 deals with the refund of duty/tax as made applicable to the

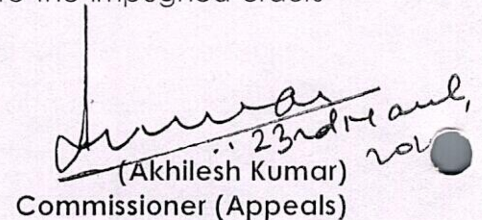


Service Tax under Section 83 of the Finance Act, 1994. The judgement of Gujarat High Court (on the basis of which the appellant has filed the refund claims) was pronounced in case of some other parties and the appellant was not a party in the said judgement. The judgement of the Apex Court in case of M/s. Mafatlal Industries Ltd. is relevant in case of Refund. It says that in absence of the unconstitutional levy of tax, the refund can be dealt with only under that particular Act/law under which the tax is levied. In the present case, Section 11B of the Central Excise Act, 1944 will be applicable for refund of Service Tax as the same is made applicable to the service tax law under Section 83 of the Finance Act, 1994. However, where the levy of the tax is held unconstitutional, the same can not be dealt with under Section 11B of the Central Excise Act, 1944 and a suit or writ petition before High Court or Supreme Court is required to be filed. It also says that where the assessee is not satisfied with the levy of some duty/tax, he is required to lodge the protest and required to fight the case before proper authority. In the cases on hand, the appellant has not put forth any evidence that they have ever challenged/contested the levy of the said tax. They even failed to produce the order/judgement of any Higher authority in their own case which shows that they have contested the levy of tax. (It could have been possible only when the appellant had contested/challenged the said levy of tax). Therefore in absence of any litigation or appeal on part of the appellant, the service tax paid by them can not be treated as paid under protest. Thus, instead of contesting their case before the proper authority, the appellant is taking advantage of the order/judgement issued by the Courts in favour of some other assessees that too at a later stage. The appellant failed to show that they have contested the levy of such tax in their own case. Therefore service tax paid by the appellant has become final and the judgement pronounced by the Courts in the matter of some other assessees can not be made applicable in their case. In view of the judgement of the Hon'ble Apex Court, the refund claim filed by the appellant is required to be processed under the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax under Section 83 of the Finance Act, 1994. Since the appellant failed to establish that the tax was paid under protest, the second proviso of the Section 11B (which says 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) would not be applicable in case of the appellant. Therefore the refund claims of the appellant were rightly rejected by the adjudicating authority as time bar being beyond the period of one year as the relevant date in their case would be the payment of duty. The appellant has submitted in their grounds of appeal that the relevant date in their case would be the date on which the said judgement of Gujarat High Court came to their knowledge and not the date on which the judgement was passed by the Gujarat High Court which is totally contrary to the provisions contemplated under (ec) of the "relevant date" under Section 11B which says "the date of judgement, order, decree or direction of court". <u>It is mentioned specifically here that in the matter on hand the date of judgement of High Court was 25.03.2013 and the appellant has filed the 5 refund claims on 20.05.2015 and the 6th refund claim on 15.09.2015 which are beyond the period of one year</u>. However it is pertinent to mention that the said judgement of Gujarat High Court holding the relevant sections of the Finance Act, 1994 supra ultra vires has not been considered to be ultra vires or unconstitutional by the Apex Court and therefore can not be taken into consideration. Moreover, in view of the judgement of the

Apex Court in case of M/s. Calcutta Club Ltd., it can be inferred that the tax was paid by the appellant under mis-interpretation or mis-application of provisions of the Finance Act, 1994. But then, it is also the judgement of the Apex Court comprising 9 justice in case of M/s. Mafatlal Industries Ltd. which says that where tax/duty is levied by mis-interpreting or mis-applying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. Therefore, the refund claims filed by the appellant can be dealt only under the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to the Service Tax by Section 83 of the Finance Act, 1994. In view of the above, the appeals filed by the appellant are liable for rejection on merits.

10. While processing the refund claim by the adjudicating authority, it was mandatory on part of the appellant to produce all the documents which are required to process their claim. The appellant did not submit the original invoices before the adjudicating authority to process their refund claim for the reason that the documents involved would be very huge in number and are therefore difficult to produce. It is pertinent to mention here that the appellant has approached the authority for refund claim therefore it was mandatory on part of the appellant to submit the documents which are required. Such a vague arguments is unacceptable in the matter that too when refund of tax was involved. The adjudicating authority has specifically mentioned that certain documents have been prescribed by the Board, however the appellant did not submit the original invoices. Therefore the adjudicating authority was proper in rejecting the claims in absence of the required documents also.

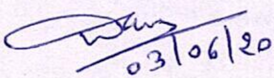
11. In view of above, I did not find any reason to interfere the impugned orders and the appeals filed by the appellant are rejected.



(Akhilesh Kumar)
Commissioner (Appeals)

Date : .03.2020

Attested



(Jitendra Dave)
Superintendent (Appeal)
CGST, Ahmedabad.

BY R.P.A.D. / SPEED POST TO :
M/s. Ellisbridge Gymkhana,
Netaji Marg, Ellisbridge, Ahmedabad-380006.

Copy to :-
1. The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Principal Commissioner, CGST & Central Excise, Ahmedabad South Comm'rate.
3. The Addl./Jt. Commissioner (Systems), CGST & Cen. Excise, Ahmedabad South Comm'rate.
4. The Addl. Commissioner, CGST & Cen. Excise, Ahmedabad South Comm'rate.
5. The Dy./Asstt. Commissioner, CGST & Cen. Excise, Division-VI, Ahmedabad South Comm'rate.
6. Guard File.
7. P.A. File.