



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(74)190/Ahd-South/2018-19

/ 10607 to 10611

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-02-2019-20

दिनांक Date : 18-04-2019 जारी करने की तारीख Date of Issue _____ 15/05/2019

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 18/AC/SKL/REF/2018 दिनांक: 18.03.2019 issued by Assistant Commissioner, Div-II, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
mahendra metal industries
Ahmedabad

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 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.

(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 उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the 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 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 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 Mahendra Metal Industries, A-301, Arihint Tower, Shahibaug, Ahmedabad [hereinafter referred to as "the appellant"] against Order-in-Original No.18/AC/SKL/REF/2018 dated 18.03.2019 [hereinafter referred to as "the impugned order"] passed by the Assistant Commissioner of CGST, Division-II, Ahmedabad South [hereinafter referred to as "the adjudicating authority"].

2. Brief fact of the case is that the appellant has filed a refund claim of Rs.35,00,000/- on 23.01.2019. The background for filing the said refund claim is that the appellant had paid the said amount at various stages, while pending of central excise duty evasion case booked against them. Finally, the Hon'ble CESTAT has decided the said case and remanded to the jurisdictional Commissioner to decide the case afresh. Accordingly, the appellant has filed the refund claim in question, considering the payment as pre-deposit during pendency of appeal. The adjudicating authority has rejected the refund claim, vide the impugned order, not considering the amount paid as pre-deposit but payment towards duties as per Hon'ble Addl. Chief Metropolitan Magistrate/CESTAT's order.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that the Hon'ble CESTAT vide its stay order dated 23.06.2010 has considered the amount paid as a pre-deposit under Section 35 F of CEA and accordingly, the refund of said amount is admissible to them; that if the department treats the said amount as payment of duty, neither in the show cause notice nor in the OIO the amount paid during investigation or later has been appropriated. The appellant has relied on various case laws wherein it has held that the amount paid during investigation is a deposit and not duty.

4. Personal hearing in the matter was held on 04.04.2019. Shri N.K.Oza, Advocate appeared for the same and reiterated the grounds of appeal. He further submitted additional submissions along with case laws in their favour.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. The limited point to be decided in the matter is relating eligibility refund amount which was paid during pendency of evasion case and appeal period.

6. At the outset, I observe the background of filing the refund claim in question. I find that an investigation regarding evasion of central excise duty was initiated against the appellant which resulted issuance of show cause notice dated 08.02.2009 and Order-in-Original dated 21.07.2009. Vide the OIO dated 21.07.2009, the jurisdictional Commissioner has confirmed the demand of Rs.70,02,02/- with interest and imposed penalty equal to duty confirmed. The appellant preferred an appeal before Hon'ble CESTAT. Meanwhile, the appellant has paid Rs.20,00,000/- towards excise duty as per order dated 13.02.2009 of

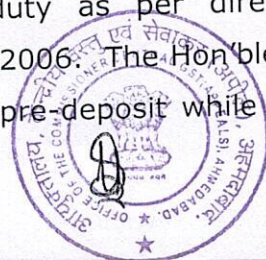


Hon'ble Chief Metropolitan Magistrate, Ahmedabad, being a condition of releasing Shri Mahendra Duggad, Partner of the appellant on bail, who was arrested on 07.02.2009. Further, the appellant has again paid Rs.15,00,000/- towards excise duty as per CESTAT's stay order dated 23.06.2010 towards central excise duty.

7. The appellant has filed the refund claim in question as considering the whole amount as pre-deposit paid during pendency of appeal. Looking into the circumstances for which the appellant had paid the amount of Rs.35,00,000/-, I find that they had paid the said amount in two counts. First, they had paid an amount of Rs.20,00,000/- towards duty amount, as per order of Hon'ble Chief Metropolitan Magistrate, Ahmedabad, being a condition of releasing Shri Mahendra Duggad, Partner of the appellant on bail and secondly an amount of Rs.15,00,000/- was paid by them towards duty in accordance with the order No.S/624-625/WZB/AHD dated 23.06.2010 of Hon'ble CESTAT.

8. The offence case booked against the appellant is now pending with the jurisdictional Commissioner of CGST for adjudication as the Hon'ble CESTAT has remanded the case. In other words, the issue regarding non-payment of duty is pending now at show cause notice stage. I find that the payment of Rs.20,00,000/- was paid by the appellant as per direction of Hon'ble Metropolitan Magistrate, Ahmedabad, as a condition of bail order dated 13.02.2009 and 18.05.2009 issued in respect of Shri Mahendra Duggad, Partner of the appellant. On record, I find that the factory of the appellant is closed in 2006 and Central Excise registration admittedly surrendered on 19.09.2006. The Hon'ble Court has ordered to pay the said amount and the appellant has paid the amount when the case was pending at show cause notice stage. Looking into the facts and circumstances of the case, it is obvious that the Hon'ble Court has directed the appellant to pay the amount towards duty evaded only as a preventive measure towards Government Revenue. In the circumstances, I am of the considered view that the said payment cannot be considered as a pre-deposit amount made by the appellant during pendency of case and also cannot be considered as a payment made under Section 35 F of CEA. Therefore, the said amount of Rs.20 lacs is not eligible for refund as the Hon'ble Metropolitan order under which the said amount was deposited is automatically become non-breakable at present. Therefore, refund of the said amount is premature at this stage.

9. As regards payment of Rs.15,00,000/-, I find that the said amount was paid by the appellant as per Stay Order of the Hon'ble CESTAT dated 23.06.2010. On perusal of the said Stay Order, I observe that the Hon'ble CESTAT has directed to deposit the amount after considering the plea of the appellant that they had already made payment of Rs.20,00,000/- towards duty as per direction of Hon'ble Metropolitan Court and their factory is closed in 2006. The Hon'ble CESTAT has not considered the said amount of Rs.20 lakhs as pre-deposit while passing the Stay



Order dated 23.06.2010. As per Stay Order, the appellant had deposited only Rs.15 lacs and therefore, the said amount only can be considered as pre-deposit. I find that the CBEC has issued clarification, vide Circular No.275/37/2K-CX dated 01.01.2002 and 984/8/2014-CX dated 16.09.2014 regarding return of deposit made in terms of Section 35F of CEA. It has been clarified that such deposit should be return in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication. In the circumstances, the amount of Rs.15 lacs deposited as per CESTAT's order is eligible for refund and issue in question was remanded by the Hon'ble CESTAT to the original adjudicating authority.

8 In view of above discussion, I partly allow the appeal filed by the appellant.

Ushankar

(उमा शंकर)

प्रधान आयुक्त (अपील्स)

Date : .04.2019

Attested

Mohanan V.V
(Mohanan V.V)
Superintendent (Appeal),
Central Tax, Ahmedabad.



By RPAD.

To,
Mahendra Metal Industries,
A-301, Arihint Tower, Shahibaug, Ahmedabad

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central GST, Ahmedabad South.
3. The Assistant Commissioner, System, CGST, Ahmedabad South
4. The Assistant Commissioner, CGST, Dn.II, Ahmedabad South
- ✓ 5. Guard File.