



सत्यमेव जयते

आयुक्त का कार्यालय), अपीलस( )  
Office of the Commissioner,  
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय  
Central GST, Appeal Commissionerate- Ahmedabad  
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.  
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015  
☎ 26305065-079 : टैलेफैक्स 26305136 - 079 :



रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)35to38/Ahd-South/2019-20 / 11515 to 11522

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-034 to 37-2019-20  
दिनांक Date : 08-07-2019 जारी करने की तारीख Date of Issue \_\_\_\_\_ 16/07/2019

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

ग Arising out of Order-in-Original No. CGST/WS07/Ref-01to04/MK/AC/2019-20 दिनांक: 24.4.2019  
issued by Assistant Commissioner, Div-VII, Central Tax, Ahmedabad-South

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

Bipinbhai C. Chauhan  
Siddhesh B. Chauhan  
Jitendra C. Chauhan  
Sambhav J. Chauhan  
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 अंतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

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

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

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

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



... 2 ...



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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

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

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

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

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

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

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

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

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

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

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

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

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

Four appeals as detailed below filed before the Appellate Authority under Section 85 of the Finance Act,1994 against Order-In-Originals (henceforth, "impugned orders") issued by the Assistant Commissioner, CGST, Division-VII, Ahmedabad-South (henceforth,-,"adjudicating authority") involving common question of law are taken up together for decision:

Sr. No	Name of Appellant	Appeal No.	OIO NO. and date	Amount under dispute(Rs)
1	Shri Bipinbhai C.Chauhan	V2(ST)35/Ahd-South/2019-20	CGST/WS07/Ref-03/MK/AC/2019-20 dated 24.04.2019.	19,03,783/-
2	Shri Sidhesh B. Chauhan	V2(ST)35/Ahd-South/2019-20	CGST/WS07/Ref-01/MK/AC/2019-20 dated 24.04.2019.	6,77,095/-
3	Shri Jitendra C. Chauhan	V2(ST)35/Ahd-South/2019-20	CGST/WS07/Ref-02/MK/AC/2019-20 dated 24.04.2019.	18,89,082/-
4	Shri Sambhav J. Chauhan	V2(ST)35/Ahd-South/2019-20	CGST/WS07/Ref-04/MK/AC/2019-20 dated 24.04.2019.	6,77,095/-

2. Briefly, the facts are that based on audit objections that services provided by director of a company to the company is chargeable to service tax under reverse charge mechanism in term of Section 68(2) of the Finance Act,1994 and subsequent issuance of show cause notice for recovery of service tax to from M/s Jade Blue Lifestyle India Ltd, (for shot 'M/s. JBLIL') who is a recipient of "Renting of Immovable Property" service provided by the appellants, the appellants filed refund claims on 28.01.2019 for the amount of tax shown above which stands paid by them as service providers. Said claims, without going into merit were rejected under impugned orders holding that it has hit by limitation of time.

3. Feeling aggrieved, by the rejection of the refund claims, the appellants filed these appeals contesting inter alia, that when there were no tax, it amount as deposit of money and needs to be refunded to the appellants; that section 11B of the Central Excise Act, 1944 is applicable in a situation where duty has been paid, whereas in these cases it is not applicable as appellants paid service tax mistakenly; that allowing the respondent to retain such amount would be injustice to the appellant; that when service tax is not payable, the principle of





unjust enrichment/limitation is not applicable; they cited various judgments in favor of their claim.

4. In the personal hearing held on Shri Vipul Khandhar,CA & Shri Girishbhai reiterated the grounds of appeal and submitted citations viz 2017(354)ELT 577(Guj) in case of ONGC v/s UOI, 2018(18)GSTL 410(Mad.) in case of 3E Infotech v/s CESTAT,Chennai & 2018(359)ELT 113(Bom) in case of Parijit Construction v/s Commr. Of Cen. Ex. Nashik.

5. I have carefully gone through the facts of the case, the grounds of appeal and the oral averments raised during the course of personal hearing. I find that the primary question for determination is whether the adjudicating authority was correct in rejecting the refund claim or otherwise on the ground of limitations in term of Section 11B of the Central Excise Act,1944.

6. On going the impugned orders dated 24.04.2019, I find that all refund claims were rejected only holding that the claims were not filed within one year as provided under Section 11B of the Central Excise Act,1944 and hence hit by limitation of time. Said provisions makes it clear that refund claim has to be filed before expiry of one year from the relevant date which has not been followed in the present case. However the main plea of the appellant is that service tax was not payable as per the show cause notice issued to the recipient of the service. In this circumstance, the amount paid by the appellants is an amount which is paid mistakenly and hence limitation issue is not applicable to the present cases. The issue of time bar not applicable to cases where duty has been paid under mistake of law is no more res integra. In a catena of judgments Hon'ble High Courts have held that bar of limitation under Section 11B is not applicable in such cases. I reproduce below relevant part of the judgment of Hon'ble High Court of Gujarat in case of Parijat Construction v/s Commissioner of Central Excise, Nasik cited by the appellant reported in 2018(359)ELT 113(Bom) holding that limitation prescribed under Section 11B of Central Excise Act,1944 to be not applicable to refund claims for service tax paid under mistake of law:

“ Refund of tax paid under mistake of law - Limitation - Refund claim on ground that assessee provided construction services for use of organisation or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for purposes of profit and thus exempted in terms of C.B.E. & C. Circular No. 80/10/2004-





S.T., dated 17-9-2004 - Claim rejected as time-barred - **HELD : Limitation prescribed under Section 11B of Central Excise Act, 1944 not applicable to refund claims for Service Tax paid under mistake of law - Assessee entitled to refund ”.**

“5. We are of the view that the issue as to whether limitation prescribed under Section 11B of the said Act applies to a refund claimed in respect of service tax paid under a mistake of law is no longer *res integra*. The two decisions of the Division Bench of this Court in *Hindustan Cocoa (supra)* and *Commissioner of Central Excise, Nagpur v. M/s. SGR Infratech Ltd. (supra)* are squarely applicable to the facts of the present case.

6. Both decisions have held the limitation prescribed under Section 11B of the said Act to be not applicable to refund claims for service tax paid under a mistake of law. The decision of the Supreme Court in the case of *Collector of C.E., Chandigarh v. Doaba Co-Operative Sugar Mills (supra)* relied upon by the Appellate Tribunal has in applying Section 11B, limitation made an exception in case of refund claims where the payment of duty was under a mistake of law. We are of the view that the impugned order is erroneous in that it applies the limitation prescribed under Section 11B of the Act to the present case were admittedly appellant had paid a Service Tax on Commercial or Industrial Construction Service even though such service is not leviable to service tax. We are of the view that the decisions relied upon by the Appellate Tribunal do not support the case of the respondent in rejecting the refund claim on the ground that it was barred by limitation. We are, therefore, of the view that the impugned order is unsustainable.”

7. The appellants have pleaded that a Show cause notice dated 28.08.2018 for recovery of service tax under reverse charge mechanism has been issued to the recipient of the service M/s.Jade Blue Lifestyle India Ltd, Ahmedabad wherein the appellants are directors. It is alleged therein that M/s.Jade Blue Lifestyle India Ltd is a public Limited company falling under category of “Body Corporate” and in term of the provisions of Section 68(2) of the Finance act,1994 readwith Rule 2(d) of the Service Tax Rules,1994 and Noti.No.30/2012-St as amended by Noti.No.45/2012-St, the recipient was liable to pay 100% service tax. Thus, it has been alleged in said Show cause notice that services rendered by the director of a company or body corporate to the said company or body corporate is chargeable to service tax under reverse charge mechanism. The refund claims rejected under impugned orders were filed by the appellants on the event of issuance of show cause notice referred supra. I therefore, observe that service tax paid by the appellants were paid by mistake which was not leviable to tax and hence the decision of Hon'ble High Court of Gujarat (supra) is squarely applicable to the present case in so far as limitation issue is concerned.





8. In case of M/s. 3E Infotech v/s CESTAT, Chennai reported in 2018(18)GSTL 410(Mad) Hon'ble High Court at Madras also it was held that **when service tax is paid by mistake, a claim for refund cannot be barred by limitation, merely because the period of limitation under Section 11B had expired.** Such a position would be contrary to the law laid down by the Hon'ble Apex Court, and therefore we have no hesitation in holding that claim of assessee cannot be barred by limitation, and ought to be refunded. Further, Hon'ble high Court of Gujarat in case of Oil and Natural Gas Corporation Ltd., reported in 2017(354)ELT 577(Guj) held that;

**Refund - Limitation - Unjust enrichment - Education Cess and Higher Secondary Education Cess on Oil Industries Development Cess levied on crude oil - Amount paid under mistake of law - Applicability of provisions relating to limitation and interest on delayed refund - Decision of Joshi Technologies International, Inc-India Projects [2016 (339) E.L.T. 21 (Guj.)] squarely applicable to facts of case not available at time of decision of lower authorities - In interest of justice matter restored to file of appellate authority to consider appeal afresh in light of observations made in said decision - Sections 11B and 11BB of Central Excise Act, 1944 - Section 17 of Limitation Act, 1963.**

8. For the purpose of appreciating the controversy in issue, it may be apposite to refer to the decision of this Court in the case of *Joshi Technologies International, INC-India Projects v. Union of India* (supra), wherein this Court has held thus :

- Since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged under the provisions of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007. Thus, the amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of Section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under Section 11B of the Central Excise Act, 1944.
- Even in case where any amount is paid by way of self-assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which mandates that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same.





9. Respectfully following the above decisions, I observe that the service tax which was paid by the appellants mistakenly, refund of which does not attract limitation period prescribed under Section 11B of the Central Excise Act,1944. In view of such settled legal position, the impugned orders are not sustainable to which I set aside and allow the appeals.

10. The appeals filed by the appellant stand disposed of in above terms.

अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

*उमा शंकर*

(उमा शंकर)  
प्रधान आयुक्त (अपील्स)  
केंद्रीय कर, अहमदाबाद

दिनांक: . . .2019

सत्यापित

*डी.ए. पुरमेश्वर*  
(डी.ए. पुरमेश्वर)  
अधीक्षक (अपील्स),  
केंद्रीय कर, अहमदाबाद



By RPAD.

To,

1. Shri Bipinbhai C Shah,  
8, Tapas Bungalow, Chimanbhai Patel Institute Road, Prahaladnagar,  
Ahmedabad-380015.
2. Shri Siddhesh B Chauhanpinbhai C Shah,  
8, Tapas Bungalow, Chimanbhai Patel Institute Road, Prahaladnagar,  
Ahmedabad-380015.
3. Shri Jitendra C. Chauhan,  
7, Krupesh Society, 132 Ft Ring Road, Satellite, Ahmedabad-380015.
4. Shri Shambhav J Chauhan,  
7, Krupesh Society, 132 Ft Ring Road, Satellite, Ahmedabad-380015.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad- South,
3. The Asstt. Commissioner, System, Central Tax, Ahmedabad- south.
4. The Asstt. Commissioner, CGST, Division-VII, Ahmedabad-South.
- ✓ 5. Guard File.
6. P.A.