



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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आज़ादी का
अमृत महोत्सव

By SPEED POST

DIN:- 20240164SW000000D202

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/1230/2023 / 256 - 26
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-EXCUS-001-APP-222/2023-24 and 29.12.2023
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	03.01.2024
(ङ)	Arising out of Order-In-Original No. WS08/CGST/Ref-04/KSZ/AC/2022-23 dated 26.12.2022 passed by The Assistant Commissioner, CGST, Division-VIII, Ahmedabad South.	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s. Havmor Icecream Pvt. Ltd., (Former Name - Havmor Ice Cream Ltd.) 2 nd Floor, Commerce House 4, B/s Shell Petrol Pump, 100 Feet Road, Near Auda Garden, Satellite, Ahmedabad - 380015

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 :-

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 :-

(क) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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।

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.

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



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।

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

(घ) 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।

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.

(2) 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 भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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 :-

(2) उक्तलिखित परिच्छेद 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।

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2ndfloor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad: 380004. In case of appeals other than as mentioned above para.

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 मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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 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) एके प्रति अपीलो के मामले में कर्तव्यमांग (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 सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की मांग (Duty Demanded)।

- (1) खंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिया गलत सेनवैट क्रेडिट की राशि;
- (3) 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.

(6) (i) 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

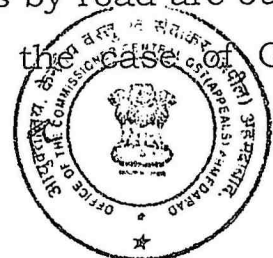
The present appeal has been filed by M/s Havmor Icecream Pvt. Ltd. (formerly known as Havmor Ice Cream Ltd.), 2nd Floor, Commerce House 4, B/s Shell Petrol Pump, 100 Feet Road, Near Auda Garden, Satellite, Ahmedabad- 380 015 (hereinafter referred to as the "*appellant*") against Order in Original No. WS08/CGST/Ref-04/KSZ/AC/22-23 dated 26.12.2022 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division-VIII, Ahmedabad South (hereinafter referred to as "*adjudicating authority*") rejecting a refund claim for Rs. 1,00,05,283/-

2. The facts of the case are that the appellant had filed refund claim in Form-R on 28.09.2022 for the period from April, 2015 to June, 2017 amounting to Rs. 1,00,05,253/- along with interest (Refund of Rs. 97,66,111/- + Interest of Rs. 2,39,142/-) on the ground that between April 2015 and June 2017, the appellant had a doubt in respect of the taxability of "Good Transport Agency" services provided by truck owners. They emphasized oral contracts, point-to-point deliveries at a pre-approved rate, and cited the Finance Minister's statement that services by truck owners are not taxable. The appellant submitted notarized affidavits from truck owners, all were issued in the month of September 2022, stating no documents with regard to transportation by them to the appellant were issued to them. They did not make or give any documents called consignment note to the appellant. They argued road transport services are in the negative list and therefore not taxable, contending the department's letter vacating their protest is illegal and incorrect under provision of law. Despite an EA-2000 Audit and inclusion in an observation para in Final Audit Report No. 1436/2016-17 dated 10.04.2018, they started paying service tax on self-assessment basis under protest, asserting the time limit doesn't



apply under section 11B of Central Excise Act read with Section 83 of Finance Act, 1994 on the amount paid under protest and it applies only to amounts paid as duty/tax, not in cases of amount paid under doubt or mistake. Upon reviewing the claim, it was noted that the appellant failed to submit the refund claim in the prescribed format with required declarations. Other irregularities included eligibility concerns, as the claimant paid service tax from April 2015 to June 2017 but later claimed it "under protest." The refund claim exceeded the permitted one-year time limit under Section 11B of the Central Excise Act 1944. In response, a Show Cause Notice F.No. Div.-VIII/WS08/RFD/Havmor Icecream/2022-23 dated 22.11.2022 was issued to M/s Havmor Icecream Pvt. Ltd, questioning why the refund claim of Rs. 1,00,05,253/- should not be rejected under section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. Subsequently, the said SCN was adjudicated by the then Assistant Commissioner. Division-VIII, CGST, Ahmedabad South vide the impugned order rejecting the refund claim of Rs. 1,00,05,253/- (Refund of Rs. 97,66,111/- + Interest of Rs. 2,39,142/-). Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the following grounds:

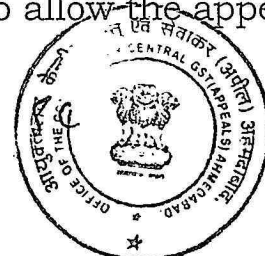
- The Id. Adjudicating authority cannot deny the claim of refund just because the confusion regarding service tax liability for transportation of goods by road ahs been made in later years.
- Issuance of Consignment Note is not mandatory to be issued by every transporter under the service tax law. If a person is not a GTA then Rule 4A as well as Rule 4B of Service Tax Rules, 1994 are not applicable.
- Documents submitted with Refund Application have not been considered.
- Services of Transportation of goods by road are outside the purview of Service tax except in the case of Goods



Transport Agency.

- Law does not prescribe that payment of tax under protest must be recorded only in the case of direction nor objections taken by the department and not otherwise.
- The appellant had made payment of service tax under protest in respect tax payment and the same is being reflected in ST-3 Rerturns filed for the period of April 2015 to June, 2017.
- The appellant relied on the judgment of the Hon'ble Tribunal in the case of M/s Shri Javed Akhtar Vs. CGST, Mumbai West- 2021 (11) TMI 281- CESTAT Mumbai.
- Transportation of goods by truck owners without issue of consignment note as prescribed in Rule 4B of the Service tax Rules, 1994 would be considered mere transportation and not the service of GTA.
- The appellant relies on the judgment in the case of S.V.R. Electrical Pvt. Ltd. vs. CCE, Guntur wherein it is clarified that one need to fulfill two conditions as per the definition of GTA (1) transportation of goods by road (2) issue a consignment notes
- The limitation of one year shall not apply where any duty and interest has been paid under protest.
- The appellant availed transportation of goods by road that is exempted as per section 66D of the Finance Act, 194. However, service tax wrongly paid by the appellant should be refunded without applying the limitation of section 11B of the said Act.
- Question of unjust enrichment cannot be left undecided when specific issue was raised in the SCN.

3. Personal Hearing in the case was held on 25.10.2023. Shri Nitesh Jain and Shri Jay Dalwadi, Chartered Accoutatns, appeared on behalf of appellant for the hearing and reiterate the submission in the appeal and requested to allow the appeal.



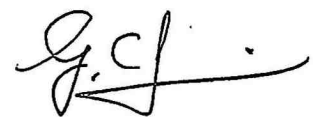
4. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum, and materials available on record. The issue before me to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, rejecting the refund claim of an amount of Rs. 1,00,05,253/- along with interest (Refund of Rs. 97,66,111/- + Interest of Rs. 2,39,142/-) in terms of Section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, in the facts and circumstance of the case, is legal and proper or otherwise.

5. I find on reading the para 7.3.3 of the impugned OIO that the appellant did not submit all the invoices issued by their transporters. Now, the appellant submitted that they were ready to submit all the invoices, which need to be verified by the adjudicating authority. The appellant has also submitted affidavit of one transporter ie. MAJ. P C Suri HUF, which also needs to be verified. The appellant has also submitted CA certificate certifying the fact that incidence of Service tax and interest sought as refund in the application has not been passed on directly or indirectly to any other persons. Therefore, it is in the fitness of the thing that the matter is remanded back.

6. Accordingly, in view of my foregoing discussions and finding, the appeal filed by the appellant is allowed by way of remand.

7. अपीलकर्ता द्वारा दायर अपील का निपटान उपरोक्त तरीके से किया जाता है।

The appeal filed by the appellant stands disposed of in above terms.



(ज्ञानचंद जैन)
आयुक्त (अपील्स)

Date : 29 .12.2023



Attested

Amrendra Kumar
 अमरेंद्र कुमार
 अधीक्षक (अपील्स)

सी.जी.एस.टी, अहमदाबाद

By RPAD / SPEED POST

To,
 M/s Havmor Icecream Pvt. Ltd.,
 2nd Floor, Commerce House 4,
 B/s Shell Petrol Pump,
 100 Feet Road, Near Auda Garden,
 Satellite, Ahmedabad- 380 015

Appellant

The Assistant Commissioner,
 Central GST, Division-VIII,
 Ahmedabad South.

Respondent

Copy to :

- 1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
- 2) The Commissioner, CGST, Ahmedabad South
- 3) The Assistant Commissioner, Central GST Division-VIII,
Ahmedabad South
- 4) The Assistant Commissioner (HQ System), CGST, Ahmedabad South
For uploading the OIA)
- 5) Guard File
- 6) PA file

